U.S. Department
Of Transportation
Federal Transit
Administration

Administrator

400 Seventh St. S.W.
Washington, D.C. 20590

C-13-01

November 6, 2001

Dear Colleague:

Welcome to the Federal Transit Administration's Best Practices Procurement Manual website.

Since the original publication of the manual on May 7, 1996, we have added a number of new topics and have identified a variety of additional best practices. Many thanks to all of you who have contributed ideas, topics, and "best practice" content, as well as those who have helped to make this document as "customer-friendly" as possible.

We continue to actively seek grantee and industry comments, suggestions for new topics, and "best practice" proposals, so the manual can be kept up-to-date and relevant to your needs. Your thoughtful contributions will help ensure that America's transit systems keep our communities safe and moving.

Sincerely,

Jennifer L. Dorn

Administrator

FEDERAL TRANSIT ADMINISTRATION
BEST PRACTICES PROCUREMENT MANUAL

Preface

Purpose

This Manual provides recipients of Federal Transit Administration (FTA) funds suggestions on conducting third party procurements to assist them in meeting the standards of FTA Circular 4220.1E (the Circular).

The Manual consists of suggested procedures, methods, and examples which FTA encourages.

These are based on the Federal acquisition process, Comptroller General decisions, and "Best Practices" of grantees and others in the industry.

Please Note, Suggested Procedures Are Not Mandatory.

The Manual is envisioned as an ongoing and expanding document. It will be updated periodically with both new subjects as well as additions or changes to existing subjects. The additions/changes will be based on: (1) changes in statutes, (2) the result of recent court decisions, (3) the need for further clarification, and (4) new or innovative practices of grantees.

The Manual is located on the Internet World Wide Web under the FTA Homepage. The internet location enables FTA to provide its customers with the latest and newest information using the fastest means possible. Additionally, FTA solicits "best practices" of its grantees and others in the industry. After review by FTA, new and or innovative practices will be added to the manual. FTA is being assisted in this endeavor by Leon Snead & Company, P.C. Their Internet address is: [leonsnead.companypc@erols.com]. All proposed "best practices" should be sent to this Internet Address.

Scope

The Manual consists of 11 chapters and Appendices as follows:

1. Purpose and Scope
2. Procurement Planning & Organization
3. Specifications
4. Methods of Solicitation and Selection
5. Award of Contracts
6. Procurement Object Types: Special Considerations
7. Disadvantaged Business Enterprise
8. Contract Clauses
9. Contract Administration

10. Close-Out
11. Disputes

Appendix A: Governing Documents
Appendix B: Examples
Appendix C: Reserved
Appendix D: Annotated FTA Circular 4220.1E. For a copy of this Circular, go to www.fta.dot.gov/ftahelpline/fta_c4220_1E.doc.

Format

The Manual is divided into 11 Chapters and Appendices (see above). This format will allow FTA to send updates as necessary and allows you to locate them easily. As sections of the Manual are updated, the last revision date is indicated for that section in parentheses.

Introduction

You are responsible for ensuring full and open competition and equitable treatment of all potential sources in the procurement process. You are also responsible for planning, solicitation, award, administration and documentation of all Federally funded contracts.

During the procurement process, the Procurement Officer is responsible for making comprehensive business judgments based upon the application of sound procurement policies and procedures.

This Manual will not make business judgments for the Procurement Officer. It will aid him/her in performing the steps necessary to ensure public funds are expended properly and will protect the integrity of the grantees' procurement process.

BEST PRACTICES PROCUREMENT MANUAL

RECENT UPDATES TO BPPM

Revision Date	**Section No.**	**Subject**
October 2005	1.3.3.10	Disposition of Surplus *(Revised)*
October 2005	4.6.4	Unsolicited Proposals *(New)*
October 2005	7.2.4	Prompt Payment Mechanisms *(Revised)*
October 2005	7.3.5.4	Good Faith Efforts to Meet Contract Goals *(Revised)*
October 2005	7.3.5.5	Counting DBE Participation toward the Goal *(Revised)*
October 2005	Appendix A.1	Federally Required and Other Model Contract Clauses- #28 (*Revised)*
April 2005	2.3.2	Independent Grantee Cost Estimate *(Revised)*
April 2005	2.4.3.1	Fixed Price Contracts *(Revised)*
April 2005	2.4.4.3	Progress Payments *(Revised)*
April 2005	5.3.2	Debriefing of Offerors (*Revised*)
April 2005	6.1.7	Partnering (*Revised*)
April 2005	8.2	Surety Bonds (*Revised*)
April 2005	8.2.1	Performance Bonds (*Revised*)
April 2005	10.3	Record Retention (*Revised*)
April 2005	Appendix B.20	Independent Cost Estimate (ICE) Form (*New*)
March 2004	1.3.3.5	Intergovernmental Agreements, Joint Procurements, Piggybacking/Assignments (*Revised*)
March 2004	4.4.3	Single Bid *(Revised)*
March 2004	6.5	Architect-Engineering Services (*Revised*)

March 2004	Appendix A.2	Dear Colleague Letters *(Revised)*
November 2003	1.1.1	FTA Circular 4220.1E (*Revised*)
November 2003	1.1.7	FTA Procurement System Reviews (PSRs) (*Revised*)
November 2003	1.1.9	Procurement System Self-Assessment Guide (*New*)
November 2003	1.3.3.4	Real Estate Contracts (*Revised*)
November 2003	1.3.3.11	Operating Assistance, Preventive Maintenance, CMAQ and JARC Projects (*Revised*)
November 2003	4.1.2	Consolidation of Micro-Purchases (*New*)
November 2003	4.3.2.4	Pre-Bid and Pre-Proposal Conferences (*Revised*)
November 2003	4.3.3.2.2	Buy America Certification (*Revised*)
November 2003	4.5.2	Evaluation of Proposals (*Revised*)
November 2003	6.6	Insurance (*Revised*)
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BEST PRACTICES PROCUREMENT MANUAL

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Appendix D – Annotated FTA Circular 4220.1E. For a copy of this Circular, go to www.fta.dot.gov/ftahelpline/fta_c4220_1E.doc**.**

Chapter 1

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1.1 ASSISTANCE, GUIDANCE AND REQUIREMENTS

The topics addressed by this Manual are developed according to a standardized format, which consists of three parts: (1) Requirements, (2) Discussion and (3) Best Practices.

REQUIREMENT
Where a *requirement* exists in the third-party procurement regulations which grantees must follow, a table entitled REQUIREMENT will set forth the pertinent sections of the *FTA Circulars*, the *Master Agreement* (MA), the *Code of Federal Regulations* (CFR's) or an FTA *Dear Colleague Letter*. When there is a mandatory requirement it will be clearly set forth as such.

DISCUSSION

Following the statement of the requirement, or if there is no requirement as such, there will be a *discussion* section giving some definition and guidance concerning the meaning or purpose of the topic being presented.

Best Practices

In those situations where the Federal or grantee practices have proven to be effective, the Manual will present these *best practices* for the assistance and guidance of the grantee. The procedures and practices presented are not mandatory unless so identified. These best practices are meant to be informative and helpful to the grantee community. They are offered for the guidance and assistance of the grantee, but it is also recognized that a grantee may have a unique situation that precludes it from adopting the procedures of another grantee in a certain area.

1.1.1 FTA Circular 4220.1E

This Circular sets forth the requirements a grantee must adhere to in the solicitation, award and administration of its third party contracts. The Circular contains 54 mandatory procurement standards that grantees must meet in their procurement operations. These 54 standards are set forth in Appendix B.19 – *Mandatory Procurement Standards Worksheet.* The "Worksheet" provides cross-references to specific paragraphs in the Circular where the standards may be found, and a column for grantees to cross-reference the standards to their own policies and procedures. Grantees are encouraged to review their written procurement policies to ensure that they cover each of the 54 mandatory standards.

The requirements of the Circular are based on the common grant rules found at 49 CFR Part 18 (State and Local Governments) and 49 CFR Part 19 (Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations), and the Federal Transit Laws. The Best Practices Procurement Manual will state the requirements of this Circular wherever they pertain to a topic being covered by the Manual. Since this Circular is updated periodically, grantees must ensure that they consult the latest edition of the Circular.

This Circular replaces 4220.1D dated 4-15-96 and Change 1, dated 8-4-98. The Circular incorporates policy updates contained in several Dear Colleague letters issued since 1996.

Annotated Circular - FTA has also published an annotated version of this Circular with interpretive comments. These comments were developed to help avoid incorrect interpretations of the Circular that have evolved over time. The comments explain what FTA believes the law and regulations conveyed through the Circular actually require of its grantees. As applicable laws, regulations and contracting practices evolve, FTA will use the annotated Circular to convey its views to FTA grantees and the transit industry as a whole. As changes are made in the comments, a date will be inserted with the change to notify the reader of when the change was made. The *Annotated Circular* is available online at: www.fta.dot.gov/ftahelpline/fta_c4220_1E.doc.

1.1.2 FTA Waivers and Approvals

Grantees are required to process their requests for waivers and approvals required by Circular 4220.1E through their regional FTA offices. The regional FTA offices will instruct grantees as to the required content and format of these requests. The FTA Administrator has established the FTA signatory levels for granting *waivers*, and for the *approval of actions* which require FTA approval in the Circular, as follows:

Authority to grant waivers - Administrator

Authority to grant approvals - Associate Administrator for Administration

Waivers pertain to those third party contract actions which a grantee is not authorized to take under the Circular, but for which FTA has authority to make exceptions.

Approval/disapproval covers third party contract actions which a grantee is authorized to take under the Circular only after receiving FTA approval. An example would be the use of advance payments for an individual procurement.

1.1.3 Master Agreement

The FTA Master Agreement contains standard terms and conditions governing the administration of a Project supported with Federal assistance awarded by the FTA through a Grant Agreement or Cooperative Agreement with the Recipient. The FTA Master Agreement is updated annually at the start of each fiscal year (October 1) and published on the FTA web site. [1] The Master Agreement contains procurement requirements that may be referenced in the Best Practices Procurement Manual.

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[1] - http://www.fta.dot.gov/16874_16882_ENG_HTML.htm.

1.1.4 Federal Acquisition Regulation (FAR)

This Manual will frequently contain references to the FAR. These references are, with one exception, always for information purposes and are not intended to suggest that grantees must follow the FAR. [2] Neither grantees nor their contractors are required to follow the FAR. The FAR citations are given in order to inform grantees how the Federal government treats a particular issue but the Federal practices are not binding on grantees.

The Federal Acquisition Regulation is available at the following internet address: http://www.arnet.gov/far.

1.1.5 FTA Dear Colleague Letters

The FTA Administrator periodically issues *Dear Colleague Letters* to the FTA grantee community. When these letters affect grantee procurement operations by imposing new FTA requirements or clarifying earlier FTA policy statements, the Manual will be updated to reflect the new Dear Colleague Letter. Those Letters that affect grantee procurement operations are contained in Appendix A.2 of the Manual.

1.1.6 Locating FTA Documents

The *FTA HelpLine* web site (see 1.1.8 below) contains a link to important FTA documents, such as Circulars, Dear Colleague Letters, etc. You may access these documents by using the *Online Tools & Resources* tab at the following Internet address: www.fta.dot.gov/ftahelpline/index.htm. You may also access FTA documents at the FTA web site address: www.fta.dot.gov under the "grantee" page tab.

1.1.7 FTA Procurement System Reviews (PSRs)

FTA conducts periodic reviews of its grantee's procurement systems. These reviews are conducted in accordance with the *Guide for Procurement System Reviews*, which FTA has developed in order to evaluate the grantee's compliance with the requirements of FTA Circular 4220.1E. Grantees now have access to this *Guide* and can effectively evaluate their own procurement system's compliance with 4220.1E using the *Guide*. Section III.2 of the *Guide* contains checklists for each type of contract to be reviewed as well as for the procurement system-wide elements that FTA also evaluates. The Guide is now available on the Internet at the following FTA web site address: http://www.fta.dot.gov/grant_programs/fta_oversight/4022_8480_ENG_HTML.htm.

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[2] - Grantees are required to use the Federal cost principles in FAR Part 31 to determine allowable costs on cost-type contracts and when negotiating (fixed) prices for contracts and modifications that are based on estimated costs. See BPPM Sections 2.4.3.1 and 2.4.3.2.

Best Practices

Audit Follow-Up and Tracking System - Grantees should consider adopting a tracking system for following up on the findings generated by FTA Procurement System Reviews (PSRs), FTA Triennial Reviews, and other public audits or internal audits conducted by the agency's own management staff. The Los Angeles County Metropolitan Transportation Agency (LACMTA) has developed an in-house, MS Access-based database to manage audit findings and track corrective actions to ensure they are implemented as proposed. This tracking system - the Findings and Recommendations Management System (FARMS) - is a central repository for all audits, findings, recommendations, audit responses, proposed corrective actions, and audit follow-up and close-out information. Information can be sorted in a variety of ways such as by executive area, audit source, findings, dates, or recommendation status (e.g., open, closed). Tickler reports are routinely routed to inform appropriate parties of approaching or missed deadlines and quarterly reports of implemented actions are routed to management. This system enables the agency to track who proposed to do what by when. The system is especially valuable when agency management changes (usually with voting cycles) and incoming managers need to be made aware of commitments made by their predecessors. LACMTA has seen a number of benefits from their tracking system:

- Minimizes likelihood of recurring findings that can lead to fines, schedule delays, fraud, waste, or abuse.
- Assures Management corrective action has been taken.
- Maximizes audit value by tracking each finding and recommendation through resolution.
- Automatically compiles Lessons Learned and Best Practices and greatly enhances reporting options.

LACMTA has agreed to make their system available to any agency that wishes to implement an audit follow-up and tracking system capability. [3]

1.1.8 FTA Helpline

FTA has initiated a *Third Party Procurement HelpLine* to provide a means for FTA customers to get answers to their procurement questions. The goal is to answer questions within 48 hours of receiving them. The web site also contains a topical index to *Frequently Asked Questions* and helpful links to important FTA documents, the FAR, the BPPM, etc. The Internet address is: http://www.fta.dot.gov/ftahelpline/index.htm.

[3] - Contact Michael Flores, LACMTA Audit Manager, at 213-922-6345 or floresm@mta.net.

1.1.9 Procurement System Self-Assessment Guide

FTA has developed a *Procurement System Self-Assessment Guide* for grantees. This *Guide* is provided for assessing those particular areas of procurement that have historically been the most problematic, as determined by oversight reviews of transit agency procurement systems (the Procurement System Reviews conducted by FTA). The *Guide* discusses the top ten areas of deficiency consistently found during the Procurement System Reviews. This Guide may be accessed online at: http://www.fta.dot.gov/ftahelpline/Cover_Self-Assessment_Guide.htm.

1.2 IDENTIFYING A CONTRACT

As defined by the Federal Acquisition Regulation, a "contract" means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. Contracts would include bilateral instruments, awards and notices of awards; job orders or task assignment letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements. [4]

The parties to a contract must possess the legal capacity to enter into the contract, and they must assent to the terms of the contract. The terms of the agreement must not require the performance of an illegal act by the parties. Contracts may be either oral or written in form. The subject matter of a contract determines which primary law applies. Generally, Common Law rules apply for contracts. However, the *Uniform Commercial Code* (UCC) Article 2 applies when the contract is for the sale of goods.

1.2.1 Offer, Acceptance, Consideration

Offer, acceptance and consideration are three essential elements of a contract.

Offer - The offer to enter into a contract can be made by either party to the contract. In third party contracting, the offer is normally made by the contractor. The grantee issues solicitations for offers either by an Invitation for Bid (IFB) or a Request for Proposal (RFP). The offer is made when the contractor submits a signed bid or proposal in response to the grantee's solicitation. In small purchases, however, the roles are reversed. The grantee issues a purchase order, which is an offer, to buy supplies or services at a specified price (usually obtained by a Request for Quotation that the grantee has issued earlier).

The party to whom the offer is made, the offeree, may accept the offer until it is terminated by the offeror. Termination of an offer can occur in one of many different ways:

[4] - FAR 2.101.

- Expiration. The offer is not accepted within the specified time period or within a reasonable time, if no time period is stated. The offeree may agree to extend its offer beyond the specified time period without any changes or qualifying terms to its offer.

- Revocation. The offeror may withdraw the offer. The withdrawal is effective when received by the offeree. Generally, the revocation may occur at any time prior to acceptance by the offeree.

- Rejection. The offeree may reject the offer, and the rejection is effective when received by the offeror.

- Counter-offer. The offeree proposes new terms, not an inquiry regarding the possibility of new terms. The offeree's counter-offer to the offeror is effective when received by the offeror.

- Death. The offer is terminated when either the offeror or offeree dies. However, the offer passes to the personal representative of the offeree's estate in an option contract.

- Illegality. The offer is void if the subject matter is illegal.

- Destruction. The offer is terminated if the subject matter is destroyed.

Acceptance - The offer must be accepted unequivocally. The offeree must accept the offer without changing or qualifying the terms of the offer. If the terms are changed, the offer is rejected and a counter-offer is made. This terminates the original offer.

The offer may be accepted by any reasonable means of communication (i.e., fax, telephone, etc.) unless the offeror indicates a specific method of acceptance. As a general rule, the acceptance is effective when mailed by the offeree, except where the offeror specifies the acceptance must be received by a specific date and time.

Grantee procurements involve two processes for acceptance of offers. When the grantee has issued an IFB or RFP, acceptance occurs when the grantee assents to the terms made by the bidder or offeror in its bid or proposal. The grantee accepts the offer by signing the contract and issuing the offeror a notice of award. For small purchases the contractor accepts the offer made by the grantee in its purchase order by either signing the order (contract), if so required by the purchase order, or by actually performing in accordance with the terms of the purchase order.

Consideration - Each party must give consideration for an agreement to be a contract. Consideration exists when something of value is given up in a bargained-for exchange. The following must exist:

- Legal benefit. Someone receives something they had no prior legal right to receive.

- Legal detriment. Someone gives up something they did not have to relinquish. This detriment does not have to involve a tangible detriment, only a legal detriment.

1.2.2 Oral v. Written

Statute of Frauds - Generally, the Statute of Frauds dictates whether contracts should be oral or written. In order to be enforceable, the Statute of Frauds requires certain contracts to be written and signed by the party charged with performing the contract. The following contracts must be in writing:

- An agreement in which the period of performance is greater than one year. The time period starts the date the contract is made, not on the date the performance commences.
- Contracts regarding real property; i.e., mortgages, easements, sale of real estate, etc.
- Contracts of guaranty; i.e., where someone guarantees to pay the obligation of another (send the deliverable item to X, and if X does not pay, I will).
- Contracts involving the sale of investment securities.
- Promises by an executor/administrator to be held personally liable for the debts incurred by an estate.
- Contracts for the sale of goods in excess of $500.

Consult your state law for applicable requirements.

1.2.3 Mutual and Unilateral Mistakes

If a material mistake has been made by one or both parties, there is a possibility the contract is voidable. If a material mistake was made by both parties (mutual mistake), either party has the option to void the contract. If a material mistake was made by one party (unilateral mistake), the contract remains valid. However, if the other party is aware of or should have been aware of the mistake, the contract is voidable.

1.2.4 Procurements Often Overlooked

Many organizations may be overlooking procurements which could benefit from the application of the procedures outlined in this manual. These overlooked areas would include: utility services, mailing/shipping services, telephone service, electric and gas service. In the past these areas have been under the control of a single source supplier, but recent deregulation has, or will soon, open up many of these areas to competitive procurement possibilities.

1.3 APPLICABILITY OF FEDERAL REQUIREMENTS

One of the principles of contracting with Federal funds received directly or indirectly from FTA is a recognition that, as a condition of receiving the funds, certain specific Federal requirements must be met not only by the recipient of the funds (the grantee) but also by sub-recipients and a grantee's third party contractors. The Federal requirements to be met by the grantee's third party contractors will be defined by the clauses included in the grantee's third party contracts. It should also be noted that third party contractors are not required to follow FTA Circular 4220.1E in their subcontracting activities.

The specific requirements for your particular grant of funds will be found in the Master Agreement incorporated into the Grant Agreement or Cooperative Agreement that was executed by you as a grant recipient. Different rules apply depending upon whether you, as the recipient or subrecipient, are a state, local, or Indian tribal governmental entity or whether you are an institution of higher learning, a hospital, or another non-profit organization. Also, depending upon the type of Federal funds you receive (e.g., operating assistance) or the nature of the capital project you are involved in, the contractual sphere of Federal requirements may include your procurements regardless of whether Federal funds are actually drawn down to fund payments in a particular procurement.

As the person responsible for procurement within your agency, you must be aware that compliance with Federal requirements is a condition of receipt of Federal funds. Failure to comply with these provisions may, in accordance with the terms of your Grant or Cooperative Agreement, be grounds for default of that agreement and result in the loss of the funds.

1.3.1 Recipient and Subrecipient

DEFINITIONS

The Master Agreement [5] provides the following definitions for "Recipient" and "Subrecipient".

Recipient - Any entity that receives Federal assistance directly from FTA to accomplish the project. The term "Recipient" includes each FTA "Grantee" as well as each FTA Recipient of a Cooperative Agreement. Except as FTA permits otherwise, the Recipient is the entire legal entity even though only a single organization within that entity is designated as the Recipient in the Grant Agreement or Cooperative Agreement. [6]

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5 - Form FTA MA(12), October 1, 2005.

6 - Id. at Section 1.m.

Subrecipient - Any entity that receives Federal assistance awarded by an FTA recipient rather than from FTA directly. The term "subrecipient" also includes the term "subgrantee," but does not include "third party contractor" or "third party subcontractor." [7]

DISCUSSION

It is important to determine whether your agency is a recipient or subrecipient so as to determine what third party contracting rules under the Circular and 49 CFR Parts 18 and 19 (the "common grant" rules) are applicable to your procurements.

What Third Party Contracting Requirements Under 49 CFR Parts 18 and 19 and FTA Circular 4220.1E are Applicable to Recipients and Subrecipients?

Section 15 of the Master Agreement contains the requirements to comply with applicable procurement standards of 49 CFR Part 18.36 (state, local, and tribal governments) or 49 CFR Part 19.40 through 19.48 and Appendix A (hospitals, non-profits, and institutions of higher learning). For purposes of this discussion, it is important to recall that "recipient" includes "grantee," and "subrecipient" includes "subgrantee" other than third party contractors and subcontractors.

Paragraph 4 of the FTA Circular 4220.1E outlines four distinct rules relating to the applicability of the procurement requirements to recipients/grantees or subrecipients/subgrantees:

1. **If a transit authority is both a direct recipient of Federal funds and a subrecipient of a State, the State may permit the transit authority to follow the requirements of the Circular instead of State procurement requirements, although it is not obligated to do so. If your transit authority is in this situation, make sure that the procurement requirements you are obligated to follow for Federally assisted procurements are clearly stated, preferably by both the State and FTA.**

2. **When a "State" [8] procures property or services under a grant or cooperative agreement with FTA, it will follow the same procurement policies and procedures it uses for procurements using non-Federal funds. States must, however, comply with the requirements of paragraphs 8.a (Full and Open Competition) and b (Prohibition**

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[7] - Id. at Section 1.p.

[8] - See Paragraph 6.b., FTA Circular 4220.1E for definition of "State." Note that the definition in both this paragraph of the Circular and 49 CFR Part 18.3 specifically excludes "local governments" (as defined therein as well) from the definition of a "State." Thus, if you are a city government and a recipient/grantee, and if your state has a procurement statute that applies to "local government" procurements, you still must comply with the Circular and the provisions of 49 CFR Part 18.36(b) through (t). However, if you are a subrecipient/subgrantee of your state, you shall follow state law and procedures. The differences between these two instances may be subtle, but they are real differences that should be considered and addressed.

Against Geographic Preferences), and 9.d (Procurement of Architectural and Engineering Services (A&E)) of the Circular and must include in all purchase orders and contracts executed by it, or a subgrantee using Federal funds, all clauses required by Federal statutes, executive orders and their implementing regulations. Subgrantees of a "State" (except as indicated in subparagraph (4) below) shall follow State law and procedures when awarding and administering contracts.

3. **For the purposes of this Circular, regional transit authorities are not State agencies or instrumentalities.**

4. **Subgrantees of States which are institutions of higher education, hospitals or other nonprofit organizations and all other FTA recipients/grantees will administer contracts in accordance with the requirements of the Circular. Grantees and subgrantees that fall within this category shall use their own procurement procedures that reflect applicable State and local laws and regulations provided that the procurements conform to applicable Federal law. [9]**

1.3.2 Federal Contractual Sphere

REQUIREMENT

"...the Recipient agrees to include appropriate clauses in each third party contract stating the third party contractor's responsibility under Federal law, regulation, or directive, including any necessary provisions requiring the third party contractor to extend applicable requirements to its subcontractors to the lowest tier necessary."

Master Agreement § 2.e.(2)(a).

“This Circular applies to all FTA grantees and subgrantees that contract with outside sources under FTA assistance programs. FTA grant recipients who utilize FTA formula funds for operating assistance are required to follow the requirements of this Circular for all operating contracts. These requirements do not apply to procurements undertaken in support of capital projects completely accomplished without FTA funds or to those operating and planning contracts awarded by grantees that do not receive FTA operating and planning assistance."

FTA Circular 4220.1E, Paragraph 4.

"Project means activity or activities (task or tasks), listed in the Project Description, the Approved Project Budget, and any modifications stated in the Conditions to the Grant Agreement or Cooperative Agreement applicable to the project."

Master Agreement § 1.l.

[9] - *Id.* at Paragraph 7.a.

There are several aspects of your grant agreement which together establish the sphere of procurements to which Federal requirements may apply. In general you may undertake capital projects wholly without Federal funds, and be confident that your grant agreements will not affect those procurements. However, Federal grant requirements apply to many contracts in addition to the contracts between you and your suppliers for which you intend to draw down Federal payments. Generally, the concept is that solely because of the receipt of Federal funds by a grantee, certain clauses and federal requirements are required to be included in contracts within the contractual sphere. There are four procurement contexts to which the concept is important:

1. The general "flow down" of Federal requirements in contracts;

2. The inclusion of all Federal requirements if the transit property receives operating assistance;

3. The inclusion of all Federal requirements in all elements and activities if the overall capital project (as defined in a full funding grant agreement) includes Federal funds; and,

4. The concept of a "minimal operable segment."

These concepts are highlighted below so you can be aware of them in your capital project planning and procurement planning processes. Each Federal requirement has applicability criteria deriving from statute, regulation, or policy. The sphere of contracts to which the requirements apply, if they are otherwise applicable, is affected by these four concepts:

1. Flow Down – Perhaps the easiest determinant of the sphere to visualize is the concept of “flow-down.” Federally required clauses and requirements, as a general rule, are required to be included in each third party contract at every tier and in each subrecipient agreement at every tier. [10] When clauses are required to flow down, the clauses and requirements flow down to all levels of the Federal funding chain beginning with the grantee.

2. Inclusion of Federal Requirements when Receiving Operating Assistance - The second example of the sphere involves grantees receiving operating assistance. In this instance, all grantee procurements except for capital projects undertaken without Federal funds, must include all of the Federal requirements that would be included if the operating budget were fully Federally funded and must comply with the Circular. [11] FTA maintains that one dollar of Federal operating assistance converts

10 - The flow-down of clauses is not an absolute requirement; e.g. Drug and Alcohol Testing requirements apply only to the work of the prime contractor.

11 - Paragraph 4, FTA Circular 4220.1E.

the operating funds of the transit property so that all such funds of the property therefore become subject to Federal requirements. The rules on this dimension of the sphere are clear -- if you receive operating assistance, the requirements of the Circular apply, even if you do not intend to use that assistance in support of any procurement action (e.g., you intend to apply all the operating assistance to pay salaries of your direct-hire bus operators).

3. Inclusion of Federal Requirements in Federally Funded Capital Projects - FTA has recently taken the position that, when a capital project requires a full funding grant agreement,

> *. . . the Federal 'undertaking' in a Fully Funded Grant Agreement (FFGA) will no longer be segmented into Project and Local Activities. All activities related to a Federal undertaking will be identified as the Federal Project. The Federal funds will be distributed among all the activities in the project at a level funding ratio equal to the percentage of Federal financial participation in the entire project. Thus, all the elements and activities of the project, as described in the FFGA will be funded, in part, with Federal funds; and, the requirements attached to the use of Federal funds will apply to each such task, unless otherwise exempted as provided in the applicable laws, regulations and policies.* [12]

Regardless of how large or small the percentage of Federal funding is, where a full funding grant agreement with the FTA is executed, all elements of the project identified in the agreement are within the sphere and must be procured in compliance with Federal requirements.

4. Minimal Operable Segment - In the case of a multi-task capital undertaking, the sphere includes a segregable portion of the undertaking, or a project portion that has independent functional utility. Under this concept, FTA and your agency identify a segment of the overall undertaking that represents *the minimal segment that can be feasibly operated independently*. Imagine you are able to overmatch Federal funds to construct a badly needed new fueling station with 85% state and local money. FTA's policies may not apply to every related expenditure of these state and local funds, e.g., landscaping or a nearby tire storage structure; however, neither will FTA apply its policies to the mathematically minimum portion of the project with no independent utility (e.g., applying FTA policies to the roof, alone); rather you must define a segregable project with FTA to which the Federal requirements apply, and you may then have additional latitude in the remaining portions undertaken without Federal funds. The full funding grant agreement will cover all of the necessary elements to build and operate the segment -- a station at each end of the segment, land to build the stations on, rail cars to run on the segment, systems to support the rail cars, rail on

[12] - Letter from FTA Administrator to Executive Director, Dallas Area Rapid Transit dated March 3, 1992, page 2.

which the cars will run, etc. Federal requirements of the Circular apply to all of the individual contracts relating to these elements because they are part of the minimal operable segment and within the Federal contractual sphere. [13]

1.3.3 Types of Contract Actions

Details and Best Practices for meeting the requirements for various types of contract actions that are described below can be found in other sections of the manual.

1.3.3.1 Supplies, Services, Equipment and Construction

REQUIREMENT
FTA Circular 4220.1E defines the requirements a grantee must adhere to in the solicitation, award and administration of its third party contracts. Such contracts would include the procurement of supplies, services, equipment and construction.

1.3.3.2 Legal and Associated Services

REQUIREMENT
The requirements of FTA Circular 4220.1E apply to the procurement of legal and associated services, such as paralegals, investigators, expert witnesses, etc. if Federal funds are being used to fund these contracts (i.e., if receiving operating funds or if the legal services are funded by a capital grant).

DISCUSSION

As noted above, the requirements of FTA Circular 4220.1E apply to the procurement of legal and associated services, such as paralegals, investigators, expert witnesses, etc. if Federal funds are being used to fund the contracts for legal services. FTA Circular 4220.1E would not apply if the legal services are funded entirely with local funds. The Circular requires such services to be procured competitively, as with other types of services. However, there may be cases where the grantee has pending litigation which might be jeopardized through a public disclosure which would result from advertising the procurement beforehand. In such cases the grantee may have valid grounds for limiting

[13] - In discussing statutory and regulatory requirements, Paragraph 16 of FTA Circular 4220.1E advises grantees to contact other Federal agencies for specific guidance concerning the cross-cutting requirements of those agencies. Section 8.1 of the BPPM, which discusses the federal contract clauses, will cross-reference other agencies requirements, whenever possible.

the competition to the degree of not publicly advertising the procurement. In such cases a waiver request should be submitted to the FTA.

1.3.3.3 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 4220.1E, 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 4220.1E.

1.3.3.4 Real Estate Contracts

REQUIREMENT
Requirements related to the acquisition, use and disposal of real property may be found in the following regulations: (a) FTA Circular 5010.1C, *Grant Management Guidelines*, Chapter II-2 *Real Property*. This Circular defines the requirements of the Federal Transit Laws which are codified at 49 U.S.C. Chapter 53. (b) 49 CFR § 18.31 *Real Property,* and 49 CFR Part 24, Subpart B *Real Property Acquisition*. (c) Master Agreement MA(12) Section 19.

DISCUSSION

The acquisition of real property, either by purchase or lease, is not subject to the requirements of FTA Circular 4220.1E. *Real property* is defined in 49 CFR § 18.3 as "land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment." The acquisition of easements and rights of way are considered real estate acquisitions and the requirements discussed herein pertain to these types of acquisitions.

Real property acquisition, use and disposal is also covered by FTA Circular 5010.1C, Chapter II-2; 49 CFR Part 18.31; 49 CFR Part 24 Subpart B; and by the FTA Master Agreement, Section 19. [14] It is important that the grantee be familiar with the

[14] - MA(12), dated October 1, 2005.

requirements established by FTA in Circular 5010.1C, Chapter II-2. This circular establishes procedures to be followed by grantees in the following areas:

- **The conduct of Hazardous Waste Site Assessments before acquiring real property.**
- **The conduct of an independent appraisal by a certified appraiser.**
- **The requirement for a review appraisal of the initial appraisal.**
- **FTA review and concurrence requirements related to the grantee's offer to buy the property.**
- **Incidental use of acquired real property as a means to supplement transit revenues.**
- **Disposition of excess real property by sale, transfer to other programs, etc.**
- **The requirement to prepare an excess property utilization plan for all real property no longer used for its original purpose.**

1.3.3.5 Inter-Governmental Agreements, Joint Procurements, Piggybacking

REQUIREMENT
FTA Circular 4220.1E, paragraph 7.e. encourages inter-governmental procurements: e. Intergovernmental Procurement Agreements. (1) Grantees are encouraged to utilize available state and local intergovernmental agreements for procurement or use of common goods and services. When obtaining goods or services in this manner, grantees must ensure all federal requirements, required clauses, and certifications (including Buy America) are properly followed and included, whether in the master intergovernmental contract or in the grantee's purchase document. [15]

[15] - Sub-paragraph (1) looks primarily to State government contracts that allow subordinate government agencies to buy from established schedules akin to the GSA schedules in Federal practice. FTA believes grantees may buy through these contracts provided all parties agree to append the required Federal clauses in the purchase order or other document that effects the grantee's procurement. When buying from these schedule contracts, grantees should obtain Buy America certification before entering into the purchase order. Where the product to be purchased is Buy America compliant, there is no problem. Where the product is not Buy America compliant, the grantee will still have to obtain a waiver from FTA before proceeding.

(2) Grantees are also encouraged to jointly procure goods and services with other grantees. When obtaining goods or services in this manner, grantees must ensure all federal requirements, required clauses, and certifications are properly followed and included in the resulting joint solicitation and contract documents. [16]

(3) Grantees may assign contractual rights to purchase goods and services to other grantees if the original contract contains appropriate assignability provisions. Grantees who obtain these contractual rights (commonly known as 'piggybacking') may exercise them after first determining the contract price remains fair and reasonable. [17]

DISCUSSION

Piggybacking - Your Agency may be able to take advantage of existing contracts awarded by other governmental entities for goods and services which you currently need. This practice has become known as "piggybacking." Piggybacking is defined by FTA Circular 4220.1E, paragraph 6.e, as follows:

> ***"Piggybacking" is an assignment of existing contract rights to purchase supplies, equipment, or services.*** [18]

The use of piggybacking, which involves assignment of contracts or portions of contracts from the original purchasing agency to another agency, is discussed in the BPPM, Section 6.3.3 - *Joint Procurements of Rolling Stock and "Piggybacking*." Appendix B. 16 of the BPPM contains a *Piggybacking Worksheet* that will assist a grantee wishing to piggyback another agency's contract to work through the FTA requirements that must be met in order for piggybacking to be permissible.

Adding Federal Clauses to Existing Contracts - FTA's policy regarding the addition of Federal clauses to existing contracts distinguishes between State GSA-type contracts and

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16 - Sub-paragraph (2) reflects FTA's belief that grantees should consider combining efforts in their procurements to obtain better pricing through larger purchases. Joint procurements offer the additional advantage of being able to obtain goods and services that exactly match each cooperating grantee's requirements. We believe this is superior to the practice of 'piggybacking' since 'piggybacking' does not combine buying power at the pricing stage and may limit a grantee's choices to those products excess to another grantee's needs.

17 - Sub-paragraph (3) reflects grantees' continuing ability to assign contractual rights to others – 'piggybacking.' FTA believes it is extremely important that grantees ensure they contract only for their reasonably anticipated needs and do not add quantities or options to contracts solely to allow them to assign these quantities or options at a later date.

18 - FTA's definition of "Piggybacking" in 4220.1E differentiates this practice from joint procurements or other intergovernmental agreements.

contracts awarded by other grantees. For example, in the recently issued Circular 4220.1E, paragraph 7.e.(1), ***FTA allows grantees to modify State GSA-type contracts and add Federally-required clauses and certifications when the grantee issues the first purchase order against the contract. However, FTA has taken the position that grantees may not add Federal clauses and certifications to their own contracts or those of other grantees in order to purchase against these contracts with Federal funds.*** **The rationale is that, in a State GSA-type contract, the purchase order is the transit community's initial work on the contract – much as any buy off the Federal GSA IT schedule will be when a grantee chooses to use this Federal contract. In other cases (like transit agency A buying off transit B's contract), the transit-unique rules are in place and known from the beginning, there is no expressed intent in the common grant rule (as with State schedules) to balance the rules against each other, and it would infer that a transit agency could essentially avoid most Federal rules by placing orders through another transit agency. In short, the integrity of the system would be threatened by extending the after-the-fact option beyond schedule purchases.**

Joint Procurements - You may also wish to plan procurements in advance with other agencies or governmental users, and competitively award contracts that several governmental entities can draw upon to meet their needs. Such an approach would create economies of scale, reduce procurement lead times in the case of being able to use existing contracts, and reduce administrative effort and expense. Any third party contracts resulting from or utilized by grantees under inter-governmental agreements are subject to the requirements of FTA Circular 4220.1E. Inter-governmental agreements not involving third party contracts would not be subject to FTA Circular 4220.1E. The topic of joint procurements that makes use of advance planning by several agencies is discussed in the BPPM, Section 6.3.3 - ***Joint Procurements of Rolling Stock and "Piggybacking."***

Best Practices

Piggybacking - If it appears that there may be an existing governmental contract which may be used for a specific need, you will first want to obtain a copy of the entire contract and review it carefully to determine if it contains the provisions required by FTA Circular 4220.1E. This is an important first step, because the requirements of the Circular apply to procurements made through inter-governmental contracts and assignments. If the contract lacks required provisions, you may be able to have it modified by the awarding Agency to include the necessary Federal clauses. Among the steps you may want to take are the following:

1. Determine that the contract is still in effect or can be modified by the awarding Agency to permit sufficient lead time to make the required deliveries to your Agency.

2. Determine that the specifications in the existing contract will meet your needs.

3. Review the terms and conditions carefully to determine that they are acceptable to you; e.g., warranty provisions, insurance requirements, etc.

4. Determine that the requirements needed by your Agency will not be *beyond the scope of the existing contract*, creating a sole-source (noncompetitive) add-on to the contract which will have to be justified in accordance with FTA Circular 4220.1E Paragraph 9.h. Generally, if you are working with an indefinite quantity contract you should have the needed flexibility to order additional quantities without having a "new procurement" action requiring a sole-source justification.

5. Determine that the contract was awarded competitively, either through sealed bids or competitive proposals. If the contract was a sole-source award, you will have to justify a sole-source award in accordance with FTA Circular Paragraph 9.h. and your Agency's procurement procedures.

6. You are not required to do a second price analysis if one was originally performed. However, you must determine that the contract prices originally established are still fair and reasonable. Circumstances should dictate the steps to be taken. For example, if the original award was made some time ago, you may want to do a market survey and/or perform price analysis to ensure that the prices are still fair and reasonable (even if the original award was competitive and a price analysis was performed initially). Similarly, if your deliveries are to be made to a local or centralized delivery point and the original contract calls for statewide deliveries, you should be entitled to a price reduction. See BPPM Section 5.2 *Cost and Price Analysis* for a discussion of price analysis techniques.

7. Determine that the contractor has submitted all federally required certifications to the awarding Agency; e.g., Buy America, debarment, restrictions on lobbying, etc. See paragraph above *Adding Federal Clauses to Existing Contracts* and BPPM Section 4.3.3.2 *Federally Required Submissions with Offers.*

8. Work through the items in the Piggybacking Worksheet in Appendix B. 16 (and explained in Section 6.3.3 - *Joint Procurements of Rolling Stock and Piggybacking* of the BPPM). Note that some of the items on this Worksheet may overlap with items already mentioned above.

9. You should prepare a Memorandum for the Record documenting your analysis of the various items mentioned above. This will constitute the *Written Record of Procurement History* required by Paragraph 7.i. of FTA Circular 4220.1E.

Joint Procurements - When it appears that your agency has a common requirement with another governmental user, and that a joint procurement is feasible, you will want to carefully consider whether a joint procurement will result in obtaining the best price for all of the parties to the procurement. It is quite possible that substantial differences in the requirements (delivery schedule, quantities, location, etc.) of one party to the joint procurement will result in increased costs to the other parties and thereby negate other benefits of a joint procurement such as lower solicitation costs. You must also determine whether the different funding sources have different procurement regulations, especially where there are Federal and non-Federal requirements

affecting contract clauses, etc. Should conflicts occur, grantees should consult their respective legal counsels or request FTA pre-award review of their procurement (as permitted by FTA Circular 4220.1E, Paragraph 5.b.)

1.3.3.6 Subgrants

REQUIREMENT

FTA Circular 4220.1E, paragraph 4, defines the applicability of the Circular to subgrants:

> 4. APPLICABILITY. This circular applies to all FTA grantees and subgrantees that contract with outside sources under FTA assistance programs. . . .
>
> a. States. When procuring property and services under a grant, a State will follow the same procurement policies and procedures that it uses for acquisitions that are not paid for with Federal funds. States must, at a minimum, comply with the requirements of paragraphs 7m, 8a and b, and 9e of this circular and ensure that every purchase order and contract executed by it using Federal funds includes all clauses required by Federal statutes and executive orders and their implementing regulations.
>
> b. All Other Recipients. Subgrantees of states and all other FTA grantees (to include regional transit authorities) will administer contracts in accordance with this circular.

49 CFR § 18.37 – *Subgrants* requires States and all other grantees to ensure that their subgrantees comply with certain requirements. These requirements are discussed below.

DISCUSSION

Subgrants themselves are not "third party contracts" within the meaning of FTA Circular 4220.1E, and thus the requirements of that Circular do not apply to the subgrant awards. However, to the extent that the subgrantee contracts with third parties, the FTA Circular applies to such contracts awarded by the subgrantee.

All subgrantees **are required to include in their contracts the clauses required by Federal statutes and executive orders and their implementing instructions. See BPPM Appendix A.1** ***Federally Required and Other Model Contract Clauses.***

Subgrantees which are institutions of higher education, hospitals or other nonprofit organizations, and all subgrantees of grantees which are not States, **are required to administer their contracts in accordance with all of the requirements of the FTA Circular 4220.1E** ***Third Party Contracting Requirements. Subgrantees of states (excluding institutions***

of higher education, hospitals or other non-profit organizations) **are authorized to follow state law and procedures when awarding and administering contracts.**

If you are a grantee awarding subgrants with FTA funds, you will want to have an overview system in place for periodic reviews of your subgrantees to ensure that they are in compliance with the requirements of FTA Circular 4220.1E and the requirements of 49 CFR Part 18.37. The Federal government practice (FTA) is to perform periodic Procurement System Reviews (PSR's) of its grantees, evaluating their procurement activities against the requirements of the circular. FTA has developed a *Procurement Systems Review Guide* for its review teams, and you may want to obtain a copy of this guide for your review of subgrantees. (See BPPM Section 1.1.7 - *FTA Procurement System Reviews* above). You should note that 49 CFR Part 18.37 imposes a responsibility on all grantees to ensure that their subgrantees have included all Federally required clauses in their contracts and that the subgrantees are aware of requirements imposed on them by Federal statute and regulation, including those requirements imposed by 49 CFR Part 18. 49 CFR Part 18.37(a)(3) specifically mentions a responsibility to include a clause in all cost reimbursement subgrants that the subgrantee comply with Part 18.42, which deals with retention and access requirements for records.

1.3.3.7 Equipment Leases

REQUIREMENT
Requirements related to the lease of equipment and facilities may be found in the following regulations: (a) FTA Circular 4220.1E generally, and Paragraph 7.d which requires, where appropriate, an analysis of lease versus purchase alternatives to determine the most economical approach. (b) FTA Circular 5010.1C, *Grant Management Guidelines*, Chapter II-3(d) *Leasing-Out Agreements.* These guidelines contain several requirements which grantees must incorporate in their lease agreements. (c) FTA Master Agreement MA(12), Section 16, *Leases***.** (d) Capital Leases (49 CFR Part 639).

DISCUSSION

Since equipment leases are considered "third party contracts" within the meaning of FTA Circular 4220.1E, the requirements of that Circular apply to such procurements.
FTA Circular 4220.1E requires a lease versus purchase analysis to determine the most economical approach to any given procurement. FTA Circular 5010.1C, Chapter II-3(d),

deals with maintenance requirements under leases. The FTA Master Agreement references regulations dealing with Capital Leases (49 CFR Part 639).

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

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

1.3.3.8 Revenue Contracts

REQUIREMENT
49 CFR Part 18.25 *Program Income* states that *grantees are encouraged to earn income to defray program costs.*

FTA Circular 4220.1E *Third Party Contracting Requirements* requires grantees to use competitive selection procedures in the award of revenue contracts.

The FTA Administrator's *Dear Colleague Letter C-98-25,* dated October 1, 1998 defined *revenue contracts* and stipulated requirements regarding competitive selection procedures, five-year term limits (no longer applicable) and requests for waivers.

The FTA *Dear Colleague Letter* C-08-02, dated May 29, 2002 rescinded the requirement that grantees obtain FTA approval for contract terms longer than five years.

DISCUSSION

It is critical to *first determine the primary purpose of the contract.* If it is to procure supplies or services, then it is not a *revenue contract*. For example, management and para-transit contracts are not *revenue contracts* because the primary purpose is to manage a project or operate a service. Royalties received as a by-product of a development or supply contract, e.g. software, would not be considered a *revenue contract.* Disposal of Project property would be another example that would not be considered a *revenue contract.*

If the *primary purpose is to generate revenue* then the contract is a revenue contract. Advertising, concessions (food and news-stands), use of right-of-ways, licenses, and land leasing are some examples of revenue contracts. The definition of a revenue contract developed by FTA is as follows:

> ***A revenue contract is any third party contract whose primary purpose is to either generate revenues in connection with a transit-related activity or to create business opportunities utilizing an FTA-funded asset.***

There are three concepts involved in the definition of a revenue contract. First, the objective of revenue contracts is to lower program costs, and thereby reduce both the federal and the grantee's financial contribution. Creative ways of generating these revenues are encouraged, and FTA uses broad latitude in approving them.

Second, revenue generation for the transit agency is a business opportunity for the business community. Such business opportunities can take various forms, such as: advertising, land development, concessions, and utilization of right-of-ways.

Third, an FTA-funded asset is anything that has been purchased, in whole or in part, with FTA funds as part of an approved transportation budget. This can include funds for acquisition, operating expense or maintenance. Grantees must have a detailed familiarity with the approved budgets to know if a particular activity is included and funded by federal funds, in which case it would be governed by federal requirements.

All revenue generated activity involving third-party contracts must follow an important requirement of FTA Circular 4220.1E:

- **The *requirement for competitive selection procedures* applies to all business opportunities including all revenue generating contracts.**

Competition - The competitive process usually consists of a formal bid or proposal process but it does not always have to. Grantees may use their own judgment about how to meet the intent of the competition requirement, but they must document the record to show how competition requirements were met.

Disadvantaged Business Enterprises - DBEs should have the maximum opportunity to participate in both contracts and subcontracts that use any federal funds. The grantee is responsible for taking all necessary and reasonable steps to ensure that DBEs have maximum opportunity to compete for revenue contracts since these contracts are considered business opportunities.

Contract Term - The five-year contract term limit was rescinded by FTA's Dear Colleague Letter of May 29, 2002. For a discussion of establishing appropriate contract terms, see BPPM Section 2.2.1 - *Contract Period of Performance Limitation.*

Flow-down Requirements - Generally, if federal funds (not assets) are not used to generate revenues, then there are no requirements to include federal clauses in the revenue contract itself.

Unsolicited Proposals - These may come forth when companies see an opportunity to use the transit system (an FTA-funded activity) to enhance their business interest. It may appear from such proposals that no other company could offer the same product or service. However, this does not justify a sole source contract. If the idea or activity is of interest to you, the concept should be evaluated on its own merit and revenue producing potential. If the decision is to implement it, then a competitive process should be used to select the contractor, unless you determine that the proposed concept itself is proprietary.

Best Practices

It is important to always keep in mind the requirement for competition.

The New York City Transit Authority (NYCTA) has experience in many of the areas of revenue generation:

- advertising - buses, trains, stations and other property (billboards), direct advertising on back of MetroCard
- lease/rental of MTA-owned property - concessions, news stands, retail space, subleasing of office space

The NYCTA procurement office does not handle the revenue generation contracts. Various departments of the transit agency are responsible for the revenue contracts, like the Advertising Department and Real Estate Department. These Departments are aware of the federal requirements and follow them to obtain third-party contractors.

NYCTA was approached recently by a company, which submitted an unsolicited proposal, who wanted to install an electronic information system on the subway cars. The company wanted to program the system so that riders would know what was overhead, e.g. Wall Street, theater district. New York City decided to investigate the concept first to determine if it was something that they wanted to do to enhance the subway system. Deciding that they liked the idea, they then prepared an RFP and solicited vendors on a competitive basis.

Metropolitan Atlanta Rapid Transit Authority (MARTA) received an unsolicited proposal from a company about use of subway right-of-way for linking Atlanta with fiber optic cable using MARTA's system-wide conduits. MARTA determined that they had unused conduits and could lease space in them to various telecommunication companies. They contacted the regional FTA office and received their approval for a non-exclusive RFP to seek competitive proposals for twenty-year leases. This has produced successful revenue contracts. [19]

1.3.3.9 Transit Oriented Joint Development Projects

REQUIREMENT

FTA Circular 9300.1 *Capital Program: Grant Application Instructions*, Appendix B, "Joint Development Projects."

Federal Register Notice, March 14, 1997, *FTA Policy on Transit Joint Development*. This *clarifies* the relationship between transit laws and regulations and FTA policy regarding property disposition, leases of property, and sale of property affecting program income and the definition of "highest and best transit use" for joint development.

FTA Circular 5010.1C *Grant Management Guidelines* states:

> II-2b. Use - ...FTA encourages incidental uses of real property that can raise additional revenues for the transit system or, at a reasonable cost, enhance system ridership.
>
> FTA approval is required for these incidental uses of real property which must be compatible with the original purposes of the grant.

FTA Circular 4220.1E *Third Party Contracting Requirements* states the requirements the grantee must adhere to in third party contracting. Specifically, note:

[19] - Metropolitan Atlanta Rapid Transit Authority (MARTA), contact Mr. Durham Hamilton, Director of Program Management, at (404) 848-4409, to discuss Atlanta's fiber optic cable contracts.

- Competitive Selection Procedures
- Possible Flow Down of Certain Federal Clauses

DISCUSSION

FTA is encouraging transit systems to undertake transit-oriented joint development projects (TODs) with either new grants or with property acquired under previous grants. The property can be associated with rail, bus or other transit facilities.

The purpose of a joint development project is to:

- **secure a revenue stream for the transit system; and,**
- **help shape the community that is being served by the transit system.**

Where the grantee retains effective continuing control for mass transit purposes, all proceeds of sale, lease or other encumbrance of the property will be treated as *program income* for use by the transit system to meet capital and operating needs. The very nature of a joint development project *requires long-term relationships* between the various contracting parties due to issues related to land use, zoning, financial investment, long-term leases, multiple contracting parties, construction, and management. The Federal Register notice of March 14, 1997, clarified and addressed apparent inconsistencies in the use of revenues. This Notice states:

1. **Joint development projects are considered "mass transportation projects" eligible for funding under FTA capital programs.**

2. **All projects must generate a one-time payment or revenue stream for transit use, the present value of which equals or exceeds the fair market value of the property.**

3. **When the grantee retains continuing control and use of the joint development for mass transportation purposes, all proceeds will be considered *program income*.**

Grantees are advised to submit the joint development proposal to the FTA regional office in accordance with the Federal Register notice of March 14, 1997, paragraph entitled "Procedures." The proposals to FTA should include:

1. **The proposed joint development agreement;**

2. **A market and financial assessment of the joint development project and its impact on the transit system;**

3. **A statement of the outcome of planning and coordination between the joint development project and the transit facility; and**

4. **Documentation of the projected benefits for the transit system as well as the effective continuing control of the joint development project for transit purposes.**

Competition is an important requirement in the development of the project. Requirements for full and open competition of the proposed project can be obtained by: public announcements in the newspapers and trade journals; building a solicitation list that is inclusive and not exclusive; developing a realistic response time for developers, knowing that developers have to frequently build a "team" to respond to the RFP; having realistic criteria to judge the responses; having an evaluation team with broad and diverse experience rate the proposals; and, competitive negotiations.

Flow-down requirements dealing with Federal clauses in a joint development project will follow the federal funds. It must be determined whether and to what degree Federal regulations apply, particularly to the privately funded, non-transit portion of the project. These regulations could include: National Environmental Policy Act, Davis-Bacon Act, Buy America Act, labor protection arrangements, and third-party procurement requirements. You should determine (with FTA's assistance as necessary) the most appropriate procedures for satisfying any flow-down requirements, given the particular circumstances of your project.

Best Practices

Atlanta's transit system, Metropolitan Atlanta Rapid Transit Authority (MARTA), is involved in a joint development project called the Lindbergh Center. Their objective is to build a village that will: increase ridership, be high-density mixed use, be a livable community, generate long-term revenue, integrate the station and development. They have addressed the issues, been through the procurement process, and selected a developer. How did they do this? They began by working first with their FTA regional office in explaining what they wanted to do. Next, they developed three requests for proposals (RFPs) leading to three contracts for: marketing the property, evaluating the development proposals, and the development itself.

The question of open and full competition was met through the marketing strategy. The marketing plan was critical in reaching out to developers who might bid on the project. MARTA set a target of 500 developers to reach through a variety of methods: a predetermined listing of potential developers, advertising in major newspapers (Wall Street Journal), national and international solicitations. An outside management consulting firm was retained to assist MARTA in the evaluation of developers' proposals. The Development RFP detailed the requirements of the expected development proposals. Included in the evaluation factors was a

category of "maximize revenues and returns to MARTA." The process was successfully completed and a developer has been chosen. [20]

1.3.3.10 Disposition of Surplus

REQUIREMENT
Requirements related to the generation of program income, and the disposition of surplus equipment, supplies and real property may be found in the following regulations: (a) FTA Circular 4220.1E (general principles applicable to all contracts involving Federal funds or Federally funded assets). (b) FTA Master Agreement MA(12), Section 19.g *Disposition of Project Property*. (c) 49 CFR 18.25 *Program Income*; 18.31 *Real Property*; 18.32 *Equipment*; 18.33 *Supplies.* (d) FTA Circular 5010.1C, *Grant Management Guidelines*, Chapter II-2c, *Real Property – Disposition;* Chapter III-4 *Program Income*. (e) 49 U.S.C. 5334(g) *Transfer of Assets No Longer Needed.*

DISCUSSION

FTA interprets Circular 4220.1E as applying to contracts for the disposition of surplus supplies, equipment or property. Grantees are also advised to be familiar with other regulations that specifically address the disposition of property, especially FTA Circular 5010.1C, Chapter II – *Management of Real Property, Equipment and Supplies.*

It is important that the grantee be familiar with the disposition requirements of FTA Circular 5010.1C, Chapter II-2(c) and 3(f). This Circular establishes procedures to be followed by grantees in a variety of situations, and grantees need to carefully review these requirements. They pertain to circumstances such as:

- **Selling property (competitively to the extent practicable) and reimbursing FTA its share of the fair market value.**
- **Selling real property and using the proceeds to reduce the cost of the grant if it is still open or of other FTA funded capital projects.**

[20] - Metropolitan Atlanta Rapid Transit Authority (MARTA), contact Ms. Lisa DeGrace, Director of Contracts, Procurement and Materials at (404) 848-5467, to discuss Atlanta's transit oriented development and other revenue contracts.

- **Retaining title to real property by reimbursing FTA for its share of the current (appraised) market value.**
- **Disposing of rolling stock before the end of service life.**
- **Disposing of equipment.** [21]
- **Transfer of equipment to a public agency for non-transit use.**
- **Selling and using proceeds for other capital projects.** [22]

Comment [JPL1]: This was pretty confusing as written. If we take away the reference to valuation in the bullet, it makes more sense when explained in the footnote. As an alternative, we could just one bullet for $5,000 and under and another for $5,001+.

Transfer of Assets No Longer Needed – 49 USC 5334 (g)(1) allows for the transfer of assets no longer needed by the grantee. If a grantee decides an asset acquired with FTA funds is no longer needed for the purpose for which it was acquired, the grantee may request FTA approval to transfer the asset to a local governmental authority to be used for a public purpose with no further obligation to FTA. The Secretary of Transportation may authorize a transfer for a public purpose other than mass transportation, but only if the Secretary decides -

A) the asset will remain in public use for at least 5 years after the date the asset is transferred;

B) there is no purpose eligible for assistance under 49 USC Chapter 53 for which the asset should be used;

C) the overall benefit of allowing the transfer is greater than the interest of the Government in liquidation and return of the financial interest of the Government in the asset, after considering fair market value and other factors; and

D) through an appropriate screening or survey process, that there is no interest in acquiring the asset for Government use if the asset is a facility or land.

The decision to permit the transfer must be in writing and include the reasoning that supports the transfer.

Sale of Assets No Longer Needed – 49 USC 5334 (g)(4) allows for the sale of assets no longer needed, subject to the approval of the Secretary of Transportation. When real

[21] Equipment with a unit market value of $5,000 or less, or supplies with a total aggregate value of $5,000 or less, may be retained, sold or otherwise disposed of with no obligation to reimburse FTA, providing useful service life requirements have been met.

[22] The situations covered by the Circular include more than those listed above, and grantees need to carefully review the Circular instructions.

property, equipment, or supplies acquired with FTA funds are no longer needed for mass transportation purposes as determined under the applicable assistance agreement, the Secretary may authorize the sale, transfer, or lease of the assets under conditions determined by the Secretary. The net income from asset sales, uses, or leases (including lease renewals) must be used by the grantee to reduce the gross project cost of other capital projects carried out with FTA funds.

Best Practices

One transit agency has developed detailed procedures for disposing of surplus items. [23] These include:

- Competitive bidding procedures for materials that are regularly generated, regularly removed, high volume, and low unit price such as scrap steel or motor oil.
- Development of specifications by the Materials Management Department in coordination with the User Department(s) for the surplus items to be offered for sale and review by the Purchasing Department.
- Preparation of a solicitation and advertising of the items being offered for sale by the Purchasing Department when competitive bids are being solicited.
- Issuance of a "Invitation to Quote" letter to prospective bidders by the Purchasing Department, or a letter inviting “offers to purchase” by the Sales Division when the selling price of the material is expected to be below the small purchase threshold. [24]
- Analysis of bids by the Purchasing Department, with a written recommendation for award to the winning bidder.
- Internal agency approvals to award a contract for the *sale* of Authority property or services parallels that of the approval process to award a contract for the *procurement* of goods and services.

1.3.3.11 Operating Assistance, Preventive Maintenance, CMAQ and JARC Projects

REQUIREMENT
FTA Circular 4220.1E, paragraph 4, addresses the issue of the Circular’s applicability to (a) operating contracts, (b) contracts utilizing Congestion Mitigation and Air Quality (CMAQ) and Job Access/Reverse Commute (JARC) project funds, and (c) preventive maintenance contracts which are funded with FTA formula capital funds:

[23] - New York City Transit. Contact Mike Zacchea, (646) 252-6204.

[24] - If the material to be sold does not meet the criteria for competitive bidding, solicitation and advertising of individual items offered for sale would be a responsibility of the Sales Department, not Procurement.

This circular applies to all FTA grantees and subgrantees that contract with outside sources under FTA assistance programs. FTA grant recipients who utilize FTA formula funds for operating assistance are required to follow the requirements of this circular for all operating contracts. These requirements do not apply to procurements undertaken in support of capital projects completely accomplished without FTA funds or to those operating and planning contracts awarded by grantees that do not receive FTA operating and planning assistance. [25]

Congestion Mitigation and Air Quality (CMAQ) and Job Access/Reverse Commute (JARC) project funds may be used for operations. Although grantees must follow circular requirements for any specific contracts that utilize CMAQ or JARC funds, the use of CMAQ and JARC funds for operations does not trigger the applicability of the circular to all other operating contracts. [26]

Grantees that utilize formula capital funds for preventive maintenance contracts are subject to the following requirements of the circular: If FTA formula capital funds are fully allocated to discrete preventive maintenance contracts, then the requirements of this circular will apply only to those discrete contracts and must be identified and tracked by the grantee. If the FTA formula funds are not allocated to discrete contracts then all preventive maintenance contracts are subject to the requirements of the circular. [27]

DISCUSSION

If a transit property receives FTA formula funds for *operating assistance*, all grantee procurements must comply with FTA Circular 4220.1E except for capital projects

[25] - As a general rule, the circular, along with the underlying requirements in the Federal transit laws and regulations, applies whenever Federal funds are involved. Those grantees authorized to use formula funds for operating assistance must apply the circular to all operating contracts – even if they are able to administratively segregate the federal funds to non-contract operating expenses. The ability to use formula funds for operating assistance hinges upon a grantee's total operating expenses and the portion of those expenses not offset by operating income. Since the entire range of operating expenses is considered in this calculation, each segment of those operating expenses must be subject to Federal standards. Grantees that are not authorized to use formula funds for operating assistance are not required to apply the circular to their operating contracts.

[26] - Congestion Mitigation and Air Quality (CMAQ) and Job Access/Reverse Commute (JARC) funds may be used for operations by all grantees. The circular must be applied to all contracts that are funded, in part, by CMAQ or JARC funds. Using CMAQ or JARC funds for a specific operating contract or contracts does not trigger the requirement to apply the circular to other operating contracts. This is because the calculation required to use formula funds for operations contracts is not required as a prerequisite to using CMAQ or JARC funds for operating contracts.

[27] - Grantees who use formula capital funds for preventative maintenance contracts must apply the circular to those contracts. If, through their accounting procedures, these grantees are able to allocate the Federal funds to discrete maintenance contracts, only those discrete contracts must adhere to the circular. If unable to allocate federal funds to discrete maintenance contracts, the circular applies to all maintenance contracts. Capital projects that don't include Federal funding are not required to conform to the circular.

undertaken without Federal funds or those operating and planning contracts awarded by grantees that do not receive FTA operating and planning assistance. Grantees whose net operating deficit is financed by Federal funds cannot segregate any of their operating or planning contracts so that they are exempt from the requirements of the Circular. The Circular must be applied to all such contracts.

When grantees receive *CMAQ and JARC funds* for operations projects, the Circular requirements must be followed for those specific contracts using CMAQ and JARC funds. However, the use of these particular funds for operations does not trigger the applicability of the Circular to all operating contracts, as is the case with FTA formula funds.

1.3.3.12 E-Commerce

REQUIREMENT
FTA Circular 4220.1E, paragraph 7.q. recognizes E-Commerce as an allowable means to conduct procurements. If a grantee chooses to utilize E-Commerce, written procedures must be developed and all requirements for full and open competition must be met.

DISCUSSION

The Best Practices Procurement Manual (BPPM) intends to cover the topic of E-Commerce at a later date when industry experience has been sufficient to indicate some "best practices" for the transit industry. In the meantime, the *Dear Colleague Letter* of May 29, 2002 reminds grantees that E-Commerce is an allowable means to conduct procurements. If a grantee chooses to implement an E-Commerce system, written procedures must be developed and all the requirements of FTA Circular 4220.1E must be met, including the requirement for "full and open competition" as stated in FTA Circular 4220.1E, Paragraph 8a.

Chapter 2

2 - Procurement Planning & Organization

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2.1 ORGANIZATION OF PROCUREMENT FUNCTION

2.1.1 Scope of Responsibility

REQUIREMENT
FTA Circular 4220.1E, paragraph 5a – *Grantee Self-Certification,* states that FTA intends to rely on grantees' [annual] "self certifications" that their procurement system meets FTA requirements to support the required finding [by FTA] that a grantee has the technical capacity to comply with Federal procurement requirements. FTA Circular 4220.1E, paragraph 7b – *Contract Administration System,* requires grantees to maintain a contract administration system that ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

DEFINITIONS

Centralize - To concentrate procurement actions and decisions in one person or group within an organization.

Contracting Officer - A procuring official who has delegated authority, usually including authority to sign contracts and amendments on behalf of the procuring agency for one or more specific contracts.

Contracting Officer's Technical Representative (COTR) - A representative of the procuring agency who has more limited authority than the contracting officer, usually including providing technical direction to the contractor.

DISCUSSION

As a Contracting Officer you are responsible both for your contract's cost-effectiveness and its compliance with Federal and state requirements. It is easier to fulfill these responsibilities if most of the decisions and contractual actions concerning procurement are focused in one or more individuals who are familiar with procurement requirements and procedures. These actions begin with planning and solicitation of offers, include communication with offerors and contractors, and continue through contract acceptance and warranty enforcement. Except in very small organizations, the contracting responsibilities will often reside with different individuals than the individuals who would best understand the functional and performance requirements of the goods or services. These latter persons are your internal customers.

Purpose

You and the leadership of your organization need to clearly understand the scope of the procurement function and organize responsibilities to accomplish several objectives:

- to obtain the best buy for your agency which requires an evaluation of all the service quality, safety, cost, schedule, and other objectives of the agency's operating functions;
- to comply with Federal, state, local, and agency procurement requirements;
- to ensure an understanding of the precise authority of you and your agency team members in dealing with suppliers who, while partners in many respects, have some interests that conflict sharply with your agency's; and
- to control through finite, professional boundaries, the possibility of corruption or unethical practices.

These objectives require the clear definition and assignment of procurement responsibilities. A specific aspect of that assignment, the need for autonomy, is discussed in more detail in the following section of the Manual.

Best Practices

Identification of Need - The initial identification of need is one aspect of the procurement cycle that is generally the sole responsibility of your internal customers (i.e., program or technical personnel for whom you are procuring goods or services). However, you may be in a position to facilitate the consolidation of procurements of different internal customers with the same need.

Procurement Planning – Preparation of procurement planning, on the other hand, should be exclusively a procurement function. If your agency has not conducted formal planning, this process is a way to establish the need for a separate procurement function and demonstrate its value to the organization. Specific suggestions for useful planning activities are discussed below under long range and annual planning cycles.

Preparation of Specifications – Preparing specifications or statements of work is usually a customer function. Generally, customers have the greatest understanding of functional and performance requirements; however, the procurement function should play at least an advisory role in order to avoid exclusionary specifications and to encourage free and open competition.

Solicitation of Offers – The solicitation of offers (including invitation for bids and request for proposals) is usually the first important public action the agency takes, and it should clearly be the responsibility at this point of the procurement staff. Customer team members are often helpful in compiling lists of potential offerors, and should participate in the procurement process, but communications with offerors and the official action of soliciting offers is a procurement function.

Communications – If communication with offerors is decentralized, one offeror may obtain more information about the agency's preferences or evaluation process than the others. It is a general practice (except at the smallest agencies) to restrict communication with offerors to only procurement personnel so that no offeror could gain an advantage or apparent advantage over another.

Evaluation of Offers – Procurement personnel will usually request and rely upon their technical customers to evaluate the technical merits of proposals and assess the offeror's ability to perform the contract successfully. The Procurement Officer must oversee the technical evaluation to ensure it is consistent with the evaluation criteria published in the RFP and that the contract file is adequately documented to reflect the relative strengths, deficiencies, weaknesses and risks of the various proposals. It is important that the technical evaluation provide a clear narrative of the proposals' relative merits and not merely a numerical rating of the proposals. To maintain the overall integrity of the procurement, the procurement function normally must at least approve the selection and (if it does not have sufficient authority) will often present the recommendation to the final authority.

Administration – You should play a continuing role in the administration of the contracts, particularly in changes and disputes. Acceptance of goods and services and payment approvals always require your review. In simpler or routine situations, a receiving report or COTR acceptance can be matched to your original purchase order to ensure proper control.

Centralization / Decentralization – Many organizations find it more efficient to permit customer groups, particularly those with a large number of similar, small procurements, to perform some of the functions normally performed by the procurement office (e.g., solicitation and evaluation

of offers up to a specific dollar amount). However, in these cases, procurement personnel can provide a valuable oversight role, providing forms, procedures, and technical assistance. Although decentralized procurement can reduce the administrative cost of the procurement and be more responsive to a customers' needs, if it is uncontrolled, it could eventually result in situations involving non-compliance, unwise contracting, or unethical practices. It is a best practice to ensure that no employee undertakes any of the procurement functions without clear authority and guidelines.

2.1.2 Autonomy

DISCUSSION

Autonomy of the procurement function, or its independence from internal customers, is important to carrying out procurement responsibilities without undue influence by the customers and users of the goods and services procured. While the degree of autonomy and organizational reporting relationships will vary with the size of the organization and its policies, autonomy enables procurement personnel to give unbiased consideration to procurement principles and requirements, as well as to the schedule, budget, functional and other requirements of the internal customers.

Purpose

A debate has raged for years between those who are process oriented (procurement officials and compliance departments such as legal, internal audit, or grants) and those who are program oriented (maintenance managers, engineers, project managers).

- Should the procurement functions described in the previous section be controlled by the program functions? After all, it is the program office whose needs are to be met, and, in most accounting systems, the program to whose budget the purchase will be charged.

- Should the procurement official be entirely autonomous and evaluate the needs of the program (e.g., for immediate services) against the legal or procedural requirements of the funding source (e.g., FTA Circular 4220.1E if Federal funds)?

Some degree of autonomy of the procurement function is necessary organizationally and functionally so that procurement personnel will be free from undue influence or pressure in the award and administration of contracts. The obvious solution to the conflict between "process" and "program" is to have a team in which each member recognizes the strengths and capabilities of the other team members and appreciates the role each side brings to the contract table. This

sounds easy to accomplish but, in most practical situations, is very difficult to achieve. [1] Failure to achieve unity and teamwork within the agency in the awarding and administration of public contracts creates frequent opportunities for a contractor to take advantage of a contentious staff relationship to its financial advantage (and the agency's financial disadvantage). Achieving proper balance between groups requires delicate balancing of personalities and corporate objectives, a strong executive, and a well-trained staff. It must also be recognized that there is no textbook answer that will work in every situation and in every agency.

In addition to balancing the roles of program and process interests in making procurement decisions, the payment of your agency's funds to contractors generally requires three independent concurring actions. The requirement for independent concurring actions is sometimes called "internal control," as it is a method for the agency to control the propriety of its actions internally, rather than requiring external reviews and control. While best practices differ, all authorities recognize a fundamental need for a system of checks and balances in the overall procurement process. In an organization with no checks and balances, if an individual perceived a need for a staff car, that person could draft the specifications for the car, prepare the solicitation document, order the car, approve the contract, inspect the preparation of the car, administer the contract, accept the car after delivery, sign the agency check to pay the dealer, and use the car in a manner the person deemed appropriate. It should be obvious that an organization and procurement process such as this would not be credible and would be subject to great abuse, actual or perceived. As a result, most public and private agencies divide those functions among, at least, three distinct elements within its organization.

- The requiring activity is represented by the program manager who is responsible for determining the requirement, preparing the specifications and, then, acting as the technical representative or advisor to the contracting officer during contract performance.

- The procurement activity is represented by the contracting officer who is responsible for ensuring specifications are not restrictive, preparing the solicitation document in accordance with the law and rules and regulations of the agency and the FTA, soliciting the requirement, and awarding the contract in accordance with the solicitation. Contract administration functions are usually shared with the requiring activity and involve such functions as approving payment, accepting the goods or services bought, and closing out the contract.

[1] - For formal assistance in implementing a team process see Howard, Jennifer M. and Miller, Lawrence M., *Team Management: Creating Systems and Skills for a Team-Based Organization* (The Miller Consulting Group, Inc., 1994) or Leinberger Robin et al, *The Art of Business Process Management: A guidebook*, (KPMG Peat Marwick, LLP, 1993).

- The payment activity is represented by a third party (the finance department) who ensures that all approvals are obtained and that the payment is within the dollar amount of the contract. Often, the accounts payable function in finance either physically or electronically matches three documents issued by three different employees (the purchase order, receiving report, and approved invoice) before releasing funds.

The procurement and payment activities are "process" functions ensuring that the goods are bought and paid for in accordance with the terms of the contract. The "program" activity is to determine what is needed and that it is obtained within the time required and budget allocated.

Best Practices

Degree of Autonomy - From a narrow procurement perspective, the procurement activity would enjoy the highest degree of autonomy where it reports directly to the governing policy board of your organization. Most transit organizations have too much direct operating responsibility to permit this degree of autonomy. Three solutions are:

- Procurement and contracting can report to a chief executive.

- Most typically, the procurement department reports to an administrative or financial function that is independent of the primary internal customers (facility equipment and operating functions).

- Some degree of autonomy can be preserved even within an operating or implementation function if procurement is separated from the program delivery sub-groups.

In medium and large systems, if the contracting function is not separated from the program office, there is an inadequate system of checks and balances on the procurement process. Overall, procurement personnel should have enough autonomy or checks and balances to achieve a quality product at a fair and reasonable price without real or apparent conflicts of interest in the solicitation, evaluation or award.

2.2 LONG TERM PLANNING

DISCUSSION

Long-term procurement planning (i.e., planning more than one year in advance) is one option to be considered by large transit systems and by systems planning a major transit investment, complex capital project, or a substantial number of operating contracts that will span several years. Systems without current major capital projects may find that annual planning is adequate.

Purpose

Procurement plans covering several years may be an improvement over partitioning or consolidation in major projects as a way to facilitate the most cost-effective project management and delivery. The plans can identify major changes in procurement work load, and can obviate any tendency to rush procurement decisions or activities in ways that result in waste (e.g., through failure to consolidate major procurements) or risk non-compliance (e.g., through inadequate notice and non-competitive awards).

Plan Contents - A long-term procurement plan would identify the major procurements projected over the next two to five years. The multi-year element of the Transportation Improvement Program (TIP) is a good starting point for identifying future capital projects and their corresponding procurement requirements. Typically, the procurement plan includes any fixed guideway projects, revenue rolling stock replacements or fleet expansions, and major construction projects. In the case of fixed guideway and other construction projects, where multiple procurements may be involved, the plan would identify the initial strategy for packaging the design, construction, and equipment. Consideration would also be given to turnkey procurements and to long term projects that are not public works. The latter would include major software systems, fleet overhaul and ADA operational service.

Major Projects - Often major design/construction and rail vehicle procurements are planned seven to ten years *in advance of needed completion* because several interdependent contracts may have to be awarded in order to accomplish the project. The time intervals typically required to accomplish these contract awards might include:

- One year advance planning before Request for Proposals (RFP) for the engineering services;
- Four months from RFP to award of the engineering services;
- Two years to prepare technical specifications;
- Three months from completion of specifications to system RFP;
- Six months from system RFP to award; and
- Three years for system construction.

The planning and design processes can change this schedule significantly, and few procurements require this length of time. When major projects are undertaken, a comprehensive procurement plan that outlines these major projects along with the rest of your procurement workload will be extremely helpful. Bus procurements and major electronic/data systems generally require at least three years of advance planning.

2.2.1 Contract Period of Performance Limitation

REQUIREMENT
49 USC § 5326(b) limits the procurement of rolling stock and replacement parts to no more than five years' requirements under a single contract, even though delivery may take place beyond five years from the date of the initial contract. FTA Circular 4220.1E, paragraph 7.m, addresses the five-year contract term limitation for rolling stock and replacement parts. It also requires that contract terms for all other types of contracts be based on sound business judgment. FTA Circular 4220.1E, paragraph 8 – *Competition*, requires all procurement transactions to be conducted in a manner providing for full and open competition. FTA Circular 4220.1E, paragraph 7i – *Written Record of Procurement History*, requires grantees to maintain records detailing the history of a procurement.

DISCUSSION

On May 29, 2002, the FTA Administrator issued *Dear Colleague Letter* C-08-02 rescinding FTA's long-standing five-year contract term limitation for all contracts except those for rolling stock and replacement parts. The limitation on rolling stock and replacement parts remains in effect since the limitation is a statutory requirement and not an FTA policy.[2] The new FTA policy is now expressed in FTA Circular 4220.1E, paragraph 7.m – *Contract Term Limitation*.

Prior to this letter, FTA Circular 4220.1D, paragraph 7.m - *Contract Period of Performance Limitation*, had limited the period of performance of DOT-assisted supply and service contracts to five years, inclusive of options, without prior FTA approval. [3] As a result of this rescission of the contract term limitation, grantees will no longer be required to obtain prior FTA approval for contract terms longer than five years. [4] The rescission of the five-year term limit applies not only to new contract awards, but to existing contracts as well. Grantee procurements will continue to be reviewed by FTA for compliance with the "full

[2] - The limitation is expressed in terms of buying no more than five years' requirements even though delivery may occur beyond five years from the date of the contract.

[3] - This limitation did not apply to construction contracts or to leases of real property for the life of the transit asset to be constructed on such property.

[4] - FTA *Dear Colleague Letter* C-08-02 dated May 29, 2002.

and open competition" principle stated in FTA Circular 4220.1E paragraph 8a, and grantees will continue to be responsible for conducting their procurements in accordance with sound business practices. Grantees are expected to be judicious in establishing and extending their contract terms.

Best Practices

Although FTA no longer requires prior approval for contract terms longer than five years, grantees remain responsible for conducting their procurement transactions in accordance with the "full and open competition" principle expressed in FTA Circular 4220.1E, paragraph 8a. As with any procurement action, grantees should ensure that their procurement files adequately document their decision making process. This record should include the rationale for the contract period of performance.

Period of Performance Criteria – Periodic re-competition of contracts preserves competition and keeps prices competitive. Without periodic competition the incumbent will not have the pressures of a competitive market to keep prices reasonable or an incentive to maintain satisfactory performance. There are, however, criteria that the grantee can employ when deciding upon the term of a contract. Some of these criteria are suggested below.

Revenue Contracts – It is FTA policy to afford all persons an equal opportunity to access FTA-funded assets. FTA also encourages its recipients to maximize non-farebox revenues. This can be done through contractual or other appropriate arrangements, which involve the use of FTA-funded assets without interfering with its transit use. FTA had previously invoked a five-year term limit as one way to balance these potentially conflicting policies. It is important for grantees to document their revenue contract files with an *economic analysis* that demonstrates how these dual objectives were accomplished. If the contract opportunities allow for free and open competition, then the Grantee's procurement policies will address FTA's equal opportunity policy. Where however, there is a limit to the number of firms who will be awarded contracts, then the grantee should include an *economic analysis* in the contract file to justify the contract term. The *economic analysis* should explain why the specific period of performance was necessary for the recovery of the contractor's investment and a reasonable economic return. In performing this analysis, grantees may wish to conduct a market survey to obtain information and recommendations from prospective offerors to determine what the typical up-front investment will be and what kind of contract period would be required for the offerors to recover that investment and realize a reasonable economic return on that investment. Grantees should document their files with this information, showing the conclusions reached with respect to the contract period of performance finally selected.

Supplies – Typically the contract period of performance for supplies will be dictated by the grantee's foreseeable needs and such factors as economic quantity breaks, warehousing space, shelf life, technology concerns, etc. When the grantee perceives that there may be an opportunity to increase competition through a larger purchase, the grantee may wish to conduct a *market*

survey of potential suppliers to determine if they would make an offer under a different contracting scenario. For example, it may be that they were discouraged from bidding because the up-front investment (non-recurring costs of tooling, etc.) would be prohibitive over a relatively short contract period/limited quantity buy. However, if the period were extended and the quantity increased, these potential suppliers might be induced to participate. This is in effect what one large transit agency has done successfully. [5] Thus, the shortest contract period/ minimum quantity buy may not necessarily be the optimum decision. Grantees will need to exercise some diligence in determining if longer/larger contracts might be in their best interests. If they decide to do that, they should document their files showing the benefits obtained from the longer contract periods.

When deciding the best period of performance for on-going services contracts, grantees need to consider the up-front investment by potential offerors for specialized personnel training and other non-recurring start-up costs (e.g., relocation) that must be recovered over the life of the contract. Once again, grantees should consider a pre-solicitation industry outreach to discuss with individuals in the industry what they may see as up-front investments that must be recovered from the profits anticipated by the contract. These discussions should reveal what the industry needs in terms of a contract life in order to submit competitive prices against the incumbent. These facts need to be documented in your contract files as you reach an agency decision on the proper period of performance of the services contract.

2.2.2 Multi-Year vs. Multiple Year Contracting

DISCUSSION

Grantees are authorized to procure rolling stock or other supplies and services by a number of methods. These include buying on an annual or on an as-needed basis, and also on a multi-year or multiple-year basis. The distinction between the multi-year and multiple year methods is as follows:

Multi-Year Contracting - multi-year contracting is a method by which the grantee procures its needs for the entire life of the contract, even though funding for the entire contract is not available at the time of contract award. The contract requires the contractor to deliver the entire requirements of the contract. Option provisions are unnecessary. Because the grantee does not have sufficient funds for the entire contract at the outset of the contract, it will be necessary to recognize in the contract that the grantee may have to cancel the contract at some point if additional funds are not forthcoming. Grantees *may have to include cancellation costs* in the contract in the form of an advance agreement for any program year or portion thereof canceled by the grantee (but

[5] - Contact Mr. John Trotta, Vice President, Purchasing/Warehousing, Chicago Transit Authority, at (312) 222-6113.

cancellation costs are not required to be included if the contractor will accept a contract without them). Additional information on multi-year contracting, while not binding on grantees, is discussed in the *Federal Acquisition Regulation* (FAR), Subpart 17.1 - *Multi-Year Contracting*.

Multiple Year Contracting - multiple year contracting is a method by which the grantee awards a contract for a base period of one or more years, with option provisions for future years' requirements. The base period of the contract is a firm and fully funded requirement. Beyond the base period, the grantee uses option provisions, which may be exercised unilaterally at the discretion of the grantee as additional funding becomes available. There is no need for the inclusion of cancellation payments since the exercise of the options is totally within the discretion of the grantee.

Additional information on multiple year contracting, while not binding on grantees, is discussed in the *Federal Acquisition Regulation* (FAR), Subpart 17.2 - *Options*.

Term of Contracts – As noted above in Section 2.2.1 – *Contract Period of Performance Limitation,* 49 USC § 5326(b) limits the procurement of rolling stock and replacement parts to no more than five years under a single contract, even though delivery may take place beyond five years from the date of the initial contract.

2.3 ANNUAL PLANNING

2.3.1 Sources and Contents

DISCUSSION

Every transit organization can carry out annual planning; large systems may maintain multi-step planning processes with substantive documents that are carried forward from year to year. Small systems may prepare the plan simply through preparation of a list of known procurements at the beginning of a planning cycle (i.e., in budget preparation or in the mandated planning process).

Purpose

A basic purpose for maintaining formal plans regarding procurements well in advance of issuing the solicitations is to enable more deliberate and coordinated decision-making in moving forward with the procurements and related activities. In addition, procurement planning is the best opportunity to identify potential consolidation of procurements (e.g., several internal customers purchasing furniture or personal computers in the same time-frame). Larger agencies may find that procurement consolidation yields substantial savings. More specifically, an advance procurement plan is a good way for the agency to document its compliance with paragraph 7(d) of Circular 4220.1E which states, "Grantee procedures shall provide for review of proposed

procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase."

The advance procurement plan also proves useful in responding to procurement challenges. It provides an early record of decisions that were made for business purposes before the receipt of offers and without the possibility of competitive bias. Contracting officials should recognize that the plan is fluid and that their customers' needs will change, but even this change can be more orderly if the base plan has been documented. A change is simply accomplished through a plan update, rather than being passed around by word of mouth or memorandum, which tends to result in confusion and indecision.

Best Practices

Sources for Plans - The preparation of an advance procurement plan can begin with data already prepared for service and financial planning purposes. Both state and local Transportation Improvement Programs list major Federally funded projects for all modes of transportation. While the preparation of the plans is the responsibility of the local Metropolitan Planning Organization and the state, most transit agencies are involved in assisting with development of the transit element of the plans, which lists their projects separately. An internal capital budget is another source, which may have more detailed or up-to-date information on planned capital procurements.

Although projects funded with operating funds are often smaller and the operating budget does not usually offer as much specificity, contracting officials may be able to identify many planned procurements from the operating budget as well. Historical usage is another valuable source for the plan, particularly when compared to the operating budget.

Another method available to assist with preparation of the plan is to conduct a survey of internal customers. They may provide more detail on the budgeted projects and may be able to identify projects that are not differentiated in the budget. An annual survey of the major customers will encourage the customers themselves to plan their needs for goods and services.

Annual procurements, which account for a great deal of activity, such as parts, fuel, and other supplies, can be projected at most agencies based on historical need and agency-wide plans and projects.

Plan Contents - In addition to the identity of each procurement, plans normally identify the customer contact(s) (at medium and large agencies), time requirements, and funding sources. Tentative start dates, publication dates, opening dates and award dates are usually based on the type and size of the procurement contemplated. Time should be allowed for:

- preparation of a source selection plan (if not already complete or in progress), where appropriate;

- preparation of specifications;
- assembly of the solicitation of offers;
- publication period and time for preparation of offers, including pre-bid/proposal conference, where appropriate;
- receipt and evaluation of offers; and
- required reviews and approval actions.

Complex projects will require more time for preparing specifications. Negotiated procurements will require more time after receipt of offers. If governing board approval is required, and the governing board meets on a fixed schedule, time would be added for this step. In all major procurements and cases where negotiated procurement is utilized, the planning process can evolve into a source selection plan for each procurement.

In the case of procurement of complex systems, such as rail transit systems or advanced rail vehicles, an advanced procurement plan concept includes planning, not only for the prototype development, testing, and acceptance of the system, but also the life cycle support of the system, which includes training of maintenance personnel, maintenance infrastructure, such as electronic design diagrams and parts catalogs, long term availability of parts, and technical support.

2.3.2 Independent Grantee Cost Estimate

REQUIREMENT
FTA Circular 4220.1E, Paragraph 10 provides that grantees must perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals.

DISCUSSION

A logical element of your annual procurement plan is a cost estimate for each major procurement. It is normally cost-effective to have an independent cost estimate that also satisfies the Federal requirement and to have such an estimate at some time before receiving bids or proposals. You may obtain such estimates from published competitive prices, results of competitive procurements, or estimates by in-house or outside estimators.

BPPM Appendix B.20 – ***Independent Cost Estimate Form,*** **provides a format and guidance for grantee in-house estimators that should be helpful. This form was developed by one**

transit agency to assist its user organizations with the development of independent cost estimates and statements of work.

Purpose

The following are purposes of establishing a cost estimate using a method independent from the prospective offerors in advance of the offer:

- it ensures a clear basis for the grantee's determination that the benefits of the procurement warrant its cost;
- it provides essential procurement and financial planning information (see "Advance Procurement Plan," above); and
- it provides a basis for price analysis, which may assist in obviating the need for a more burdensome cost analysis.

Although it may seem self-evident that the agency has at least implicitly prepared a cost estimate in deciding to proceed with a procurement, many projects can change in scope without clear communication among the people responsible. For example, a management information system for parts inventory control may seem cost-effective, but may grow during discussions to include unanticipated electronic imaging, scanning of repair manual diagrams, unanticipated distributed processing devices, and multi-user programming. An independent cost estimate prepared when the agency first undertook the project could alert all involved that the project had grown beyond the scope originally intended. A deliberate decision to reduce the scope or revise the cost estimate can be made at each step of the project's development.

The cost estimate is essential information for procurement planning. It gives the contracting official some indication of the complexity of the project and the degree of investment that offerors will want to make in the procurement process, thus allowing planning of procurement time and personnel. It is also the basis for determining which procurement procedures apply to the project. If the cost estimate exceeds $100,000, for example, a competitive solicitation is normally required. (State or local requirements may be stricter.) Similarly, certification and bonding requirements imposed by Federal regulations are triggered based on the value of the contract. (See "Methods of Procurement" FTA Circular 4220.1E, § 9; "Bonding Requirements," § 11; "Buy America" Master Agreement § 14 (a); "Debarment and Suspension" Master Agreement § 3 b.) However, the application of these and most other requirements depends not on the cost estimate, but on the contract amount.

A final purpose of the independent cost estimate is for price analysis. Either a cost or price analysis is required for every contract and every change order so that the essential objective of a reasonable price is assured. The adequacy of the price or cost analysis is a critical responsibility of the contracting official. In many contract awards the bids alone may be adequate to assure a

reasonable price. However, in all negotiated procurements, most contract changes, sealed bids where price competition was not sufficient, and non-competitive awards, further analysis is required. An independent cost estimate prepared before receipt of offers is invaluable in these circumstances. The estimate alone may, if prepared with sufficient detail and reliability in the contracting official's judgment, be sufficient to determine whether the price is reasonable. It will at least supplement other pricing data in making the determination. Because cost analysis can be time consuming, expensive, and raise disputes, the availability of an independent pre-bid estimate, which allows for price analysis and obviates cost analysis, is worth material pre-bid effort.

In these circumstances, it is essential that the grantee's cost estimate be developed independently from the offerors' pricing submissions. If a bus purchase is being prepared, for example, the prospective offerors should not be relied upon for the independent cost estimate, except in the form of prior bids submitted with adequate competition.

Any price analysis or data collection performed after receipt of the offers, in addition to consuming valuable time during the limited validity of the offers, will not be as probative as data collected before the receipt of the offers. An independent cost estimate prepared before the receipt of the offers does not raise the question of whether the particular data and analysis was consciously or unconsciously intended to justify the award.

Best Practices

Construction - In some cases, cost estimates may be difficult to obtain or may lie outside the competence of agency personnel. In the case of construction projects, a design firm may already be under contract and may perform this service. In some cases, the agency's in-house personnel who have participated in design or past construction efforts may be the most professional and reliable cost estimators.

Supplies and Equipment - Equipment estimates can often be prepared from published price lists or from past competitive procurements updated with inflation factors. Grantees may find relevant pricing data by contacting other agencies that obtained competitive bids for the same equipment or supplies. In the case of specialized equipment, care must be taken that the source of the estimates is not disproportionately obtained from one supplier.

Services - Professional services often range widely in both price and quality, and are often being acquired precisely because the agency personnel are unfamiliar with the subject matter. Therefore, your in-house personnel may not be qualified to estimate the cost of a major professional service contract. In these cases, it may be worth obtaining a professional cost estimate by a firm not interested in the final procurement. Other grantees are a valuable source of cost estimating information if they have undertaken similar projects. The contracting official should obtain and, when appropriate, update the independent cost estimate in the manner best suited to the circumstances of the particular procurement. Because reasonable price is a key objective of every procurement, and is also a critical Federal interest in Federally funded

procurements, an independent cost estimate should be prepared for every action before offers are received.

2.4 SOURCE SELECTION PLAN

2.4.1 File Documentation

REQUIREMENT
FTA Circular 4220.1E, Paragraph 7.i - *Written Record of Procurement History* requires grantees to maintain records detailing the history of a procurement. As a minimum, these records shall include: • The rationale for the method of procurement; • Selection of contract type; • Reasons for contractor selection or rejection; and • The basis for the contract price.

DISCUSSION

A properly documented procurement file provides an audit trail from the initiation of the acquisition process to the beginning of the contract. The file provides the complete background, including the basis for the decisions at each step in the acquisition process. A well-documented file speaks for itself, without need of interpretation from the contract administrator. A well-documented file also supports actions taken, provides information for reviews and investigations, and furnishes essential facts in the event of litigation or legislative inquiries.

Purpose

Documents recording the key steps in each procurement are important for a number of reasons, including the following:

- You are taking legally and financially significant actions on behalf of your agency and the public. Information relating to these actions needs to be readily retrievable in the event that contract personnel are personally unavailable or their memory is not precise enough to assist the agency in moving forward with the administration of its program. You may routinely expect your colleagues to take actions based on the file.

- The key steps in a procurement, including those listed under "Requirement," above, are frequently material elements in financial (e.g., payment or withholding) determinations or legal disputes. Written documentation will have great value to your agency under those circumstances.

- The agency's process may be reviewed, audited, and/or may be the subject of in-depth investigation. This documentation is the history of the public procurement. Many hours of reconstructing events and decisions, stretching memories, and evaluating scenarios can be saved with a concise file that factually answers the questions typically raised.

- Finally, you reduce the likelihood of additional supervision or burdensome restrictions being placed on your agency or your procurement process with concise documentation of the decisions you are making.

Many procurement reviews, while finding few problems with the underlying decisions or procurement results, may reach negative conclusions and make unwanted recommendations simply because well considered decisions were not well documented. Noting briefly why you did what you did may help you and your agency, as well as satisfy the requirements of the "Third Party Contracting Requirements" Circular.

Best Practices

Where appropriate, the procurement documentation file should contain:

- Purchase request, acquisition planning information, and other pre-solicitation documents;
- Evidence of availability of funds;
- Rationale for the method of procurement (negotiations, formal advertising);
- List of sources solicited;
- Independent cost estimate;
- Statement of work/scope of services;
- Copies of published notices of proposed contract action;
- Copy of the solicitation, all addenda, and all amendments;
- Liquidated damages determination;
- An abstract of each offer or quote;
- Contractor's contingent fee representation and other certifications and representations;
- Source selection documentation;
- Contracting Officer's determination of contractor responsiveness and responsibility;
- Cost or pricing data;

- Determination that price is fair and reasonable including an analysis of the cost and price data, required internal approvals for award;
- Notice of award;
- Notice to unsuccessful bidders or offerors and record of any debriefing;
- Record of any protest;
- Bid, Performance, Payment, or other bond documents, and notices to sureties;
- Required insurance documents, if any; and
- Notice to proceed.

Purchase order forms (electronic or manual) and standard files for small purchases can be designed to make the recording of most of the relevant data for small purchases automatic. Bid and proposal files, particularly if you use sealed bids under $100,000 can also be standardized to facilitate recording the appropriate data. For larger procurements, there are often memoranda or correspondence that, if assembled in the file, address many of the key issues.

The procurement file and the contract administration file can be coordinated by standard practice, so that nothing between bid opening (or proposal receipt) and notice of award is omitted.

2.4.2 Full and Open Competition

2.4.2.1 Full and Open Competition Principle

REQUIREMENT
FTA Circular 4220.1E, Paragraph 8.a requires all procurements to be conducted in a manner providing full and open competition. This requirement finds its way into Paragraph 9.h of the Circular which limits the use of noncompetitive contract awards to those situations when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and at least one of several specifically named circumstances are present. Thus, contracts with a value of more than $100,000 shall be awarded by sealed bid or competitive negotiation unless there is an explicit exception. FTA Circular 4220.1E, Paragraph 8.a considers the following practices to be restrictive of competition: • Unreasonable requirements placed on firms in order for them to qualify to do business; • Unnecessary experience and excessive bonding requirements; • Noncompetitive pricing practices between firms or between affiliated companies;

- Noncompetitive awards to any person or firm on retainer contracts;
- Restrictive use of brand names;
- Any arbitrary action in the procurement process; and
- Geographic preferences [6]

DEFINITIONS

Competition - The process by which two or more vendors attempt to secure the business of a third party by the most favorable price, quality, and service.

Exclusionary - Tending to limit competition for reasons other than business or bona fide policy goals, such as price, quality, and service.

DISCUSSION

Full and open competition is the guiding principle of procurement requirements and practices. You constantly seek to permit and encourage meaningful interest and offers from all entities. Your practices should be selective or rule out offerors only for business reasons (cost, quality, and delivery). Because it is often easier not to accommodate a potential new offeror, and easier to deal with fewer entities, you must vigilantly cultivate ways to increase competition at reasonable expense.

Purpose

The principle of full and open competition has one primary and two secondary purposes. The primary purpose is to obtain the best quality and service at minimum cost. In other words, to get the best buy. The secondary purposes are to guard against favoritism and profiteering at public expense, and to provide equal opportunities to participate in public business to every potential offeror.

Best Buy - The primary purpose of free and open competition is to obtain for your customers (and the passengers, funding partners, and local community or other vested interest) the optimum combination of cost with goods and services. The most cost-effective procurement, the greatest value, and the best buy are all related terms. The premise is that suppliers competing with each other will make efforts to optimize the price and quality for you, even though it minimizes their profit percentage.

[6] - Geographic preference is permitted in certain narrow situations, including principally where part of a legal licensing requirement and for architects and engineers; FTA Circular 4220.1E § 8.b.

A countervailing view is that having to compete increases the cost of the goods and services. Some offerors will state, "If I can have a sole source contract, I can hold the cost down for you." This is a short-term perspective that is destructive in the long run. Even if a lower price can be obtained in isolated circumstances, the odds are that in most cases you can obtain a better buy through open competition. As in all procurement practices, you can also benefit in the long run from establishing a highly consistent expectation on the part of your suppliers; they will compete more cost-effectively and with less difficulty, if they are confident that free and open competition is your consistent practice. To succeed, you should diligently root out the tendency to pursue false, short-term economies of limiting competition in favor of free and open competition.

A provocative assertion is that, "A unique characteristic of good public purchasing is the underlying principle that more importance is ultimately attached to the ways and means of obtaining prices than to prices themselves." [7] Whether this is true or whether the best buy is more important than the means of procurement, it is certainly true that you may be the voice in your transit system for protecting procurement principles, particularly the principle of free and open competition, against the occasional short-sighted views of your customers.

Favoritism and Profiteering - The concern that suppliers or public agents may profit unjustly at public expense through poor procurement practices is a constant theme in the history of government procurement. While eliminating unjust gains does serve to achieve the best price, the acute concern that suppliers or pubic officials may exploit public procurements for their own gain at public expense is of great significance and plays a major role in the public's overall confidence in a transit operating entity.

Offerors' Opportunity - Scrupulously fair treatment of all offerors will foster the most satisfactory relations with the offerors in the long run. Similarly, a firm expectation of free and open competition is generally valued by the supplier community. However, there can be circumstances where a supplier's right to participate is at odds with the procuring agency's interest in the best buy. Examine the case of failure of a delivery agency or the postal service to deliver a proposal document. Although missing the proposal deadline was not the fault of the proposer, its right to participate in public business does not prevail over the procuring agency's interest in proceeding with public business. Indeed, in some jurisdictions, a disappointed bidder has no standing to enforce the competitive procurement laws. However, to the extent Federal precedents apply to your procurement, your offerors have an implied contract of fair-dealing during the procurement process. [8] So while your primary goal is the best buy, and an offeror may have no vested right to participate nor vested profit interest in the possibility of

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[7] - The Council of State Governments, National Association of State Purchasing Officials, Law Enforcement Assistance Administration, and Peat Marwick Mitchell & Co., *State and Local Government Purchasing* (1975) p. 6.2.

[8] - United States v. John C. Grimberg Co., 702 F.2d 1362, 1367 (Fed. Cir. 1983) (in banc).

participating, the offeror does have a right to fair dealing during the solicitation and selection process. To the extent that it is not inconsistent with the best buy, you will want to treat all potential offerors as fairly as possible.

Best Practices

The following are illustrative of practices you can undertake to advance competition.

Partner Information - You can undertake outreach programs with your supplier partners by preparing brochures that give background information about your agency and contain assistance in the most practical ways to identify opportunities to do business with your agency.

Partner Treatment - You can establish an ethic in your organization of treating suppliers as partners in the delivery of transit service. Everything from the telephone manner of agency staff to the consideration shown in arranging conferences and presentations can contribute to an increase in competition.

Advertisement - A traditional practice to increase competition, and still one of the most meaningful, is widespread advertising to the extent practical. Developing economical means to widen access to your procurement advertisements, such as use of the internet and private bid room services, is an area worthy of continual review and effort.

2.4.2.2 Restraints on Competition

2.4.2.2.1 Brand Names

REQUIREMENT
FTA Circular 4220.1E Paragraph 8.a. requires: "All procurement transactions will be conducted in a manner providing full and open competition. Some of the situations considered to be restrictive of competition include, but are not limited to . . . Specifying only a 'brand name' product instead of allowing 'an equal' product to be offered without listing its salient characteristics." Paragraph 8.c. requires: "...All solicitations shall: (1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features that unduly restrict competition.... ... When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a 'brand name or equal' description may be used as a

means to define the performance or other salient characteristics of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated."

DEFINITIONS

Approved Equal - An item or service which has been approved by the procuring agency as equal to the brand name item originally specified.

Salient Characteristics - Those qualities of an item that are essential to ensure that the intended use of the item can be satisfactorily realized. The term is mainly used in connection with a brand-name-or-equal description, which should set forth those salient physical, functional, or other characteristics of the referenced product that an equal product must have in order to meet the Authority's needs.

Brand Name - A name of a product or service that is limited to the product or service produced or controlled by one private entity or by a closed group of private entities. Brand names may include trademarks, manufacturer names, or model names or numbers that are associated with only one manufacturer.

Design Specifications - Specifications based on the design of a product or service. Typical design specifications may include dimensions, materials used, commonly and competitively available components, and non-proprietary methods of manufacturing.

Performance Specifications - Specifications based on the function and performance of a product or service under specified conditions, preferably conditions that can be reproduced for testing purposes. Performance specifications may include useful life, reliability in terms of average intervals between failure, and capacity.

DISCUSSION

Brand names (e.g. "Motorola Metrocom," "Webasto Heater") are among the most restrictive types of specification. Design and performance specifications are the preferred alternatives. However, in some cases using sealed bids, you may not be able to ensure you will receive an acceptable product without mentioning a brand name. (In negotiated procurements this is less often necessary because a performance or design specification can be used and the proposed brands can be reviewed during negotiations.) If you must use a brand name in your specification, you can still allow bidders to substitute an equal product with a different brand name. You may reserve the right to determine whether a particular brand or model is equal to the one you specified. If you use a brand name and allow equal brands, you must also specify the salient characteristics of the specified brand that will be among the criteria used in determining whether a suggested substitute is equal to the specified brand or not.

If a grantee believes that a specific brand name must be used in a specification and that it cannot accept any alternative product; i.e., it cannot allow a vendor to propose "an equal" product, the grantee must process this as a sole source (non-competitive) procurement action through the proper approving officials within the grantee's organization prior to release of the solicitation.

Purpose

The restriction on brand names serves the central purpose of maximizing free and open competition to obtain the best buy. If you specify a brand name with no opportunity for substitution, the original supplier of the brand name has an effective monopoly. This results in exorbitant prices and cessation of innovation and product development. In complex equipment and construction contracts where a large number of components are specified, the use of brand names can be even more restrictive than in procurement of individual units because the proliferation of brand names discourages the prime contractor from considering substitutes which might contribute to a more cost-effective end product. Therefore, in the long run, you will get the best buy if you avoid the use of brand names as much as possible.

In procuring complex systems, however, such as rolling stock and electronic systems, where reliability or other performance standards are mission critical to your transit service, you and your customers may not be able to specify a component in terms of design or performance and still ensure that your lowest responsive and responsible bidder will offer you a satisfactory component. In these cases, some price and quality competition can be preserved by allowing the substitution of equal items with other brand names. If you are the one who will determine which brand names are equal to the one specified, then you have not sacrificed any control over the quality of the product. This competition by substitution is facilitated by listing the salient characteristics, such as you would use if you used a design or performance specification, (e.g., "10-year life under varying voltage conditions of transit bus electrical systems"), so that bidders will be able to judge which brands may be equal to the specified brand.

Best Practices

Design and Performance Specifications - You can work with your customers to see if brand names can be removed from the specification by substituting design or performance specifications. Like many of the qualities of fully open and competitive procurement practices, this is an effort that may seem over-zealous under the time pressure of a specific procurement, but you can constantly seek to remove restrictions and improve the competitiveness of your procurement processes so that you generally achieve the best buy. If adequate design and performance specifications cannot be prepared, listing several acceptable brand names is far better than specifying just one.

"Or Approved Equal" - Whenever brand names are used, there are several ways you can clarify beyond a doubt that the brand name is used merely as a specification and not as a statement of a preference for the specific product specified. One way is to include a phrase such as "or equal,"

"or approved equal," or "similar in design, construction and performance" with the brand name. Many standard equipment and construction documents also contain a clause in the general provisions that states that even if the phrase "or approved equal" is inadvertently omitted, it is implied after any brand name. If you specify "or equal," you shall clearly set forth those minimum essential characteristics and standards to which the material, product or service must conform if it is to satisfy its intended use. [9]

Some of the onus of restriction is lifted for a large volume of transit procurements by the "Third Party Contracting Requirements" Circular's sanction for noncompetitive procurement of associated capital maintenance items from the original equipment manufacturer. The Circular states:

> *Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and at least one of the following circumstances applies: (e) the item is an associated capital maintenance item as defined in 49 U.S.C. § 5307(a)(1) that is procured directly from the original manufacturer or supplier of the item to be replaced*.[10]

The Circular requires, however, that "the grantee must first certify in writing to FTA; (a) that such manufacturer or supplier is the only source for such item; and (b) that the price of such item is no higher than the price paid for such item by like customers." [11]

Approval Process - If you have listed enough salient characteristics and the brand name is an insignificant factor in the overall procurement, you may simplify the procurement by not requiring approval. The contractor would then have the right to substitute a product. The ultimate determination of whether the substitute was equal to the brand specified, if contested, would be through the dispute resolution process culminating in the courts.

The better practice, however, is to provide an approval process, preferably prior to bid opening, so that bidders, in finalizing their bids will be confident about their right to substitute a brand they consider to be more cost-effective than the one specified. This will also give you confidence about the product or service you will receive. (Brand names may be used in competitive negotiation for complex systems, but the approval process need only require approval prior to award rather than at proposal submission. Approval of equal brands is usually simply a part of the discussions or negotiations.) You will want to avoid requiring bidders to wait

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9 - FTA Circular 4220.1E § 8.c.(1).

10 - FTA Circular 4220.1E § 9.h.(1).

11 - *Id.*

until after award to obtain approval, because a disapproval at that time may place a bidder (now contractor) in financial jeopardy and may prompt litigation.

If you want to require pre-bid approval, the solicitation can specify a time and format for requesting approval of equal brands. Typically, this is the same time and format used for requesting other changes in the specifications.

Approve requests for substitution whenever you determine that the offered product is equal in all material respects to the products referenced. Offers need not be rejected because of minor differences in design, construction, or features, which do not affect the suitability of the product for its intended use.

Determinations typically identify, or incorporate by reference, identification of the specific products, which the contractor is to furnish. Such identification can include any brand name, make or model number, and descriptive material. You may want to issue your determination, particularly any approval, to all bidders by addendum or as your procedures provide. (In some competitive negotiations where early and open discussion of creative integration of substitute brands is important, issuance of approvals to competing proposers is considered to constitute leveling the playing field, which would discourage open negotiations. You can consider keeping design innovations confidential but issuing approval of equal brand names to all proposers.) As with other substantive addenda to a solicitation, consider extending the bid period if the approvals are issued shortly before the scheduled bid opening, to allow all bidders to take advantage of the information prior to the bid opening.

Even if you have a pre-bid approval process, a contractor can normally request additional approvals after award. Consider clarifying in your solicitation that the contractor who waits until after award proceeds at its own risk.

2.4.2.2.2 Written Standards of Conduct and Conflicts of Interest: Personal and Organizational

Written Standards of Conduct

REQUIREMENT
49 CFR § 18.36(b)(3) establishes for the Department of Transportation the government-wide requirement that state and local government grant recipients must have written standards of conduct for procurement personnel. Grantees and sub-grantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or sub-grantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a

> conflict would arise when: (I) The employee, officer or agent, (ii) Any member of his immediate family, (iii) His or her partner, or (iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or sub-grantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to sub-agreements. Grantee and sub-grantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and sub-grantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

49 C.F.R. Sec. 19.42 imposes the same requirement for institutions of higher education, hospitals and other non-profit organizations.

> The recipient shall maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. No employee, officer, or agent shall participate in the selection, award, or administration of a contract supported by Federal funds if a real or apparent conflict of interest would be involved.
>
> Such a conflict would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in the firm selected for an award. The officers, employees, and agents of the recipient shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors, or parties to sub-agreements. However, recipients may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct shall provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the recipient.

Paragraph 7.c of FTA Circular 4220.1E implements this requirement for FTA grant recipients:

> Grantees shall maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer, agent, immediate family member, or Board member of the grantee shall participate in the selection, award, or administration of a contract supported by FTA funds if a conflict of interest, real or apparent would be involved.
>
> Such a conflict would arise when any of the following has a financial or other interest in the firm selected for award:

1. The employee, officer, agent, or Board member,

2. Any member of his/her immediate family,

3. His or her partner, or

4. An organization that employs, or is about to employ, any of the above.

The grantee's officers, employees, agents, or Board members will neither solicit not accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements. Grantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by state or local law or regulations, such standards of conduct will provide for penalties, sanctions, or other disciplinary action for violation of such standards by the grantee's officers, employees, or agents, or by contractors or their agents.

Conflicts of Interest: Personal and Organizational

REQUIREMENTS

As an ethics requirement, Section 3(a) of the FTA Master Agreement requires the written standards of conduct to encompass both personal and organizational conflicts of interest and defines them as follows:

1. Personal Conflicts of Interest. The Recipient's code or standards of conduct shall prohibit the Recipient's employees, officers, board members, or agents from participating in the selection, award, or administration of a third party contract or sub-agreement supported by Federal funds if a real or apparent conflict of interest would be involved. Such a conflict would arise when any of the following parties has a financial or other interest in the entity selected for award: (a) an employee, officer, board member, or agent; (b) any member of his or her immediate family; c) his or her partner; or (d) an organization that employs, or intends to employ, any of the above.

2. Organizational Conflicts of Interest. The Recipient's code or standards of conduct must include procedures for identifying and preventing real and apparent organizational conflicts of interest. An organizational conflict of interest exists when the nature of the work to be performed under a proposed third party contract or sub-agreement may, without some restrictions on future activities, result in an unfair competitive advantage to the third party contractor or sub-recipient or impair its objectivity in performing the contract work.

49 CFR § 18.36(c)(v) and 49 CFR § 19.43 prohibit organizational conflicts of interest as restrictive of competition. Section 19.43 further states as follows:

> All procurement transactions shall be conducted in a manner to provide, to the maximum extent practical, open and free competition. The recipient [[Page 167]] shall be alert to organizational conflicts of interest as well as noncompetitive practices among contractors that may restrict or eliminate competition or otherwise restrain trade. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, invitations for bids and/or requests for proposals shall be excluded from competing for such procurements. Awards shall be made to the bidder or offeror whose bid or offer is responsive to the solicitation and is most advantageous to the recipient, price, quality and other factors considered. Solicitations shall clearly set forth all requirements that the bidder or offeror shall fulfill in order for the bid or offer to be evaluated by the recipient. Any and all bids or offers may be rejected when it is in the recipient's interest to do so.

40 CFR § 1506.5(c) concerns the engagement of a consultant for the preparation of an environmental impact statement. It states the following:

> Environmental impact statements. Except as provided in Secs. 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under Sec. 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

DISCUSSION

A. Why Conflicts of Interest Pose a Problem

Every citizen is entitled to have confidence in the integrity of government. Therefore, when using public funds for the purchase of goods or services, each FTA grantee must prevent its personnel from taking any action that might result in -- or even create the appearance of -- a

personal or organizational conflict of interest. Avoiding conflicts of interest, through the implementation of written standards of conduct, benefits the grantee in many ways and leads to a more efficient and credible organization, while failure to deal with conflicts may not only adversely impact the project itself but may also jeopardize the grantee's ability to receive or retain federal funds. [12]

B. Responsibility of Grantee

The grantee is responsible for avoiding both personal and organizational conflicts of interest. Thus, grantees should be vigilant in preventing and mitigating possible conflicts**.**

C. Standards of Conduct

Each grantee must have written standards of conduct governing the performance of its personnel involved in the selection, award and/or administration of contracts. [13] The standards must prohibit the grantee's or sub-grantee's officers, employees or agents from soliciting or accepting gratuities, favors or things of monetary value from contractors, potential contractors, or parties to sub-agreements. The standards may contain minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, the standards should provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and sub-grantee's officers, employees, or agents, or by contractors or their agents. These written standards must prohibit *personal* and *organizational* conflicts of interest, *real* and *apparent*.

D. Personal Conflicts of Interest

Personal Conflict of Interest: A personal conflict of interest arises when one of the grantee's employees (including contractor employees), officers, board members, or agents (including outside consultants) involved in the selection, award or administration of a third party contract or sub-agreement [14] supported by Federal funds -- or a member of his or her immediate family, partner, or outside employer or prospective employer -- has a financial interest in the entity

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12 - FTA Master Agreement Sections 3(a) and 3(a)(1); 49 CFR § 18.36(3); FTA Circular 4220.1E Paragraph 7(c). In addition, many state and local jurisdictions have laws and regulations, which address both the conduct of public employees and the relationship between public entities and private businesses. These vary in nature, and may impose both civil and criminal sanctions on violators.

13 - See FTA Master Agreement Section 3(a)(1).

14 - This interpretation applies to both subcontractors and general contractors providing procurement-related services to a grantee.

selected, or competing, for the contract. [15] A personal conflict of interest also arises where any grantee employee, officer, board member, or agent solicits or accepts gifts, gratuities, favors, or anything of monetary value from a contractor, potential contractor, or party to a sub-agreement.[16] In addition, a personal conflict of interest arises where any such person uses his position, or non-public information gained during his work for the grantee, for personal gain, including gain inuring to an immediate family member, partner, or current or potential employer. These scenarios can result in potential organizational conflicts for employers, or personal conflicts of interest for the individual.

E. Organizational Conflicts of Interest

Organizational Conflict of Interest: An organizational conflict of interest occurs where - because of other activities, financial interests, relationships, or contracts - a contractor is unable, or potentially unable, to render impartial assistance or advice to the grantee; the contractor's objectivity in performing the contract work is or might be impaired; or a contractor has an unfair competitive advantage. [17] Organizational conflicts of interest can cause two distinct problems: *bias* and *unfair competitive advantage*. [18]

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15 - A personal conflict also arises where a person whose financial interests are attributed to the employee has a conflict – either because that person is an employee, prospective employee, officer, director, or agent of a contractor or competing entity, or because that person has a financial interest in the contractor or competing entity. The financial interests of the following are attributed to an employee: **a member of the employee's immediate family, his partner, or his outside employer or prospective employer.** FTA Circular 4220.1E Paragraph 7(c).

16 - See FTA Circular 4220.1E Paragraph 7(c); 18 CFR § 18.36(3)(iv); FTA Master Agreement Section 3(a). However, "[t]he Recipient may set minimum rules where the financial interest is not substantial, or the gift is an unsolicited item of nominal intrinsic value." FTA Master Agreement Section 3(a); see also FTA Circular 4220.1E Paragraph 7(c); 18 CFR § 18.36(3)(iv). These are known as "de minimus" gifts, and do not result in either a real or apparent conflict of interest. For FTA and other Federal employees, the level is set at $20 per occasion, with a maximum of $50 per calendar year from the same source (including affiliates). In many cases, however, the best response to a gift offered is a simple, "Thank you, but no thank you." Section 3(a) of the FTA Master Agreement requires that grantees include in the standards of conduct penalties, sanctions, or other disciplinary actions for violations of the code, to the extent permitted by state or local law.

17 - See FTA Circular 4220.1E Paragraph 8(a)(5). The Federal Acquisition Regulations also provide a helpful definition of organizational conflict of interest: "Organizational conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage." 48 CFR § 9.501.

18 - Generally, an organizational conflict arises because a person or entity has or appears to have loyalties to, or a financial interest in, two organizations that may have competing or differing interests from each other -- one of them being the grantee. For example, an organizational conflict would arise if an employee or a consultant serves as a member of a public or quasi-public body with regulatory authority over a project or has a stake in its outcome. This arises most often where architects sit on design review or zoning boards.

Bias arises when a contractor is placed in a situation where it may have an incentive to distort its advice or decisions. Whenever the grantee is awarding a contract that involves the rendering of advice, the grantee must consider whether there exists the potential for a conflict of interest on the part of the contractor rendering the advice. [19]

Unfair competitive advantage occurs when one contractor has information not available to other contractors in the normal course of business. For example, an unfair competitive advantage would occur when a contractor developing specifications or work statements has access to information that the grantee has paid the contractor to develop, or information which the grantee has furnished to the contractor for its work, when that information has not been made available to the public. Because this information enhances the contractor's competitive position in the procurement process, it represents an unfair competitive advantage over the other offerors. One solution to this problem is to fully disclose all information to all prospective offerors for a reasonable period of time prior to the grantee's receipt of proposals for the follow-on work. Another example where an unfair competitive advantage might arise is where a contractor is allowed to write specifications or statements of work around its own or an affiliate's corporate strengths or products and then compete for a contract based on those specifications. The grantee can prevent such an unfair advantage by placing reasonable restrictions or even a prohibition on the contractor's involvement in the subsequent procurement. If an individual employee has access to inside information, a possible solution would be to wall off that employee, so he cannot give his employer an unfair competitive advantage. Grantees should exercise care that specifications do not provide an unfair competitive advantage to any party. Grantees should also be alert to affiliations among contractors that might give one contractor an unfair competitive advantage over others.

Note: A competitive advantage is not always *unfair*. A contractor may have a *fair* competitive advantage by virtue of its prior experience, its expertise, its more efficient operations, etc. Occasionally an incumbent contractor may have what appears to be an insurmountable competitive advantage by virtue of its previous work for the grantee. An advantage of this type may not necessarily be *unfair*.

F. The "Appearance of Conflict" Standard

As stated above, FTA rules prohibit conflicts of interest -- both real and apparent. This rule applies to both personal and organizational conflicts of interest. Thus, each grantee's written code of conduct must prohibit real and apparent conflicts, not just actual conflicts of interest. The grantee should utilize the "reasonableness" standard to determine whether an "apparent" conflict

[19] - Federal transit law requires grantees to award contracts through a process of full and open competition. Organizational conflicts of interest that give any party an unfair competitive advantage impede full and open competition, and thus are considered "restrictive of competition" under Paragraph 8(a)(5) of FTA Circular 4220.1E.

of interest exists: *Would a reasonable person with all the material facts believe there appears to be a conflict?*

G. Environmental Consultants

The Council on Environmental Quality (CEQ) has enacted regulations that address the use of consultants in the environmental process. [20] These regulations are intended to prevent contractors who are hired to study alternatives and potential environmental impacts of proposed projects from presenting and profiting from biased recommendations.

The CEQ regulation at 40 CFR Section 1506.5 "prohibits a person or entity from entering into a contract with a federal agency to prepare an environmental impact statement (EIS) when that party has at that time and during the life of the contract pecuniary or other interests in the outcomes of the proposal. Thus, a firm which has an agreement to prepare an EIS for a construction project cannot, at the same time, have an agreement to perform the construction, nor could it be the owner of the construction site." See "Guidance Regarding NEPA Regulations," 48 Fed. Reg. 34263 (July 18, 1983). FTA recognized this principle in the bid protest case of JMA v. LACMTA, MTA RFP #PS-4310-0964 (2001), holding as follows: "FTA understands the CEQ regulations to prohibit an EIS contractor from being awarded a contract that includes work dependent upon the completion of the EIS and issuance of a ROD."

CEQ rules do not prohibit a consultant responsible for preparing an EIS from submitting a proposal on work connected with the project after the completion of the EIS. Indeed, in guidance offered by the CEQ, the Council expressed concern that "some agencies have been interpreting the conflicts provision in an overly burdensome manner." See "Guidance Regarding NEPA Regulations," 48 Fed. Reg. 34263 (July 18, 1983). The Council explained that, "[i]n some instances, multidisciplinary firms are being excluded from environmental impact statement preparation contracts because of links to a parent company which has design and/or construction capabilities. Some qualified contractors are not bidding on environmental impact statement contracts because of fears that their firm may be excluded from future design or construction contracts…. The result of these misunderstandings has been reduced competition in bidding for EIS preparation contracts, unnecessary delays in selecting a contractor and preparing the EIS, and confusion and resentment about the requirement." Thus, the Council does not prohibit an EIS contractor from bidding on work connected with the project after the contractor has completed all performance required for the EIS, but it does prohibit situations where the contractor has an interest in the outcome of the EIS "at that time or during the life of" the EIS contract.

[20] - Mergers and acquisitions have had a strong effect on contracts in the environmental area, thus warranting a separate discussion of this topic.

H. Insisting on Impartiality

Each grantee is entitled to impartial advice from its consultants, based solely on what is best for the transit system and the community, and not for the benefit of persons with conflicting financial or other interests. For additional protection, the grantee not only should enforce its own written standards of conduct but insist, perhaps through the use of certifications, that each of its employees, board members, officers, or other agents (as well as contractor personnel) observe any relevant code of professional responsibility governing his or her conduct, such as the codes governing the conduct of lawyers, engineers, architects, planners, and accountants. Among other things, this requirement would demonstrate to the grantee's employees and contractors the importance placed by the grantee on avoiding conflicts of interest.

I. Grantee Decision to Proceed in Spite of Conflict of Interest.

Finally, when a grantee has done all that reasonably can be done to avoid, neutralize, or mitigate a real or apparent conflict of interest, and if it is in the grantee's best interest to proceed with the contract despite the conflict, the grantee needs to document its decision. Documentation should include what steps were taken or considered, and justification for the conclusion reached, before proceeding with the contract. [21]

Best Practices

Every Agency employee involved in the award or administration of contracts must be given a copy of the Agency's (or State's) written standards of conduct, and they should be required to sign a statement that they are familiar with and will abide by these standards. [22] These statements should be signed as a condition of employment. It would be well to review and sign them again annually as part of the employee's annual performance evaluation as a means of reinforcing the importance of ethical conduct by the Agency's employees.

In some Agencies, the General Manager has issued a memorandum to all employees summarizing the most sensitive issues dealing with ethical conduct and emphasizing the importance of avoiding even the appearance of conflicts of interest. One public Agency has inserted such a memorandum into its Procurement Manual, together with the standards of conduct. [23]

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[21] - This is consistent with the approach used in Federal contracting as set forth in FAR 9.504(e), where a contract can be awarded in spite of a conflict when the contracting officer determines that it is in the best interest of the Government to do so.

[22] - Recommendation of the ABA Model Procurement Code, § R12-202.01.

[23] - BART Procurement Manual, Attachment B.

One area of particular sensitivity concerns "outside employment." Employees must understand what kinds of activities or outside employment (actual or prospective) are inconsistent with their Agency responsibilities; e.g., furnishing advice or services to a firm which is bidding on or planning to bid on a contract with the Agency, or which is doing business presently with the Agency. One strategy employed by firms bidding on contracts is to offer employment to critical procurement or technical personnel working on the procurement (if the firm is selected for award). This kind of situation creates a financial conflict of interest for those employees to whom offers have been made. Employees need to be forewarned of these and similar tactics which they may encounter in the course of their Agency work. The Agency may want to conduct training sessions for all Agency personnel doing sensitive work in the acquisition of Agency equipment or services.

Many public Agencies have adopted disclosure statement requirements for certain positions. These disclosure statements require that employees occupying designated positions within the Agency disclose their investments in businesses which engage in certain activities related to the business of the Agency. Reportable interests might include companies engaged in manufacturing rail transit rolling stock and related components, transit equipment suppliers, construction companies engaged in transit systems, etc.

The FTA Circular requires penalties, sanctions, or other disciplinary action for violation of the standards of conduct by the grantee's employees or by contractors. The lack of explicit penalties in grantees' procurement policies and procedures is a recurring observation made in the FTA Procurement System Reviews. Grantees need to adopt explicit written penalties for their employees and contractors who violate their standards of conduct.

Procedural Suggestions

The following is an outline of the steps that each grantee should consider taking before and during the procurement process and during project administration. Conflicts also can occur even before the pre-contracting phase begins, so grantees should *always* be vigilant to the possibility of a conflict.

A. *THE PRE-CONTRACTING PHASE*

1. Prepare Written Codes of Standards of Conduct. FTA requires that each of its grantees maintain a written code of standards of conduct applicable to its employees (including contractor employees), officers, board members, and agents (including outside consultants) involved in the selection, award or administration of contracts. Each grantee should consult with its counsel, as well as its procurement personnel, as to whether its code of conduct complies with FTA's requirements as set forth in Section 3 of FTA's Master Agreement, Paragraphs 7(c) and 8(a)(5) of FTA Circular 4220.1E, Third Party Contracting Requirements, and 49 CFR § 18.36 and Part 19, as applicable. Moreover, the grantee should provide a copy of its code of conduct to each of its employees, board members, officers, and other agents.

2. Require Financial Disclosure Statements and/or Non-Conflict Certifications. When determining how to deal with potential conflicts of interest, a grantee may choose "proactive" measures, "reactive" measures, or a combination approach. "Proactive" measures are designed to identify and prevent potential conflicts *prospectively*. For example, a grantee interested in employing proactive measures should consider requiring each of its employees (and others potentially involved in the procurement process) to file an annual disclosure statement concerning his or her financial and employment status and that of immediate family members (to the extent state and local law permit such a financial disclosure requirement). [24] With this information on file, the grantee can "proactively" determine, ahead of time, whether any of its employees (etc.) have interests in any of the potential or actual contractors on a particular project. The grantee, for example, can run a search on the parents, subsidiaries, and affiliates of bidders and contractors, as well as on any companies listed on employee disclosure statements, and get a broad picture of any potential conflicts. If a conflict is discovered, the grantee can -- again, "proactively" -- wall off any employee who may have a potential conflict from a particular project, thus avoiding the need for later action.

In some cases a grantee may require its contracting personnel (officers, board members, agents, etc., as applicable) to submit a "non-conflict" certification on a project-by-project basis, before that person commences work on the selection, award or administration of a contract. Such certification would state that neither the employee (etc.) nor any member of his or her immediate family has a financial or employment interest in any of the relevant bidders or contractors for the procurement in question. If the employee identifies a real or apparent conflict of interest, then the grantee can take action to mitigate it. This is a different, somewhat "reactive," approach than requiring annual financial disclosure statements.

There are pros and cons to both approaches. With annual financial disclosure statements, the grantee attempts to identify and mitigate conflicts as early as possible in the procurement process; but in order for this approach to be effective, the grantee's reviewer must both review the disclosure statements and perform relevant research as well as be aware of the various corporate interconnections. An advantage of a project-specific disclosure statement is that it serves as a regular reminder to employees of the importance of conflict avoidance, and thus may prevent some conflicts of interest from arising in the first place. Realistically, however, requiring disclosure statements on a project-by-project basis generally is too onerous for the grantees that handle many procurements every year. Moreover, this somewhat "reactive" approach puts a serious burden on the individual employee (etc.) to "self-certify" that he has no conflict on a particular project, with the understanding that the grantee will hold him accountable for the veracity of that certification. It is also possible that an individual employee, unaware of the ownership or other links between prospective bidders or contractors and the financial interests he holds, may unknowingly self-certify that no conflict exists.

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[24] - Each grantee also should consult with its counsel before requiring annual financial disclosure statements to confirm that the requirement complies with any labor agreements applicable to the grantee.

The two approaches, however, are not mutually exclusive, and the best approach may be a combination of proactive and reactive tools. Ultimately, each grantee must determine for itself the preferable approach, considering the costs involved in administering its program and any other matter the grantee deems pertinent to the decision. As indicated above, any program requiring certifications or disclosure statements from employees also should apply those requirements to the other categories of individuals listed in FTA Circular 4220.1E, specifically, officers, board members, and agents, including consultants and contractors involved in the selection, award or administration of contracts. Finally, the grantee should ask its counsel to review the form of its financial disclosure statements or non-conflict certifications for compliance with local, state, and federal law before they are issued.

3. Obtain Certifications of Compliance with Professional Codes of Conduct. The grantee should consider requiring each of its employees, board members, officers, and agents to identify in writing any code of professional responsibility governing his or her conduct, and to certify that to the best of his or her ability he or she will comply with that code whenever conducting business on behalf of the grantee. To be effective, such a requirement must be coupled with a mechanism for reporting violations to the appropriate enforcement entity.

4. Prepare Written Procedures for Addressing Personal and Organizational Conflicts of Interest. The grantees' written procedures should establish not only a means of identifying conflicts but also a predictable method of resolving them. For example, once a personal conflict has been identified, mitigating measures may include creation of blind trusts, recusal or other limits on scope of participation, procedures to allow the employee back inside the information bubble if the conflict ends (e.g., the company that the employee owns stock in does not win the contract), etc. The written procedures may address:

a. Responsibility for identifying potential conflicts;

b. Range of alternative actions;

c. Typical situations and the indicated response, for example:

i. Situations that may warrant advance restrictions:

- A contract for procurement evaluation services;
- A contract for advice on competing approaches;
- A contract for technical review and project oversight services; or

ii. Situations that may warrant other conflict-mitigation measures, or even a possible waiver, rather than a prohibition against a contractor's participation in the project:

- Complex design of integrated elements of a structure, piece of equipment, or system; or

- Successive development/design phases of innovative equipment or systems.

d. Participation of qualified personnel in the resolution of conflicts; and

e. Review and approval of conflict resolutions.

The grantee should seek the assistance of counsel in preparing written procedures for resolving conflicts of interest.

B. ***THE PROPOSAL STAGE***

1. Define the Project to Avoid Potential Conflicts. Grantees should anticipate potential conflicts and structure procurements accordingly. For example, the grantee should not allow a company that prepares the specifications for procurement to supply the products as well. Also, the grantee should be careful to structure the project so as to avoid conflicts among contractors and subcontractors. For example, on a large project, the grantee could avoid possible *bias* by procuring one contractor to perform the needed evaluation independently, and then initiating a new procurement to obtain any system that may be required and excluding the first contractor from that second competition. [25]

2. Consider Advance Restrictions. When the grantee awards separate contracts on related procurements, it might consider placing notice of an advance restriction in the solicitation where a conflict may arise. It is far better to identify a potential conflict involving two contracts in the first solicitation than to award the first contract and then address the conflict when awarding the second contract. Prime contractors should be required to inform prospective subcontractors (and to give evidence that they have done so) that the subcontractors also could be subject to the restrictions in future contracting. This way, each bidder (prime and subcontractors) for the first contract will be aware of the situation and can make its own choice about which contract to pursue. When an advance restriction is desired, consider including:

- An explanation of the conflict or potential conflict;
- The nature of the proposed restriction upon future contractor activities; and
- The terms of any proposed clause and whether those terms are negotiable, depending on the nature of the acquisition.

[25] - In large undertakings, this may involve multiple, related consulting, planning, design, technical oversight or technical evaluation contracts. Grantees can work with persons experienced in the field to decide how to segment the procurements and what restrictions to impose.

3. For Environmental Impact Statement Contracts, Comply with CEQ Regulations. Regulations promulgated by the Council on Environmental Quality require each contractor who develops an environmental impact statement to sign a disclosure statement (prepared by the grantee) certifying that it has no financial or other interests in the outcome of the proposed project. [26] This requirement is intended to prevent contractors who are hired to study alternatives and potential environmental impacts of proposed projects from presenting and profiting from biased recommendations. Pursuant to the regulations, grantees must require the submission of a disclosure statement in RFPs for consulting services so that such conflicts can be identified early in the contracting process. The grantee also must comply with 40 CFR § 1506.5 and "Guidance Regarding NEPA Regulations," 48 Fed. Reg. 34263 (July 18, 1983), explained above in Section G of the Discussion.

4. Consult With Legal Counsel. Before defining the scope of any project or publishing any document describing the project, such as a statement of work, the grantee should ask its counsel to review the project and any descriptive documentation for compliance with conflicts rules.

C. *THE SELECTION AND AWARD PHASE*

1. Review Disclosure Statements (if required by the grantee) for Potential Conflicts with Bidders. If the grantee requires its procurement staff to submit annual financial disclosure statements or project-specific disclosure statements, the grantee should review the information on such statements for potential conflicts before any procurement staff begins work on the selection process. If the employee's work on the project would cause a real or apparent conflict, then the grantee should reassign his or her duties on the project to another employee.

2. Obtain No-Conflict Certifications from contract personnel (if required by the grantee). If the grantee requires its contract personnel who will participate in the administration of a contract to submit no-conflict certifications, then the grantee should furnish information on the likely bidders to the contractor. Each contractor employee who will be assigned to work on the procurement should submit his or her certification to the grantee's reviewing official before the selection process begins. If a contractor employee fails to submit the required no-conflict certification, then the grantee should direct the contractor to reassign that employee's duties to another employee who has complied with the certification requirement.

D. *THE ADMINISTRATION PHASE*

1. Monitor Contract Staff/Contractor Compliance with Conflicts Rules. During the administration phase of a project, the grantee should require each of its employees (etc.) involved

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[26] - 40 CFR § 1506.5. Note that if a contractor has a financial interest in the outcome of the proposed project, the contractor should inform the grantee of its interest. Under appropriate circumstances, the grantee may choose to waive the conflict of interest after careful consideration (see Discussion Section I).

in the project to report any changes in his or her financial holdings or other interests that might cause a conflict of interest. Similarly, the grantee should require the contractor to report any changes in the company's financial holdings, newly developed contractual or other relationships, or those of its parents, subsidiaries, and affiliates. In this way, the grantee can monitor the situation and address personal or organizational conflicts that might arise during the administration phase of the project.

2. Obtain Certifications from Contractor Personnel Governed by Professional Codes of Responsibility. Before a contractor begins work on a project, the grantee should consider requesting a written statement from any contractor personnel working on the project whose conduct is governed by a professional code of responsibility, in each case identifying any relevant code and certifying that he or she will comply with its rules on all grantee-related work.

E. *THROUGHOUT THE ENTIRE PROCESS*

1. Consult with Legal Counsel. Grantee procurement and technical personnel are encouraged to work closely -- and proactively -- with their legal counsel throughout the procurement process to review all situations that appear to have the potential for a conflict of interest. Counsel can help in any number of ways, including reviewing written materials for compliance with conflicts of interest rules, preparing restrictive contracting clauses suitable for the particular situation, and helping to restructure the project to avoid conflict situations. Counsel may also suggest that involvement by FTA Regional Counsel would be appropriate and solicit Regional Counsel's advice when necessary.

2. Mitigate Conflicts. As potential conflicts arise during the procurement process, the grantee must take steps to avoid the conflict or, if that is not possible, mitigate its effects. For example, where a grantee's board is responsible for awarding contracts, a board member with an interest in a project bidder should disclose his interest and recuse himself from the selection process. As another example, where an employee has an interest in a project bidder, the grantee could create a "fire-wall" preventing the employee from providing the bidder with any information gained during his employment with the grantee that would give the bidder an unfair competitive advantage. As always, the grantee should consult with counsel in formulating an appropriate approach to any conflict situation.

2.4.2.2.3 Geographic Restrictions

REQUIREMENT
Paragraph 15.h of the Master Agreement states: h. Geographic Restrictions. The recipient agrees to refrain from using State or local geographic preference, except those expressly mandated or encouraged by Federal statute, such as those set forth in Subsection 15.i of this Master Agreement below, or as permitted by FTA.

> i. Architectural, Engineering, Design, or Related Services. ...Provided a sufficient number of qualified firms are eligible to compete for the third-party contract, geographic location may be a selection criterion....
>
> Paragraph 8.b of FTA Circular 4220.1E states:
>
> b. Prohibition Against Geographic Preferences. Grantees shall conduct procurements in a manner that prohibits the use of statutory or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. This does not preempt State licensing laws. However, geographic location may be a selection criterion in procurements for architectural and engineering (A&E) services provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

DISCUSSION

The prohibition against geographic preferences as stated in FTA Circular 4220.1E is based upon 49 CFR Part 18.36 (c) (2). The only exception noted to this prohibition is in the procurement of architectural and engineering (A&E) services, where knowledge of local conditions and building codes is a relevant factor in the quality of the A&E services. One public Agency, in its procurement procedures manual for A&E contracts, recognizes the importance of the A&E's knowledge of local conditions, and requires that A&E proposals be evaluated in terms of their:

> ***Knowledge of the locality of the project, provided that application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project.*** [27]

This Agency has stated its policy in terms which are focused on the one generally accepted reason for allowing geographical preferences - an A&E firm's demonstrated knowledge of local conditions, which is a factor affecting the quality of the final product. This same Agency prohibits geographic restrictions, except for those permitted by FTA for A&E services, not only for its own procurements but for those of its contractors as well. [28]
Some grantees have used very localized geographical restrictions in their solicitations for parts or services which must be furnished on a short lead-time basis; e.g., within one or two hours of the request. A much better approach, and one that is not prohibited by the FTA

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[27] - Los Angeles County Metropolitan Transportation Authority. Procurement Manual Section 908(e).

[28] - Ibid., Section 2314.

Circular, would be to require an ability by the contractor to respond within the time frame needed, and not to stipulate a geographical restriction in the solicitation. The reason is that many parts suppliers maintain a staff which is capable of quick response even though they are not in the immediate city or county of the grantee.

Grantee procurement officials are sometimes confronted with pressure from their Board members to place contracts with local firms, and it is necessary for the grantees to include explicit statements in their procurement policies and procedures that geographical restrictions are prohibited except for A&E procurements, citing the FTA prohibitions in FTA Circular 4220.1E, paragraph 8.b.

2.4.2.2.4 Prequalification

REQUIREMENT
Paragraph 8.d of FTA Circular 4220.1E states: d. Prequalification Criteria. Grantees shall ensure that all lists of prequalified persons, firms, or products that are used in acquiring goods and services are current and include enough qualified sources to ensure maximum full and open competition. Also, grantees shall not preclude potential bidders from qualifying during the solicitation period, which is from issuance of the solicitation to its closing date.

DISCUSSION

Prequalification of bidders and products has been used in several circumstances, such as when an Agency is procuring critical equipment with exacting performance requirements, or critical services which are needed on a quick-reaction basis. A qualified products list (QPL) is a listing of products which have been tested and found to have satisfied all of the specified requirements. The products on the list may be supplied by any responsible vendor bidding on the procurement. The qualified bidders list (QBL) is a listing of bidders who are manufacturing more complex items, such as buses, requiring sophisticated manufacturing and quality control procedures. These bidders must be reviewed carefully to determine if their internal controls and procedures will produce satisfactory end products. These pre-qualification procedures may also be appropriate for companies who wish to bid on procurements for furnishing critical services, such as quick reaction services for repairs, etc. Only those bidders on the qualified bidders list may supply the products or services specified. The Federal government has used this practice for critical military equipment, such as jet engine turbine blades, or for critical quick-reaction services such as ship repairs. Transit Agencies using this procedure of establishing a qualified products list (QPL) often cite a rationale of: "For reasons of efficiency, economy, compatibility, or

maintenance reliability, there is a need for standardization as to various supplies, materials, and equipment." [29]

Best Practices

Documenting your decision to establish a QPL or QBL - Care must be taken to ensure that prequalification procedures are not used to restrict full and open competition. Toward this goal Federal Agencies are required to justify in writing the necessity for establishing a prequalification requirement. [30] Some transit Agencies have also chosen to follow this practice of documenting the reasons why a particular part or service is being placed on a qualified products list (QPL) or a qualified bidders list (QBL), although they are not required to do so by FTA. [31]

Qualifying during solicitation period - Some Transit agencies have two different policies as to bids offering products which have not been qualified prior to the solicitation. When using non-Federal funds, the Agency will not allow bidders to offer non-qualified products in response to a solicitation--bidders must obtain certification of their product before, and independently of, any solicitation for that item. *When using grant funds, however, grantees must allow vendors an opportunity to qualify their products during the solicitation period* (FTA Circular 4220.1E, Paragraph 8.d). A grantee would not be expected, however, to delay a proposed award (extend the solicitation period) in order to afford a vendor the opportunity to demonstrate that its product meets the standards in the specification. The Federal procurement rules do not require Federal Agencies to delay awards, and the standards applicable to these Agencies should be appropriate for grantees as well. [32]

2.4.3 Fixed Price v. Cost Reimbursement

REQUIREMENT
Paragraph 9.c of FTA Circular 4220.1E authorizes procurement by the Sealed Bid/Invitation For Bids (IFB) method when certain conditions are present. Among those listed is the condition that: (c) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

[29] - Ibid., Section 407.5. Also San Francisco Bay Area Rapid Transit District (BART). Procurement Manual, Section II-7.

[30] - FAR 9.202.

[31] - Los Angeles County Metropolitan Transportation Authority. Procurement Manual, Section 407.5 (1)(a).

[32] - FAR, Section 9.202 (e).

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

Paragraph 7.i requires that grantees document their reasons for selecting the contract type as a part of the written record of procurement history.

Paragraph 10.e prohibits the cost plus a percentage of cost method of contracting.

DISCUSSION

The selection of contract type is probably the single most important decision that the procurement specialist will make in the acquisition process. A properly selected contract type will work in the interests of the buying Agency to provide a product or service which 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 contract poorly suited to the complexity of the requirement, and the degree of specificity of the specifications or statement of work, can cause a disastrous situation for both the contractor and the Agency. When Agencies have complex requirements, and performance uncertainties make it difficult to predict the costs of performance in advance, some type of flexibly-priced contract should be considered. Where the length of contract performance extends over a long period of time, some type of economic price adjustment terms may be necessary. As requirements are repetitively acquired, and a history is established, the Agency should be able to more clearly define the requirement, and contractors should be able to assume greater risks of performance at fixed prices. Grantees have a very wide latitude in structuring a contract type which affords the best incentive to the contractor for delivering the particular product or service being acquired.

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

All fixed-price contract types impose upon the contractor an obligation to deliver the product specified in the contract, and he is not entitled to payment of the stipulated price unless he delivers the product and it meets the specifications called out in the contract. On cost-reimbursement contracts the contractor is obligated only to give its "best efforts" in order to be paid the costs of performance. The fee, however, is earned for complete performance of the contract, and if less than full performance is made, the buying Agency

is entitled to a reduction of the fixed fee based on the percentage of completion of the work.)

2.4.3.1 Fixed Price Contracts

DISCUSSION

A firm-fixed price contract establishes a single price, or a series of line item or unit prices, that are not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. The contractor takes full responsibility for the cost and profit outcome, and thus the contractor has maximum incentive to control costs and complete the contract on schedule. This contract type represents the least administrative burden upon the contracting parties; e.g., it is not necessary for the buyer to monitor contractor costs or to perform contract closeout audits. In some cases, however, there may be a need for audits if, for example, change orders have been issued on a cost-reimbursable basis.

Firm-fixed-price contracts are appropriate for acquiring commercial items, or for supplies or services which can be clearly defined with either performance/functional specifications or design specifications, and where performance uncertainties do not impose unreasonably high risks upon the contractor. [33] This aspect of performance risk is important to judge realistically, for if contractors are put into positions of undue risk and the worst case happens, the buying Agency can look forward to excessive claims, possible litigation, a poor-quality product where the contractor has "cut corners" to save money, and in some cases, the bankruptcy of the contractor or refusal to complete the contract. High-risk performance situations will also result in contractors building costly contingencies into their prices for risks that may never occur, resulting in higher than necessary prices and excessive profits on that contract.

Fixed Price Contracts With Economic Price Adjustment - Fixed-price contracts may provide for price adjustments (upward or downward) when specified contingencies occur. These contracts are typically used when there is serious doubt about the stability of selected costs or prices over an extended period of contract performance. For example, a five-year fixed-price contract may present an unusually high cost risk to a contractor for certain commodity prices or labor costs, and the parties may agree to use an economic price adjustment clause. Price adjustments may be based on published indices, actual cost experiences of the contractor for certain materials or labor, or increases or decreases in published prices for specific items. The contract will define the circumstances under which the economic price adjustment will be made and the means whereby it will be calculated. Using economic price adjustment clauses is an excellent way to deal with high-risk situations and avoid having to price the initial contract on the basis of contingencies that

[33] - Many state laws require construction contracts to be awarded at a firm fixed price.

may never occur. This technique may also be necessary to get contractors to accept fixed-price contracts that have a lengthy performance period. [34]

Best Practices

You may want to refer to the *Federal Acquisition Regulations* (FAR), Subpart 16.203 -*Fixed-price contracts with economic price adjustment*, and the related contract clause language in FAR 52.216-2,3,4. These FAR provisions and contract clauses are not required to be followed by FTA grantees but they may prove helpful in structuring contract language for specific contingencies. The FAR may be accessed online at http://www.arnet.gov/far/.

Steel Price Escalation Clauses – Following are two examples of steel price escalation clauses used by transit agencies. The first clause (Sound Transit) uses a one-time price adjustment. The second clause (New York City Transit) allows for multiple price adjustments.

One-Time Price Adjustment - Following is an example of an economic price adjustment contract clause used by Sound Transit one transit agency to provide for one steel price increase during the period of the contract. Note that this clause:

1. Bases the price adjustment on the steel supplier's invoices to the Contractor from the time the bid was prepared to the time the steel was ordered after the Notice to Proceed.
2. Requires that the Producer Price Index (PPI) support the price increase as invoiced by the steel supplier. This is an important safeguard in establishing the reasonableness of the supplier's higher price by comparing it to the industry norm.
3. Limits the increase to the lesser of the percentage increase in the invoiced price vs. the PPI.
4. Requires adequate documentation from the Contractor, and the agency's right to review the Contractor's bid preparation documents and supplier invoices.
5. Does not contain a maximum percentage by which the contract price may be adjusted for steel price increases. Under normal circumstances you should include a maximum limit on the percentage increase you will allow but the inclusion here of the lesser of the supplier's increase vs. the PPI provides a certain degree of price protection to the agency. [35]

[34] - It is important that the grantee's project budget reflect an allowance for any potential increase in volatile commodity prices (e.g., steel).

[35] - The FAR price escalation clauses in FAR 52.216-2,3,4 include a maximum aggregate price increase of 10 percent; however, the FAR also gives the Contracting Officer latitude to increase this maximum percent if circumstances warrant.

6. The clause provides for downward price adjustments as well as increases.

SP-9.10 STEEL PRICE ESCALATION

A. A price adjustment clause is included in this Contract to provide additional compensation to the Contractor or a credit to Sound Transit for fluctuations in steel prices. This price adjustment is dependent upon either: an increase or decrease in the price of steel used in the production of products utilized on this project or an increase or decrease in the ratio of the Bureau of Labor Statistics – Producer Price Index listed below. Payment or credit for steel price adjustments will be evaluated under the following conditions. Payment or credit will be made under the Contract Pay item: Provisional Sum – Steel Price Escalation.

B. The conditions of this provision are as follows:

1. This provision shall only apply to material cost changes that occur between the date of bid opening and the date of certified invoice. The Contractor is expected to order materials promptly upon Notice to Proceed (or upon shop drawing approval) and take possession of materials as quickly as reasonably possible. [36]

2. A price adjustment to provide additional compensation to Contractor will be considered and paid only where the price increase in steel is due to market conditions beyond the control of Contractor and its suppliers or vendors. No adjustment is allowed under this provision for increases due to any other cause or peril (including, but not limited to, strike, weather, vendor backlog, delay in fabrication, etc.). If a price adjustment is sought under this provision, Contractor shall certify to Sound Transit that the price increase was due solely to market conditions beyond its control or that of its suppliers and that Contractor exercised its best efforts to mitigate any price increase. Sound Transit reserves the right to verify the accuracy of such certification as a condition of payment.

3. This price adjustment clause only applies to structural steel, reinforcing steel, rail, steel excavation support elements, and overhead catenary structure poles. To be considered, the category of material must have a total dollar value of $25,000 or greater.

4. The Contractor shall submit within 5 days of Notice of Award, the fabricator's or supplier's material price quotes for the items listed above that meet the requirements of Article 9.10B.3. The Contractor must certify that they are the

[36] - When using a steel escalation article only the cost of material is escalated or deescalated and no other costs such as labor or machinery.

actual quoted prices incorporated into the Contractor's bid amount submitted to Sound Transit for the represented pay item. Sound Transit has the right to inspect Contractor's bid preparation documents to verify the accuracy of such certification. Assuming such certification is accurate, these certified quotes will constitute the baseline steel material price. The quote must clearly identify the pay item(s) by number and description, describe the weights of the steel material, how the steel material will be utilized in the final project, and a breakdown of all costs including material, labor, equipment, overhead, and profit. This steel price escalation provision shall only apply to the steel component of the material quote. It shall not apply to any other materials used in the fabrication of an item supplied to the Contractor.

5. For the items listed above that meet the requirements of Article 9.10B.3, the increase or decrease in the steel materials unit cost must be in excess of 5 percent of the original quoted prices or the PPI as described below, for a price adjustment to the Contractor to be allowed.

6. If there is an increase or decrease in steel materials cost in excess of 5 percent from the original quoted unit prices (or the PPI as described in Article 9.10F below), Sound Transit will evaluate and determine an increased or decreased payment(s) under this Contract as follows:

C. The adjustment will be determined by computing the mathematical difference between the unit price that is 5 percent above (or below for decreases in price) the base unit price (bid quote) and the actual invoice unit price of the steel component. The final dollar value will be determined by multiplying this adjustment by the represented quantity of steel.

D. The Contractor shall submit to Sound Transit certified invoices as soon as steel material is purchased. The invoices shall be listed in chronological order and contain a tabulation of quantity, the order date, the date shipped from the steel manufacturer, and the price per unit weight (reflecting all deductions for quantity shipments) with a breakdown as stipulated in Article 9.10B.4 above. Freight charges shall be listed separately and are not included in this price adjustment. These invoices shall be subject to audit verification.

E. Sound Transit will verify the increased or decreased percentage between certified original quote and the actual invoice payment.

F. This change shall be supported by the U.S. Department of Labor – Bureau of Labor Statistics index entitled "Producers Price Index" (PPI). The values contained in the PPI are subject to revision 4 months after original publication. The price adjustment for steel shall be a function of the percentage of change of the price index for "Carbon Steel Scrap" Series ID WPU101211. Do not use seasonally adjusted indices. This

index is available on the internet at:
http://data.bls.gov/labjava/outside.jsp?survey=wp.

G. The Producers Price Index (PPI) listed above must meet increase or decrease by at least 5 percent over the same time period for Article 9.10C. to be valid.

H. For price increases, if the invoiced price increased, expressed as a percentage, exceeds the PPI increase, expressed as a percentage, for the same period, the adjustment will be based on the PPI percent increase; if the invoiced price increase, expressed as a percentage, is less than the PPI increase, expressed as a percentage, for the same period, the adjustment will be based on the invoiced price increase.

I. For price decreases, if the value of the invoiced price decrease expressed as a percentage is greater than the calculated value of the PPI decrease, expressed as a percentage, for the same period, the adjustment will be based on the value of the invoiced percent decrease. If the value of the invoiced price decrease, expressed as a percentage, is less than the value of the PPI decrease expressed as a percentage for the same period, the adjustment will be based on the PPI percent decrease.

J. If the PPI controls in determining the price adjustment, Sound Transit will review the PPI 4 months after initial publication to ensure that the data have not been revised. Final payments will be adjusted accordingly.

K. Adjustment Formulas:

1. If Invoice Price Controls:

a. Price Increase:

(1) Factor = (PC/PB) – 1.05)

If Factor is equal to or less than 0.0, no adjustment will be made.
If Factor is greater than 0.0, continue: PA = Factor*Q*PB

b. Price Decrease:

(1) Factor = (PC/PB – 0.95)

If Factor is equal to or greater than 0.0, no adjustment is made.
If Factor is greater than 0.0, continue: PA = Factor*Q*PB

Where: PA = Steel manufacturing price adjustment, in lump sum dollars
PB = Fabricator / supplier quoted price in bid (converted to dollars per pound)

PC = Current certified invoice price (converted to dollars per pound)
Q = Quantity of manufactured steel, in pounds

2. If PPI Controls:

   a. Price Increase:

      (1) Factor = (IC/IB) – 1.05)

      If Factor is equal to or less than 0.0, no adjustment is made.
      If Factor is greater than 0.0, continue: PA = Factor*Q*PB

   b. Price Decrease:

      (1) Factor = (IC/IB – 0.95)

      If Factor is equal to or greater than 0.0, no adjustment is made.
      If Factor is greater than 0.0, continue: PA = Factor*Q*PB

   Where: PA = Steel manufacturing price adjustment, in lump sum dollars
   PB = Fabricator / supplier quoted price in bid (converted to dollars per pound)
   IB = BLS PPI index at the time of bid
   IC = BLS PPI index at the time material is purchased from mill (invoice date; after final US DOL BLS adjustments)
   Q = Quantity of manufactured steel, in pounds

Multiple Price Adjustments - Following is an example of an economic price adjustment clause developed by New York City Transit for solicitations. This provision allows for multiple price adjustments during the period of the contract. Note that this clause refers to the "Scrap Steel" index, but any index could be used depending on the material being procured.

SOLICITATION PROVISION
PRICE ADJUSTMENT CLAUSE FOR ITEMS CONTAINING STEEL

To All Prospective Bidders:

New York City Transit (NYCT) is soliciting this item(s) utilizing a price adjustment clause. The clause set forth below is included in this solicitation because of the steel content of the item being procured and the dollar amount of the item. For illustrative purposes, an example of this formula is provided below to assist you in the preparation of your bid.

- In order to apply the adjustment formula, NYCT will utilize the pre-determined percentage steel content of the item's unit price as set forth by NYCT in the Bid Quotation Sheets. This percentage shall remain fixed for the duration of the contract.

- The unit price(s) that NYCT will pay for the item(s) during the first six months of the contract shall be the unit price quoted in the bid by the successful bidder.

- Thereafter, the unit price may be adjusted, either up or down, every six months after award, reflecting the change in the Scrap Steel index set forth in the American Metals Market.

- The adjustment will be in the form of a percentage and shall be determined by NYCT by comparing the Scrap Steel index on the day of bid opening to the index in effect on each six-month anniversary of the contract award date for the duration of the contract.

- This adjustment percentage shall be applied to the portion of the unit price that represents the steel content of each item as predetermined by NYCT to arrive at the adjustment amount.

- The adjustment amount is then applied to the original unit price set forth in the successful bidder's bid to arrive at the new unit price for the following six months.

- No price adjustment shall be instituted unless the new price results in a percentage change of at least five (5) percent (increase or decrease) of the original unit price quoted by the successful bidder.

- The unit price reverts back to the original unit price quoted if the price adjustment calculation at each successive six month interval results in a percentage change that is not at least five (5) percent (increase or decrease) of the original unit price quoted by the successful bidder.

- Prices for release orders will be the price established for the six month time frame within which the release(s) is dated, regardless of delivery date.

- If, for any reason, the index being utilized under this contract is discontinued for any reason, NYCT will select a new index to be applied.

EXAMPLE A:

A. Successful Bidder's Unit Price: $5.00

B. % Of Item Containing Steel: 50%

C. Portion of the Item's Price subject to a price adjustment: $2.50

D. Scrap Steel index on day of bid opening: 150

E. Scrap Steel index at the six-month anniversary date of the bid opening: 180

F. Percent change calculation: (E - D) ÷ D = percentage change.

For example: (180 - 150) ÷ 150 = .20

G. F X C: $2.50 x .20 = $0.50

H. New Unit Price for next six months: A + G = $5.50

EXAMPLE B:

A. Successful Bidder's Unit Price: $12.00

B. % Of Item Containing Steel: 100%

C. Portion of the Item's Price subject to a price adjustment: $12.00

D. Scrap Steel index on day of bid opening: 75

E. Scrap Steel index at the six-month anniversary date of the bid opening: 30

F. Percent change calculation:(E - D) ÷ D = percentage change.

For example: (30 - 75) ÷ 75 = - 0.60

G. F X C: $12.00 x -0.60 = -$7.20

H. New Unit Price for next six months: A + G = $4.80

EXAMPLE C:

A. Successful Bidder's Unit Price: $24.00

B. % Of Item Containing Steel: 75%

C. Portion of the Item's Price subject to a price adjustment: $18.00

D. Scrap Steel index on day of bid opening: 162

E. Scrap Steel index at the six-month anniversary date of the bid opening: 194

F. Percent change calculation:(E - D) ÷ D = percentage change.

For example: (194-162) ÷ 162 = .1975

G. F X C: $18.00 x .1975 = $3.555

H. New Unit Price for next six months: A + G = $27.555

2.4.3.2 Cost Reimbursement Contracts

REQUIREMENT
Paragraph 10.d of FTA Circular 4220.1E requires that Federal cost principles (described in FAR Part 31) be used to determine the allowability of costs incurred on third party cost-reimbursement contracts financed with Federal funds. However, grantees may reference their own cost principles if they comply with Federal cost principles. Paragraph 10.e of FTA Circular 4220.1E prohibits the cost-plus-a-percentage of cost method of contracting.

DISCUSSION

The cost-reimbursement contract is one that provides for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling on expenditures that the contractor may not exceed without the approval of the contracting officer. Cost-reimbursement contracts are suitable for use when the uncertainties of performance do not permit costs to be estimated with sufficient accuracy to use a fixed-price contract.

Completion vs. Term Form- Two forms of cost-type contracts are available for describing the contractor's responsibility: the completion form and the term form. The *completion form* describes the scope of work by specifying an end product or definite goal. This form requires the contractor to complete the work and deliver the end item as a condition for payment of the entire fee. If the contractor fails to complete the contract, the buying Agency is entitled to a reduction in the amount of the fee. This would mean that if the contractor expended all the estimated cost and the work was not complete, and the Agency decided not to add more funds (estimated cost) to the contract, the contractor would not be entitled to full payment of the original fixed fee. The term form of contract describes the work in general terms and obligates the contractor to devote a specified level of effort for a stated time period. The fixed fee is payable at the expiration of the stated time period if the contractor has indeed furnished the specified level of effort. Extension of the time period is a new acquisition involving new cost and fee agreements (unless the original time period expires and there remains a level of effort to be provided, in which case the Agency may have the right to extend the period of performance so as to use the remaining level of effort).

Federal Cost Principles - FTA Circular 4220.1E Paragraph 10.d requires grantees to use Federal Cost Principles to determine allowable costs under cost-type contracts. 49 CFR 18.22, *Allowable Costs,* defines the Federal Cost Principles for various types of contractors. Contracts with commercial concerns are required to use FAR Part 31 Cost Principles, or grantees may use their own cost principles if they are consistent with FAR Part 31.

Allowable Cost and Payment Clause – Cost-type contracts will need to include a clause or clauses addressing several important issues regarding the payment of allowable costs. The clause used in Federal contracts would be useful as a guide concerning the issues that need to be addressed. [37] The matters covered by the FAR clause, and that should be defined in a grantee's contract (though the FAR clause itself is not required), would include:

a. **The frequency of contractor billings for costs incurred;**

b. **The reference to subpart 31.2 of the FAR for determining allowability of costs;**

c. **Whether the contractor must have actually paid for the supplies or services used in contract performance before it submits an invoice, or whether the contractor may invoice for costs incurred but not yet paid;**

d. **The provisional billing rates to be used during contract performance for indirect costs prior to establishment of final audited rates;**

e. **The procedure to be followed in submitting cost proposals for establishing final indirect cost rates for the contract;**

f. **The requirement that final costs (direct and indirect) be audited before final payment;**

g. **The Contractor's assignment to the grantee of any refunds, rebates or credits accruing to the Contractor that are allocable to costs for which the contractor has been paid;**

h. **A release discharging the grantee from any future claims arising out of the contract.**

Fixed Fee – It is important that the contract contain a clear statement as to how the contractor will be paid the fixed fee called for in the contract (i.e., how the fee is earned). The Federal clause states that the contractor is to be paid the fixed fee "for performing this contract." [38] Grantee CPFF contracts should be clear in defining the contractor's performance responsibility for earning the fee. For example, if it is a completion form contract, then the contractor must complete the statement of work and deliver all required documents. If, however, it is a term form contract, the contractor must furnish the required level of effort called for in the contract during the period of performance in order to earn the full fee. It should be noted that a cost-type contract, while it is a "best efforts" contract in terms of entitlement to payment of allowable costs, does in fact require actual performance for entitlement to payment of the full fixed fee. Anything less than complete

[34] - FAR 52.216.-7 – *Allowable Cost and Payment.*

[35] - FAR 52.216-8 – *Fixed Fee*.

performance entitles the grantee to a credit in the fee based on the percent of actual completion of the work called for in the contract. In this regard a CPFF contract operates very much like a fixed price contract in requiring complete performance by the contractor for full payment of the fixed fee. An example of a payment of fixed fee clause used by a Federal agency that illustrates this principle of entitlement to fee for performance is that of NASA, which reads: "The fixed fee shall be paid in monthly installments based upon the percentage of completion of work as determined by the Contracting Officer." Grantees are encouraged to incorporate a *Payment of Fixed Fee* clause in their contracts that clearly states the contractor's responsibility to perform the contract in order to be paid the fee. The clause should also state how the fee will be paid on a monthly/incremental basis (e.g., based on a percentage of completion of work as determined by the Contracting Officer). It is also suggested that the grantee consider a *fee withholding provision* that provides for a certain percentage of the fee to be withheld until the contractor completes and delivers all documentation called for in the contract. Once again grantees may want to review the Federal clause for guidance. [39]

Advance Agreements – Certain types of costs may be allowable according to the cost principles, and yet present difficulties in determining after-the-fact what is reasonable for the particular circumstances of any given contract. [40] It is advisable to anticipate these areas of potential conflict and negotiate advance agreements before the costs are incurred (this may be before or during the contract but should always be before incurrence of the costs involved). The types of costs that tend to be problematic, and for which advance agreements would be particularly helpful, would include:

a. **Pre-contract costs;**
b. **Royalties and other costs for use of patents;**
c. **Compensation for personal services, including location allowances, hardship pay, off-site pay, and incentive pay;**
d. **Time charged directly to the contract by corporate officers and senior management personnel who normally charge their time to indirect cost accounts;**
e. **Compensation for professional consultants (e.g., legal, accounting and engineering);**
f. **Travel and personnel relocation costs;**

[36] - FAR 52.216-8 – *Fixed Fee*.

[37] - Advance agreements cannot provide for the allowability of costs that the cost principles have determined to be unallowable (e.g., interest).

g. Severance pay to employees on support services contracts;

h. Training and education costs;

i. General and administrative costs (e.g., corporate, division or branch allocations) attributable to the general management, supervision and conduct of the contractor's business as a whole). These costs are especially important in construction, job-site, and architect-engineer contracts.

Approval of Subcontractors – There will probably be situations when a grantee may wish to require their prime contractors on CPFF contracts to submit subcontracts for the grantee's consent prior to award of the subcontract by the prime. Grantees will want to exercise due diligence in the management and administration of CPFF contracts where the grantee bears much of the risk of poor performance, including cost overruns, for both the prime contractor and the prime's subcontractors. For guidance in this area of grantee review and consent to subcontracts, see the BPPM Section 9.4 – *Approval of Subcontractors*.

Adequacy of Contractor's Accounting System - It is important to determine the adequacy of the contractor's accounting system for cost-type contracts before awarding such a contract. [41] Care must be taken to assure that the accounting system can properly identify contract costs by segregating them from the costs of other jobs in the accounting records. Likewise it is important that the system of allocating indirect costs to jobs/contracts produces a distribution of costs which is fair and reasonable.

2.4.3.3 Time and Materials Contracts

REQUIREMENT
Paragraph 7.j of FTA Circular 4220.1E states: j. Use of Time and Materials Contracts. Grantees will use time and materials contracts only: 1. After a determination that no other type of contract is suitable; and 2. If the contract specifies a ceiling price that the contractor shall not exceed except at its own risk.

[41] - If a cost type subcontract is to be awarded by the prime, the subcontractor's accounting system must also be adequate.

DISCUSSION

Time-and-materials (T&M) contracts may be used for acquiring supplies or services. These contracts provide for the payment of labor costs on the basis of fixed hourly billing rates which are specified in the contract. These hourly billing rates would include wages, indirect costs, general and administrative expense, and profit. There is a fixed-price element to the T & M contract - the fixed hourly billing rates. But these contracts also operate as cost-type contracts in the sense that labor hours to be worked, and paid for, are flexible. Materials are billed at cost, unless the contractor usually sells materials of the type needed on the contract in the normal course of his business. In that case the payment provision can provide for the payment of materials on the basis of established catalog or list prices in effect when the material is furnished. These contracts also may provide for the reimbursement of material handling costs, which are indirect costs, such as procurement, inspection, storage, payment, etc. These indirect costs are billed as a percentage of material costs incurred (similar to the billing of overhead costs as a percentage of direct labor). Such material handling costs must be segregated in a separate indirect cost pool by the contractor's accounting system and must not be included in the indirect costs included as part of the fixed hourly billing rate for direct labor. It would always be prudent to obtain a pre-award audit of the contractor's accounting system to determine the adequacy of the system to properly segregate material handling costs from other overhead costs being billed with the fixed hourly rates for labor.

Use Only When No Other Type Will Work - ***The FTA Circular requires that you make a determination, before using this type of contract, that no other type of contract is suitable*. The reason why 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 thus minimize total costs to the buyer. (In a CPFF contract the fee is fixed in dollar terms at the outset of the contract, allowing the contractor to earn the fee whenever the work is complete, thus providing some incentive to finish the contract as quickly as possible.)**

Subcontracts - If your T&M contract will involve subcontracts for large dollar items or services, you will need to evaluate whether the contractor's material handling costs should be charged to these large dollar subcontracts as an indirect cost (as an overhead type of charge), because to do so may result in an inequitable allocation of these indirect costs to your contract. This is because the large dollar value subcontract will absorb a far greater proportion of the indirect cost pool than it should, based on a reasonable assessment of the material handling costs actually generated by the subcontract versus those generated by all other materials procured by the contractor for other customers. When this situation arises you will want to negotiate an advance agreement with the contractor as to the charging of material handling costs. It may be more equitable to pay for the cost of subcontract administration on a direct charge basis; i.e., the labor cost for the subcontract

administrator charged directly. Or you may want to negotiate a reduced indirect material handling cost rate to be charged to the subcontract (which represents a more equitable allocation of the material handling costs actually generated by the subcontract).

Ceiling Price - You will need to specify the Agency's maximum obligation (ceiling price) in the contract; i.e., the limitation of the Agency's financial obligation which the total funds allotted to the contract will allow. The contractor may not exceed this funding limitation without your written authorization in the form of a contract modification adding more funds.

Proper Agency Surveillance - This type of contract requires a high degree of Agency surveillance during performance in order to provide reasonable assurance that efficient methods and cost controls are used by the contractor.

Avoid Cost Plus Percentage of Cost Arrangements - As discussed below under CPPC contracts, care must be taken not to structure an agreement which compensates the contractor at a *predetermined percentage (for overhead or profit) of actual costs incurred.* If you break out the overhead and profit from the labor rate and call for them to be billed as separate rates based on actual labor costs incurred, you will have an illegal cost-plus-percentage-of-cost situation. Overhead and profit must be recovered as a part of the fixed hourly billing rate for labor, as discussed above. You may allow the contractor to bill material handling costs as an indirect cost rate applied to actual material costs, provided the contractor segregates material handling costs in the accounting system. You should conduct a contract cost close-out audit of the material handling cost pool and adjust the rates billed to those actually incurred (as you would do for an overhead rate on a cost-reimbursement contract). However, where the actual material handling costs are not large, Agencies may elect to close out the T&M contract without a final cost audit of the material handling cost pool.

2.4.3.4 Labor Hour Contracts

DISCUSSION

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

2.4.3.5 Cost Plus Percentage of Cost Contracts (CPPC)

DISCUSSION

FTA Circular 4220.1E clearly prohibits the use of this contracting method. CPPC contracts are prohibited by statute and FTA may not grant waivers for grantees to use this

method of contracting. [42] Grantees must not only avoid using this type of contract themselves, they must also insert clauses in their cost-type contracts 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, thus providing a positive incentive to inefficiency. *To fall within the definition of CPPC, the agreement must provide that the contractor's compensation, or some portion of it, will be computed as a percentage of some of the costs of performance.* So for example, it is not permissible to pay for overhead (indirect) costs by establishing a predetermined percentage in advance and stipulating that overhead expense will be reimbursed as a stated percentage of some other cost such as direct labor. The problem with this arrangement is that such compensation may be greater than the contractor's actual and final overhead expenses, which means the payment becomes additional profit. In the same way, a time-and-materials contract which called for payment of overhead and profit at predetermined percentages of 15% and 10% of cost incurred was held to be illegal.[43]

This is not to prohibit *provisional overhead rates* which are audited and adjusted to actuals at the end of the contract, nor does it prohibit provisional or interim fee payments based on costs being incurred, because the total fee is fixed at the inception of the contract and will not increase with increases in actual costs. It is also permissible to pay a material handling charge as a percentage of material costs incurred if the contractor has a separate material handling cost pool. This indirect cost pool should be audited after contract completion, and the billed rates should be adjusted to actuals based on the audit.

Another way of avoiding the problem is to include overhead and profit in fixed rates for labor. This is done in time-and-materials and labor hour contracts where contractors are paid one rate for each hour of labor performed. This type of arrangement is not illegal, but it still tends to operate as a disincentive to control cost (more hours worked equals more profits), and for this reason should be avoided whenever other contracting options exist.

2.4.4 Payments

Payment is the buyer's most important contractual obligation. Payments are the principal source of funds during contract performance allowing the contractor to continue working. Delays in payments can have a serious effect on the contractor's ability to continue performance. When less than full payment is made of a contractor's invoice, the terms *"withholding"* and *"setoff"* are

[39] - 10 U.S.C. 2306(a) and 41 U.S.C. 254(b).

[43] - 46 Comp. Gen. 612 (B-159713) (1967).

commonly used to describe the refusal to make full payment. The term *"final payment"* usually implies that both parties to the contract have fulfilled all of their responsibilities.

There are two major types of contract payments: (1) payments for completed items of work (including *partial payments*), and (2) *progress payments* based on costs incurred or upon a percentage of completion of the work. Another type of payment, which is used only under extraordinary circumstances, is payment in advance of doing the work (*advance payments*).

2.4.4.1 Payment of the Price

Payment of the contract price is due upon completion of the work and submission of the contractor's invoice. When the contract authorizes delivery or performance in increments, payment of a portion of the contract price may be made before the contract is completed. Such payments are referred to as *partial payments*. Partial payments are not considered to be a financing technique but they can be an important means of providing funds for performance, and they should be used whenever the contract can be structured in terms of incremental stages or deliveries and there are appropriate acceptance criteria for the supplies, services or completed subsystems of a larger system. In other words, when the Agency can safely inspect, test and accept these units and make a "final" payment for those items delivered, without having to worry about their functioning as part of a larger system, then partial payments should be established in the contract.

2.4.4.2 Advance Payments

REQUIREMENT
FTA Circular 4220.1E, Paragraph 12.a, "Advance Payments," states: "FTA does not authorize and will not participate in funding payments to a contractor prior to the incurrence of costs by the contractor unless prior written concurrence is obtained from FTA. There is no prohibition on a grant recipient's use of local funds for advance payments. However, advance payments made with local funds before a grant has been awarded, or before the issuance of a letter of no prejudice or other pre-award authority, are ineligible for reimbursement."

DISCUSSION

Advance payments are actually a method of financing and not a method of paying for work completed or items delivered. They are made prior to a contractor's incurrence of costs in order to enable the contractor to perform the contract. The Federal Government places severe restrictions on its own use of advance payments (FAR coverage may be found at FAR Subpart 32.4). As indicated below in the paragraph "Exceptions to the Prior Approval requirement," when advance payments are generally accepted industry practice, FTA does not require prior approval.

The FTA Circular requires FTA approval before grantees may use this form of financing on third-party contracts. However, the Circular clearly restricts the advance payment prohibition to those contracts where the grantee is using FTA funds for the advance payment. If the advance payments are being made with non-FTA funds, then FTA has no involvement in the decision and need not approve of it. Grantees are free to use local funds to finance their contractors in this manner if they deem it appropriate. The Circular also covers the situation where a grantee may wish to use local funds for advance payments before a grant has been awarded or before FTA has issued a letter of no prejudice to the grantee. In these cases FTA will not reimburse the grantee later for such payments.

Exceptions to the Prior Approval Requirement – The FTA requirement for prior approval of advance payments does not apply to transactions where it is "generally accepted industry practice" to pay in advance. In these situations, grantees may make advance payments without prior FTA approval. These situations would include (but not necessarily be restricted to) the following types of transactions:

1. **Rent**
2. **Tuition**
3. **Insurance premiums**
4. **Subscriptions to publications**
5. **Software licenses**
6. **Construction mobilization costs**
7. **Public utility connections**

Best Practices

New York City Transit (NYCT) completed a major procurement for rail cars in which there were two payment schedules in the Request for Proposals (RFP). The first was a payment schedule containing milestone payments totaling 20% of the price of cars paid prior to the acceptance of the first test trains. A second or "Alternate" payment schedule had milestone payments of 42% of the price of cars paid prior to the acceptance of the first test trains. Contractors were required to submit proposals based on both payment scenarios, as well as any alternative payment plan they wished to propose. NYCT requested that the Federal Transit Administration (FTA) provide written concurrence to make advanced payments up to approximately 45% of the price of the cars if there was appropriate consideration for greater payments made up front. In addition, NYCT required that an Advanced Payment Bond or Letter of Credit be provided in the full amount of the price of cars paid prior to the acceptance of the first test trains. FTA provided their written concurrence to NYCT's request.

In order to evaluate the proposals received from the contractors, NYCT performed a Net Present Value analysis of the 20%, 42% and other contractor alternatives in order to quantify the value of the different payment schedules. The analysis took into account the cost of money and all aspects

of the timing of invoicing, starting with receipt of the invoice through the time for actual payment. The Net Present Value analysis showed that appropriate consideration was given in the winning proposal and NYCT accepted it. An Advanced Payment Bond or Letter of Credit was required to protect all payments for cars prior to acceptance of the test trains.

This case shows a very conservative approach as to what is defined as an Advance Payment. The Advance Payment is considered to be the amount paid to the contractor for cars until the first trains are accepted by NYCT. The contractor is required to design, build and test the first 18 cars which means that the contractor is incurring substantial costs during this period. These costs include engineering and design hours, supervision, ordering materials, set-up of the production line, etc. The contract has a mobilization payment of 3% upon award of the contract and approval of the Advance Payment Bond or Letter of Credit. Thereafter, the contract has milestone (or completion-type progress payments) for various submissions of designs, approvals of designs, starting of tests, completion of tests, etc. A more liberal approach would define the mobilization cost of 3% to be considered an Advance Payment and the rest of the payments to be considered progress payments.

2.4.4.3 Progress Payments

REQUIREMENT
Paragraph 12.b of FTA Circular 4220.1E states: b. Progress Payments. Grantees may use progress payments provided the following requirements are followed: [44] 1. Progress payments are only made to the contractor for costs incurred in the performance of the contract. [45] 2. The grantee must obtain adequate security for progress payments. Adequate security may include taking title, letter of credit or equivalent means to protect the grantee's interest in the progress payment. [46]

[44] FTA has redrafted the paragraph related to progress payments to account for the practical reality that taking title to work in progress may not be desirable in some cases.

[45] Progress payments in construction contracts may be made on a percentage of completion method in accordance with 49 CFR 18.21(d). This payment method may not be used in non-construction contracts.

[46] "Adequate security" should reflect the practical realities of different procurement scenarios and factual circumstances. For example, adequate security may consist of taking title to work in progress in a rolling stock procurement, receiving a draft document in a consulting contract, or receiving some portion of recurring services under a services contract. Grantees should always consider the costs associated with this security (e.g., bonds or letters of credit must be purchased in the commercial marketplace) and the impact those costs have on the contract price, as well as the consequences of incomplete performance as they consider what constitutes adequate security for a given procurement.

DISCUSSION

Progress payments are a means of financing contractors that are performing *fixed-price* contracts (a) under unusual circumstances where a contractor cannot get private financing at a reasonable cost, or (b) where the commercial practice for the item being procured is for the buyer to provide financing (e.g., rolling stock procurements). [47] There are two major types of progress payments: those based on costs and those based on a percentage of completion of work. Both types are considered contract-financing methods (see FAR 32.102). Progress payments may be appropriate if:

- **The contractor will not be able to bill for the first-delivery of products, or other performance milestones, for a substantial time after work begins. In Federal contracting practice, the usual contract duration for using progress payments is four months or more for small businesses and six months or more for others, and**

- **The contractor's expenditures prior to delivery of the first items will have a significant impact on the contractor's working capital. [48]**

Progress payments* are to be distinguished from *partial payments*. *Partial payments* are payments made, as authorized by the contract, upon delivery and acceptance of one or more complete units (or one or more distinct items of service) in accordance with the contract specifications, even though other quantities remain to be delivered. Note that *partial payments are for completed units,* whereas *progress payments are for uncompleted work-in-progress.

Because the grantee is making payments for uncompleted, non-functional units, FTA requires that adequate security be obtained from the contractor protecting the grantee's (and FTA's) investment in case the contractor fails to complete the deliverable units. The form of security is to be determined by the grantee based on what is in the best interests of the grantee in the particular circumstances. (See footnote above re *adequate security*.)

Progress Payments Based on Percentage of Completion - The Federal Government authorizes progress payments on its contracts based on a percentage or stage of completion of the work. This type of progress payment is standard for construction contracts for all Federal agencies. [49] 49 CFR Part 18.21(d) allows grantees and subgrantees to use the percentage of completion method to pay their construction contractors, which is consistent with the regulations for Federal contracts. *However, grantees may not use the percentage of*

[47] - The term *progress payments* does not apply to cost-type contracts, and is to be distinguished from *advance payments*, which are payments made before work begins (see BPPM section 4.4.4.2).

[48] - Both of the conditions noted are almost always present on construction projects.

[49] - FAR Clause 52.232-5 *Payments Under Fixed-Price Construction Contracts.*

completion method for non-construction contracts. For those contracts, progress payments based on costs incurred must be used. [50]

Contract Clause – Grantees should refer to the FAR clause at FAR 52.232-16 for guidance on the specific issues that need to be addressed in the progress payments clause and ensure that their agency's clause adequately covers the important issues, including:

- **Computation of amounts – percentage of total costs, definition of "costs" to be included in the calculation (i.e., only those actually paid by the contractor, incurred but not paid, etc.).**
- **Liquidation – the method of linking value received to payments made.**
- **Reduction or suspension of payments – the circumstances under which the grantee may reduce or suspend progress payments.**
- **Title – this provision should define the property considered allocable to the contract (parts, materials, special tooling, special test equipment, drawings and technical data, etc.) and the party that retains title to the property/work-in-process for which the progress payments are made.**
- **Risk of loss – the contract should be clear as to which party assumes the risk of loss to contract property and work-in-progress before final acceptance of the units.** ***In the Federal clause, the contractor assumes the risk of loss even though title to all property acquired under the contract vests in the Government.***
- **Progress payments to subcontractors – this provision needs to define the circumstances under which the prime contractor must make progress payments to fixed-price subcontractors, and the subcontract terms to be included (covering the same issues as the prime contract's progress payment clause).**
- **Adequate accounting system/reports – the contract must require an adequate job-order accounting system to be maintained that properly accounts for the costs of the job even though the contract is fixed-price. This provision should also give the grantee the right to require certain reports or other data in support of the contractor's invoices.**
- **Access to records - this provision must give the grantee the right to conduct audits of costs claimed in progress payment invoices.**

[50] - 49 CFR 18.21(d) authorizes the percentage of completion method for construction contracts only.

2.4.4.4 Withholding and Final Payment

DISCUSSION

A number of contract provisions expressly authorize the withholding of payments. See, for example, the Davis-Bacon Act Clause [51] or the Contract Work Hours and Safety Standards Act Clause. [52] The standard Federal government clause for the payment of fixed fee on CPFF contracts calls for a 15% withholding of the fixed fee until the contractor submits a certified final indirect cost rate proposal and otherwise complies with the final deliverable documentation requirements of the contract (e.g., delivery of the final report concerning inventions made under the contract).

Limitation on Withholding - In the event you decide to withhold payments on a contract, you must take care that the amount of money withheld bears a reasonable relationship to the unsatisfactory work; in other words, the amount withheld must represent a reasonable estimate of the contractor's potential liability. [53] Moreover, the amount withheld must not be so great that it impairs the contractor's ability to perform. [54] You may also wish to consider a clause limiting the amount of payments that may be withheld in total under all clauses of the contract, as is the practice on Federal contracts. [55]

Final Payment - Final payment is made to the contractor when it has satisfied all of the deliverable requirements called for by all provisions of the contract, including all of the required documentation. Final payment signifies that the performance obligations of both parties to the contract have been satisfied. Before making a final payment, therefore, you should obtain a signed release from the contractor releasing the Agency from any further claims by the contractor. You should also ensure that the program office has signed a receiving and inspection report certifying that all deliverable items have been received, inspected, and accepted as being in conformance with the contract specifications.

Retainage on Construction Contracts - For a discussion of retainage on Construction Contracts, see BPPM, section 10.1, paragraph entitled "Retainage and the Problems of Contractors who Quit Work."

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[51] - Appendix A.1, Clause 16.

[52] - Appendix A.1, Clause 17.

[53] - Norair Eng'g Corp., GSBCA 3539, 75-1 BCA, paragraph 11,062.

[54] - Bailey v. Secretary of Labor, 810 F. Supp. 261 (D. Alaska 1993).

[55] - FAR Clause 52.232-9.

2.4.5 Indefinite Delivery Contracts

When the exact times or the exact quantities of future deliveries are not known at the time of contract award, or when the shelf life of the product needed is short, grantees may wish to consider some form of indefinite delivery (ID) contract. Indefinite delivery contracts offer a number of advantages that will be discussed below with each type of ID contract. As a general rule, however, ID contracts permit the grantee to maintain inventories at minimum levels and provide flexibility with respect to shipments to various user locations. It also facilitates decentralized ordering by users at different locations.

There are three types of indefinite delivery contracts:

1. Definite-quantity contracts,
2. Requirements contracts, and
3. Indefinite quantity (IQ) contracts (commodities)/Task order contracts (services).

2.4.5.1 Definite-quantity Contracts

A *definite-quantity contract* is one which provides for delivery of a definite quantity of specific supplies or services during a time period which is fixed, with deliveries or performance to be scheduled at designated locations at the time each order is placed under the contract. This type of contract is appropriate when the grantee knows in advance how many total items it will need during the contract period but is uncertain as to the exact time or the exact amount of its needed deliveries to any given location. The supplies or services called for by this type of contract must be regularly available from the supplier or available after a short lead time. For guidance as to ordering quantities above the quantity stated in the contract, see section 2.4.5.3 below, paragraph entitled *Orders above the stated maximum*.

2.4.5.2 Requirements Contracts

A *requirements contract* is one in which the grantee commits to place all of its requirements for a particular item or service with a particular contractor during a specified contract period, with deliveries or performance to be scheduled at the time each order is placed under the contract. This type of contract is used when quantities and/or the times of needed deliveries are uncertain. It permits flexibility to the grantee in both quantities and delivery schedules. It may also shorten the delivery time of a product that has a longer production lead time because the contractor knows that the grantee will obtain all of its requirements under its contract and in this situation contractors may be willing to maintain some level of inventory. A *requirements contract* also allows for the ordering of supplies or services *after requirements become known.* It differs from the *indefinite quantity contract* in that it promises the contractor that all of the grantee's requirements for the particular item will be procured from the contractor, whereas the *indefinite quantity contract* makes no promise of this nature and may in fact be one of several (multiple) contracts awarded for the same item or service. The *requirements contract* may produce better prices for the grantee in that the contractor is assured from the beginning that all supplies or

services of the type called for will be procured from the contractor during a stated period of time. The disadvantage to the grantee is that it will be committed to order all of the designated supplies at the contracted price even if it later learns that the supplies can be ordered elsewhere more cheaply.

Estimated total quantity – When this type of contract is used, grantees should state a realistic estimated total quantity in the solicitation and in the resulting contract. This estimate is not a guarantee by the grantee that it will buy the estimated quantity, but is a good faith estimate of what the requirements are likely to be. The estimate should be based on records of previous requirements as well as the most current information available.

Maximum and minimum quantities – The contract should protect the contractor by stating a maximum limit of the contractor's obligation to deliver. This maximum limit may be expressed for the entire contract, as well as for each individual order and for any particular period of time within the contract period of performance. Minimum order amounts may also be expressed for each order placed and for the contract as a whole. Minimum order amounts, however, are not required for this type of contract because the grantee's commitment to buy its requirements from the contractor represents the legal consideration necessary to make the contract binding. For guidance as to ordering quantities above the maximum amount stated in the contract, see section 2.4.5.3 below, paragraph entitled *Orders above the stated maximum*. It should be noted that the minimum and maximum quantities in a *requirements contract* are for the contractor's protection and do not necessarily limit the grantee's procurement authority to order more units (since the grantee has contracted to award *all of its requirements* to the contractor). Thus the grantee's authority to add units to a requirements contract without re-competition is founded on its initial promise to award all of its requirements to the successful contractor and such additions would not constitute an impermissible increase in scope (as would be the case with an *indefinite-quantity contract* when the grantee seeks to add units above the stated maximum – see below).

2.4.5.3 Indefinite-quantity Contracts

An *indefinite-quantity contract* is one that provides for an indefinite quantity of supplies or services, within limits that are stated in the contract, to be provided during a time period that is fixed in the contract. Deliveries of the supplies or performance of the services are scheduled by placing orders with the contractor. This type of contract may be appropriate when the grantee cannot predetermine, above a specified minimum, the precise quantity of supplies or services that will be required during the contract period, and it is inadvisable for the grantee to commit itself for more than a minimum quantity. *Indefinite-quantity* contracts offer several advantages:

1. minimum inventory levels of supplies can be maintained,
2. shipments can be direct to users in various locations,
3. they permit flexibility in both quantities and delivery scheduling,
4. supplies or services can be ordered after requirements become known, and
5. the grantee's obligation is limited to the minimum quantity specified in the contract.

Minimum and maximum quantities – To ensure that the contract is binding, a minimum number of units must be stated in the contract, and it must be more than a nominal quantity. There must also be a stated maximum of units that may be ordered. Indefinite-quantity contracts should never be "open ended," where no maximum quantity is stated. This practice has led to serious problems when agencies attempt to "piggy-back" the open ended contracts of other agencies by ordering quantities that were never included in the original competitive process. (See section 6.3.3--*Joint Procurements of Rolling Stock and "Piggybacking."* The contract may also state maximum or minimum quantities that may be ordered under each task or delivery order and the maximum that may be ordered during a specified period of time within the contract's period of performance.

Orders above the stated maximum – If it becomes necessary to order quantities above the maximum stated in the contract, (which would be the number of units included in the original competitive process), such orders should generally not be processed as "change orders," ("change orders" must be within the scope of the original competition), but should be processed as "new procurements." These new procurements may either be competed or, if circumstances warrant, processed as "noncompetitive procurements" in accordance with the grantee's internal approval process for noncompetitive ("sole source") procurements. *Grantees should anticipate the possibility of needing additional quantities when they compete the contract award initially and, if necessary, include option provisions for additional quantities in the original competitive bidding. In this way if additional quantities are needed they may be procured under the original contract without having to justify them as a "sole source" add-on.*

Multiple Award/Task Order contracts – Grantees may wish to consider making multiple contract awards for the same or similar supplies or services under a single competitive solicitation. This may be appropriate in order to ensure the quality or timeliness of deliveries by not limiting the grantee to a single supplier who may not perform according to the grantee's expectations or needs or who may not be able to meet peak delivery requirements. In this event, another supplier is immediately available to assure that needs will be met.

The Federal Acquisition Regulations (FAR), Subpart 16.504 – *Indefinite-Quantity Contracts*, addresses the issue of multiple awards in 16.504(c). The FAR expresses a preference for making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services if (i) a recurring need for the supplies or services is anticipated, and (ii) the agency cannot predetermine its needs above a specified minimum, and (iii) when it would be inadvisable for the agency to commit itself for more than a minimum quantity. The FAR envisions the award of multiple *task order contracts* in which individual task orders would be issued following competitive solicitations to the original awardees.

If multiple awards are made, grantees must advise prospective bidders of the procedures that will be used in issuing orders to the contractors selected for award, including the criteria that will be used to provide the selected contractors with a fair opportunity to be considered for each order issued. The criteria may include such items as past performance on earlier tasks or orders issued under the contract, quality of deliverables, timeliness of deliveries, and other factors considered

relevant by the grantee. It is important that price or cost be one of the selection factors considered for each order awarded. If the original contract did not establish the price for the supply or service, the grantee will have to solicit cost or price proposals for each order.

The FAR does provide for exceptions to the requirement that all awardees be provided a fair opportunity for each order awarded. These would include situations where –

a. The agency's needs for the supplies or services are so urgent that providing a fair opportunity would result in unacceptable delays;

b. Only one awardee is capable of providing the supplies or services because they are unique or highly specialized;

c. The order must be placed on a sole-source basis in the interest of economy and efficiency as a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order; and

d. It is necessary to place an order to satisfy a minimum guarantee.

Multiple awards will not be advisable when:

a. state law prohibits,

b. more favorable terms will be provided if a single award is made,

c. the cost of administering multiple contracts outweighs any potential benefits from making multiple awards, and

d. tasks likely to be ordered are so integrally related that only a single contractor can reasonably perform the work.

Chapter 3

3 - Specifications

3.0 Overview (6/03)
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3.3 Specifications for Equipment and Supplies (1/98)
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3.0 OVERVIEW

REQUIREMENT

§ 8.c (1) of FTA Circular 4220.1E requires that all solicitations shall:

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

§ 15 of the Master Agreement states that:

> d. Exclusionary or Discriminatory Specifications. Apart from inconsistent requirements imposed by Federal statute or regulations, the Recipient agrees to comply with the requirements of 49 U.S.C. § 5323(h)(2) by refraining from using any Federal assistance awarded by FTA to support procurements using exclusionary or discriminatory specifications.
>
> e. Bus Seat Specifications. A State or local government recipient may use specifications conforming with the requirements of 49 U.S.C. § 5323(e) to acquire bus seats.

DISCUSSION

As a recipient of public funds you will have to keep in mind that you represent the government, whose objectives in spending taxpayers' money will always include, as one of its goals, the goal of full and open competition. It is easy to lose sight of this under the pressure of completing a project on time. Many programs in your domain have political sensitivity and media visibility. The temptations will be great to "get something out now," and it will always be easier to respond to the immediate pressure than to do a careful and thorough job at the outset. But time taken here, in the careful research and drafting of the specifications, will invariably reward you with a better product, at a lower cost, and with far fewer claims and delays during the life of the project. Another age-old problem in this area of drafting specifications is the desire to push the state of the art to a new level, to have the best possible system, regardless of cost. Government organizations tend to be applauded for the visible quality of the things they do, whether it's their services, or major transit systems. But against these real-life pressures stands the Federal and State Government policy to define the "minimum needs" and to avoid specifications which might unduly restrict competition. We need to remind ourselves that our industrial suppliers are also taxpayers whose tax dollars are helping to finance this procurement; as such they are to be given every opportunity to compete for the work they are helping to finance.

Technical Specifications and Statements of Work must clearly describe the products and services to be procured in terms which will permit full and open competition and which will meet the buying agency's minimum essential needs.

3.1 TYPES OF SPECIFICATIONS AND RISKS

DISCUSSION

Specifications may be very detailed in describing the product or work to be done, or may simply require an end result, or may contain combinations of these two approaches. There are different levels of risks and responsibilities inherent in these different types of 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. The legal theory involved in these cases is the implied warranty of specifications.[1] Following is a discussion of the various types of specifications and the risks inherent in each type.

[1] - United States v. Spearin, 248 U.S. 132 (1918).

3.1.1 Design Specifications

DISCUSSION

Specifications detailing the manner or method of performance are often treated as *design* specifications. Contrasted with these are *performance* specifications, which leave the details of performance, and the details of design, to the contractor's discretion. *Design* specifications are those which set forth precise measurements, tolerances, materials, in process and finished product tests, quality control, inspection requirements, drawings and other specific information. It is this *design* type of specification, dealing with the details of the work, which the contractor is "required to follow as one would a road map," which gives rise to implied warranty. Under this type of 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.[2] There is an implied warranty that the detailed designs or processes will result in an end item which functions as required. Conversely, there is no implied warranty where the specification simply sets forth an objective or end result to be achieved, and the contractor is free to select the means of accomplishing the task, in which case he assumes responsibility for that selection. [3] In those cases where the specification contains both design and performance requirements, it will depend on what portion of the specification causes the contractor's difficulties, whether he has discretion to choose how to do the work. [4]

Specific situations working to relieve the contractor from end item performance responsibility would include:

- **When the contractor is left no discretion or choice in the materials to be used. [5]**
- **When specifications set forth dimensions and the item built to the dimensions cannot be used as anticipated because of those dimensions. [6]**

[2] - Monitor Plastics Co., ASBCA 14447, 72-2 BCA ¶ 9626 at 44,971.

[3] - J. L. Simmons Co. V. United States, 188 Ct. Cl. 684, 412 F.d. 1360 (1969) at 689.

[4] - Engineering Technology Consultants, ASBCA 43600, 92-3 BCA ¶ 25,133, recons. Denied, 93-1 BCA ¶ 25,507.

[5] - J. L. Simmons Co., id.

[6] - Harrison Western/Franki-Denys, Inc., ENGBCA 5523, 92-1 BCA ¶ 24,582.

- **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.)** [7]

- **When specified equipment cannot be successfully used in performing the contract.** [8]

- **When detailed specifications require performance contradictory to local codes or ordinances.** [9]

- **When the specifications provide for alternate methods of performance, and the contractor selects a method from among alternatives in the specification, the contractor will not be liable if the alternative does not accomplish the desired results.** [10]

3.1.2 Performance Specifications

DISCUSSION

Performance specifications dictate the performance of the end product, not how the contractor will do the work. These are specifications which give the contractor discretion in how to achieve the end result called for by the contract.[11] **Performance specifications 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. It must be said, however, that there are valid reasons for specifying "design" type requirements within performance specifications, as where standardization is needed, where there is an opportunity to avoid duplication of design costs which have already been incurred, etc.**

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. [12]

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[7] - Hobbs Constr. & Dev., Inc., ASBCA 34890, 91-2 BCA ¶ 23,755.

[8] - Maitland Bros. Co., ASBCA 23849, 83-1 BCA ¶ 16,434.

[9] - Huber, Hunt & Nichols, Inc., GSBCA 4311, 75-2 BCA ¶ 11,457.

[10] - Southern Paving Corp., AGBCA 74-103, 77-2 BCA ¶ 12,813 at 62,363.

[11] - Aleutian Constructors v. United States, 24 Cl. Ct. 372 (1991).

[12] - Intercontinental Mfg. Co. V. United States, 4 Cl. Ct. 591 (1984) at 595.

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" 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. For example:

- **A provision that surfaces be at a certain specified minimum temperature when painted was not a warranty that satisfactory results would be obtained at that temperature.**[13]
- **Where the agency specified a minimum of not less than 14-gauge steel it was not warranting that 14-gauge would meet performance requirements.** [14]

3.1.3 Brand Name Or Equal

DISCUSSION

These are specifications which require a particular manufacturer's product, part number, or model. The specification may allow for an "equal" product and should clearly set forth the salient physical and functional characteristics of the brand name product. Under this type of specification if the contractor uses the brand name product or an approved "equal," the buying agency assumes the responsibility for proper performance (assuming the contractor used the product in the proper way). If the contractor elects to manufacture an equal product in-house, he will be responsible that the product performs equally with the specified brand named product. The BPPM Section 2.4.2.2.1 contains extensive guidance on the use of "brand name or equal" specifications.

3.2 USING CONSULTANTS TO PREPARE SPECIFICATIONS

REQUIREMENT
§ 8.a.(5) of the FTA Circular 4220.1E requires that grantees avoid situations known as "organizational conflicts of interest." An organizational conflict of interest arises when a contractor, because of other activities, relationships, or contracts, is unable or potentially unable, to render impartial assistance or advice to the grantee, or when a contractor's objectivity in performing the contract work is impaired, or when a contractor has an unfair competitive advantage.

[13] - Ahern Painting Contractors, Inc., DOTCAB 67-7, 68-1 BCA ¶ 6949.

[14] - Inlet Co., ASBCA 9095, 1964 BCA ¶ 4093.

DISCUSSION

The FTA Circular envisions two distinct problems when using consultants to prepare specifications or statements of work: (1) that the consultant will be biased toward a particular product or firm because he has business relationships with that firm or a financial interest in the product, or (2) that the consultant will have an unfair competitive advantage if he is allowed to compete for a product or service which he helped to define in a specification or statement of work. When a contractor is used to prepare or assist in the preparation of specifications and statements of work, care must be taken to ensure that the contractor will be completely unbiased in his decisions. Buying agencies must ascertain that the contractor has no financial or organizational relationship with a potential supplier which might motivate him to slant a specification toward that supplier. With respect to the unfair competitive advantage issue, contractors developing specifications should not be allowed to compete on procurements for which they prepared specifications.

Best Practices

Contractors who are working on specifications to be used for competitive procurements should be required to accept a "Limitation on Future Contracting" provision in their contract for the specification/ consulting work which precludes them from bidding on the resulting procurement. Further guidance may be found in the BPPM Section 2.4.2.2.2 "Organizational Conflicts Of Interest."

It is also advisable when using consultants to draft procurement specifications to obtain a formal written certification with their proposal which describes all of their past, present or planned organizational, financial, contractual or other interests with organizations whose products or services may be offered in response to the procurement on which they will be consulting. Where there are such interests identified by the contractor, the contractor should also be required to describe why it believes that performance of the proposed consulting contract can be accomplished in an impartial and objective manner. An example of a certification requirement used by the Federal Department of Transportation may be found in Appendix B.10[15].

3.3 SPECIFICATIONS FOR EQUIPMENT AND SUPPLIES

DISCUSSION

Plans, drawings, specifications or purchase descriptions should state only the minimum needs of the agency and describe the supplies in a manner which will encourage maximum competition, avoiding restrictive features which might restrict offers.

[15] - Transportation Acquisition Regulation (TAR) Clause 1252.209-71 DISCLOSURE OF CONFLICTS OF INTEREST (Oct 1994).

Best Practices

Planning - A market survey should be conducted to determine sources that offer products which meet the requirements. Caution must be exercised to avoid disclosure of agency budgets or other information which might give a supplier an unfair competitive advantage. Descriptive literature from one prospective supplier cannot be used as the sole basis for writing specifications. Determine what your essential requirements are and separate these essentials from those which are "nice to have" or desirable. In your research determine what the state-of-the-art is and develop your specification within the state-of-the-art.

Content -

- A performance-type specification is generally preferable to a design-type specification (i.e., don't tell the contractor how to do the work but rather specify the end-item's performance). This is in keeping with a goal of maximum contractor responsibility and minimum risk to the buying agency. It may be necessary, however, to use design-type descriptions (as for components, tolerances, etc.) in certain situations, such as the need for standardization.

- The specification must set forth the minimum essential characteristics and standards required to satisfy the intended use (e.g., "no more than 2" wide"; "at least 3 hp"; "at least once per month").

- When "brand names" are being used for specific components, it may be advisable to include at least two brand names followed by the words "or equal". When so used, the specific features which must be met by offerors should be clearly stated. See BPPM Section 2.4.2.2.1.

- The specification must not only describe the product but must also include reliability and quality assurance requirements (Quality Control Plan).

- Criteria for inspecting, testing and accepting the product will have to be included in the specification.

- Preservation, packaging, packing, and marking requirements will also have to be addressed.

- Include a Contract Data Requirements List (CDRL) to tell the contractor what documentation is required, when it is to be delivered, and whether the documents need approval (e.g., drawings, maintenance recommendations, master parts list, shipping/ handling/ storage procedures, etc.) When buying major systems be sure to require a comprehensive spare parts data package as a deliverable item. This will be

necessary for competing the procurement of spare parts after the initial complement of spares has been used.

- Is training needed for users and those who must maintain the equipment? Are maintenance manuals needed?

- Do not include contractual terms and conditions, such as, cost/price information, warranties, delivery information, etc.

- Write sentences which are short, concise and simple.

- Use decimals instead of fractions.

- Don't use open-ended requirements such as "as directed," "satisfactory to," etc.

- Do not use unfamiliar words, colloquialisms or words which are ambiguous.

- When you have finished, read your specification and ask yourself, "Is there any way that anyone could misinterpret this statement?"

- You may wish to consider standardizing your Agency's approach to the format and content of specifications and statements of work. Appendix B.2 provides a *Specification/ Scope of Service Guide* which contains guidelines and recommendations for developing specifications, data sheets, and statements of work for supplies, equipment and services. [16]

3.4 SPECIFICATIONS FOR CONSTRUCTION

DISCUSSION

The technical provisions of construction specifications must be in sufficient detail so that, when used with the applicable drawings and the documents incorporated by reference, bids can be prepared on a fair and competitive basis. In contracting with public funds the essential objective in drafting specifications is to satisfy the fundamental public policy requiring full and open competition. This objective is not only a Federal requirement but most states and local governments have similar statutes. [17]

[16] - Prepared by Office of Procurement, The Metropolitan Transit Authority, Harris County, Texas, dated January 1987.

[17] - MPC § 3-203.

Best Practices

Contracting books, manuals, etc. - Volumes have been written about the forbidding and exotic world of construction contracting, and we would like to begin by advising you to obtain some essential roadmaps for this journey, beginning with a comprehensive text entitled, appropriately, *Construction Contracting*. [18] We would also recommend you obtain a copy of the *Construction Contract Administration Manual* (which is devoted entirely to construction contracting) produced by a public agency working with FTA grant funds. [19]

Content -

- Materials, equipment, components or systems should be described, where possible, by reference to documents generally known to industry. Such documents include Federal, military, or nationally-recognized industry, and technical society specifications and standards. The standards which best represent no more and no less than the buying agency's minimum needs should be selected for incorporation by reference into the construction specifications.

- If you employ an A/E firm to develop your specifications be sure they are warned against the use of proprietary specifications, i.e., writing a specification "around" a particular manufacturer's product, effectively precluding competition. This is a common practice among A/E firms, especially when a particular product has a proven track record, but the practice conflicts with the objective of full and open competition in public contracting.

- Keep the specifications as simple as possible**.** One court used these words: "A contractor should not be required to wade through a maze of numbers, catalogues, cross-reference tables and other data resembling cross-word puzzles in order to find out what the government requires in an invitation for bids." [20]

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18 - The George Washington University's National Law Center's Government Contracts Program has published a number of excellent books dealing with Government contracting. One such book is *Construction Contracting* (The George Washington University: Washington, D. C., 1991). For a complete catalogue of contracting-related texts contact: The GW Bookstore, 800 21st. St., N.W., Washington, D. C. 20052, Phone: (202)994-6870, Fax: (202)296-9445, http://www.gwu.bkstr.com.

19 - *Construction Contract Administration Manual*, Port Authority of Allegheny County, Procurement Department, 2235 Beaver Avenue, Pittsburgh, PA 15233-1080, Phone: (412)237-7000, FAX: (412)237-7101. This Manual contains many worthwhile things, such as procedures for bid document preparation, bidding, contract award, and contract administration; General Contract Provisions; a multitude of forms for reporting, evaluating, administering, etc.

20 - Gorn Corp. V. U. S., 424 F 2d 588 (Ct. Cl. 1970), noted at 592.

- You may want to consider using an "Order of Precedence" clause telling bidders which bid documents are to be relied on in the event of a conflict within the documents. You should choose a clause that places the most important part of the bid package in the most important position. For example, if you are certain that the drawings are correct, your clause could give the drawings priority over the specification.

- Complex specifications are best discussed with bidders at a pre-bid conference but be careful to advise bidders that none of the explanations at the conference will qualify the terms of the specifications, which can only be modified by written amendments.

- Be sure to review carefully FTA Circular 4220 (latest version) and the Master Agreement (MA) for requirements which may affect your specifications. Examples would include:

    - Preference for recycled products. [21]

    - Use of metric system. [22]

    - Seismic safety for construction projects. [23]

    - Environmental requirements. [24]

    - Requirements of the Americans with Disabilities Act. [25]

- Describe all of the contractor's obligations as far as meeting codes and standards that are applicable to the project (local, State, and Federal).

- Review the suggestions above for Supplies and Equipment, Section 3.3, for applicability to construction specifications.

[21] - FTA MA(12) § 15g.

[22] - FTA MA(12) § 30.

[23] - FTA MA(12) § 23e.

[24] - FTA MA(12) § 25.

[25] - FTA MA(12) § 12g.

3.5 STATEMENTS OF WORK FOR SERVICES

DISCUSSION

A statement of work, rather than a specification, is used for services contracts. A statement of work defines the work required of a contractor, either to design the equipment to be procured or to provide services which are not related to the procurement of hardware.

Best Practices

Statements of work should include the following elements:

- When buying services on a "level-of-effort" basis, i.e., when specifying the number of labor hours to be furnished by the contractor, be sure to define the labor categories/hours for each and define the minimum years of experience and licensing requirements (CPA, PE, etc.) for each.

- Include, if applicable, a detailed list of all data, property and services which will be provided to the contractor by your Agency for his use in performing the contract.

- Detail all tasks the contractor must perform, and specify coordination requirements.

- Specify the data that must be submitted for approval. Also define the schedules for initial submission and the review/approval time required.

- Describe all the standards the contractor must fulfill, including Federal, State, and local standards that are applicable to the project.

Acronyms

ASBCA - Armed Services Board of Contract Appeals

BCA - Board of Contract Appeals

DOTCAB - Department of Transportation Contract Appeals Board

ENGBCA - United States Army Corps of Engineers Board of Contract Appeals

FTA MA - Federal Transit Administration Master Agreement

GSBCA - General Services Administration Board of Contract Appeals

MPC - American Bar Association Model Procurement Code for State and Local Government

Chapter 4

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4.0 OVERVIEW

REQUIREMENT

The methods of solicitation and selection allowed within the Federal contractual sphere [1] are listed in § 9 of FTA Circular 4220.1E. You may choose:

- micro-purchases only for contract amounts less than $2,500;
- small purchase procedures only for contract amounts less than the simplified acquisition threshold (currently $100,000);
- sealed bids where
  - you have a complete, adequate, and realistic specification or purchase description,
  - two or more responsible bidders are willing and able to compete,
  - the procurement lends itself to a firm fixed price contract and the selection can be made primarily on the basis of price, and
  - no discussion with bidders is needed after receipt of offers;
- competitive proposals; or
- noncompetitive proposals (sole source) procurement only if you can justify not soliciting additional competition in the manner explicitly defined in FTA Circular 4420.1E § 9.h.

State law usually restricts the method of procurement more tightly than these Federal requirements.

DEFINITION

Solicitation - A purchasing entity's request for offers, including a telephone request for price quotations, an invitation for bids, or a request for proposals.

Offer - A promise to provide goods or services according to specified terms and conditions in exchange for material compensation.

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1 - *See* Section 1.3.2, "Federal Contractual Sphere."

Acceptance - Agreement to the terms of an offer. In most jurisdictions, "award" by a public agency can constitute acceptance, and may create an enforceable contract.

DISCUSSION

Based on your procurement plans and the specification developed with your customer, you will generally initiate the procurement by soliciting offers. Depending on the requirements of the method of procurement you choose, you may solicit offers in a telephone call or in many other forms ranging up to multi-volume requests for proposals. When you receive offers (whether quotations, bids, or proposals), you may accept one, reject them all, or (unless you are using the sealed bidding method) request additional offers. Regardless of the procurement method, when you accept an offer, you create a binding contract according to the terms of the offer.

Best Practices

When you and your customer have specified the requirement, you will generally solicit offers from suppliers. The solicitation ranges from a telephone call to make a reasonable price determination (in the case of a micro-purchase), to a lengthy request for proposals in the case of a competitive proposal. The terms in your solicitation of offers are substantially determined by the method of selection you will use. Because your contract will ultimately be based on the terms of the offers, the selection of a method of procurement and the terms in your solicitation of offers are important and you will have the most success if they are based on well-tested practices and documents.

The solicitation of offers places you in the position of controlling the competitive process. You, rather than the supplier, decide whether to accept or reject the offers. A technical exception to this competitive model occurs in some micro-purchases and small purchases when, based on catalogues or other supplier information, you issue a purchase order (or similar document) without receiving a direct offer. In this case you are technically making the offer, and the supplier is in a position to accept (usually by performing) or reject (usually by notice to you).

A solicitation does not bind your agency to purchase the goods or services solicited, although it may create an implied contract of fair dealing with your suppliers. [2] Although you will want to treat suppliers as partners and with respect for the purposes of long run competition and cost-effective business relations, many agencies make clear in their solicitations that they reserve the right to reject all offers, i.e., that they are merely soliciting offers and that the solicitation does not create any rights in suppliers. The price quotations, bids, or proposals submitted by suppliers should be firm offers to your agency to supply the goods or services upon the material terms in your solicitation.

[2] - United States v. John C. Grimberg Co., 702 F.2d 1362, 1367 (Fed Cir. 1983) (in banc).

In sealed bidding, there is generally no further modification of material terms: your agency either accepts one of the offers or rejects all bids. In the other procurement methods, you may request or receive additional offers before you accept one.

Although FTA Circular 4220.1E provides you broad choice and discretion, state laws and local policy often require that you use sealed bids in certain procurements and that you use competitive proposals in others. Based on state law and your own practice, you may find the method of procurement is largely determined by the type of services or goods you are procuring. [3] If the procurement is too large for micro-purchase or small purchase procedures, you will generally invite sealed bids for selection primarily based on price, or request proposals which will be evaluated according to additional criteria before a selection is made. Under certain restricted circumstances, you may solicit a non-competitive proposal from a sole source. Purchases under contracts with sister states or local agencies may also meet the Federal requirements. [4]

If the legal and policy requirements leave you with more than one available procurement method, your choice among these methods will depend largely on:

- the time and expense required of you and your suppliers for the respective methods, and
- the likelihood of getting the best buy for your customers.

When you accept an offer, you establish a contract.

4.1 MICRO-PURCHASES

REQUIREMENT
§ 9.a. of FTA Circular 4220.1E authorizes the use of micro-purchases as a method of procurement, when appropriate. If used, the following apply: 1. Micro-purchases are defined as those purchases under $2,500. 2. Micro-purchases may be made without obtaining competitive quotations if the grantee determines that the price to be paid is fair and reasonable. 3. Micro-purchases are exempt from the Buy America requirements. [5]

[3] - See Chapter 6 for a discussion of the procurement methods commonly used for each object of procurement.

[4] - FTA Circular 4220.1E § 7.f.

[5] - 49 CFR § 661.7, Appendix A to § 661.7, subparagraph (e).

4. Micro-purchases should be equitably distributed among qualified suppliers in the local area and purchases should not be split to avoid the requirements for competition above the $2,500 micro-purchase threshold.

5. The requirements of the Davis-Bacon Act apply to construction contracts between $2,000 and $2,500. [6]

6. Other than the Davis-Bacon Act clauses for construction contracts between $2,000 and $2,500, no other Federal clauses are required.

7. Minimal documentation is required: (a) a determination that the price is fair and reasonable and (b) how this determination was derived.

DEFINITION

Micro-purchasing - A method of procuring goods and services under $2,500. A micro-purchase does not require obtaining competitive quotations if you determine that the price to be paid is fair and reasonable.

DISCUSSION

If permitted by state and local requirements, purchases under $2,500 no longer require more than one price to satisfy Federal requirements, as long as you determine that the price paid is fair and reasonable. You can include a "fair and reasonable price" determination in your forms used for micro-purchases. Rotating through a list of the suppliers is one method to equitably distribute the micro-purchases among qualified suppliers.

Best Practices

A threshold question you must get an answer to is whether or not your state law allows you to implement a micro-purchase method of procurement that does not require "full and open competition." If you have the legal authority under your state law to implement a micro-purchase program, you must comply with the procedural requirements stated as items 1, 2, 4, & 5 under the Requirements portion of this section. Once you are satisfied that you can legally have a

[6] - As a practical matter, you may wish to adopt the statutory threshold for the Davis Bacon Act of $2,000 as the micro-purchase threshold for construction services. This is what has been done with the Federal Acquisition Regulation -- see, FAR § 13.601(a) which defines micro-purchases for construction as being limited to $2,000. However, if you have a requirement for $2,300 of construction, you no longer need competitive quotations, but you still need Davis-Bacon wage rate submissions and compliance.

micro-purchase program under your state's laws, you need to develop a procedure or regulation that addresses the FTA requirements and provides practical guidance to your organization

Limits and Procedures - **How will you guide the use of micro-purchase procedures?** In accordance with the general requirement to have procurement procedures and a contract administration system (including written selection procedures),[7] larger agencies often maintain formal written procedures that address the circumstances under which micro-purchase procedures should be used. Although these circumstances shall not include purchases greater than $2,500, you may wish to set your limit lower depending on state law and your own experience with the cost-effectiveness of price competition using small purchase procedures. If you can efficiently ascertain the lowest cost supplier, you may not always wish to use micro-purchase procedures.

This method of procurement is intended to be used as creatively as possible and to minimize the paperwork that is inherent in other procurement practices. In establishing policies relating to micro-purchases at the grantee level, you must always be mindful of the "equitably distribute" requirement and the prohibition against splitting procurements. [8] The latter requirement is one you already deal with at all levels of your procurement processes. However, a significant requirement is to meet the documentation requirement of the FTA -- a determination that the price is fair and reasonable and how this determination was derived.

Equitable Distribution - **How will you equitably distribute your purchases among local suppliers?** Do you have an automated purchasing and materials management system in place that allows you to track purchases by line item and vendor the item was purchased from? If so, and if you have multiple vendors for that item or service, you can alternate among those vendors. Do you have blanket purchase agreements in place with multiple vendors for multiple products which were established as a competitive process? If so, micro-purchases could be made from those vendors, again on a rotating basis. It is a good practice to keep records on dollar amounts awarded during the year to assist in monitoring distribution.

Bid Splitting - **How will you monitor procurements so that requirements are not being split to avoid another procurement method?** You may have a system in place now that allows you to monitor any tendency to split requirements over your small purchase maximum into small purchases. Micro-purchasing would be an additional method of procurement addressed in your procedures and training within your agency. If you have an automated system which records individual procurements, that system may have to be reviewed periodically to analyze the

7 - FTA Circular 4220.1E § 8.c.

8 - You must not split a procurement that would be in excess of $2,500 (three widgets worth $1,500 apiece for a total of $4,500) into smaller purchases (three sequential purchases of $1,500) in order to use this method of procurement.

procurement patterns for a particular product or service. Many times, you simply rely on your buyer or contracting officer to monitor not only bid splitting but also equitable distribution.

Fair and Reasonable Determination - **How do you document your determination that the price is fair and reasonable and the basis for that determination?** You may want to prepare some "boilerplate" determinations for signature that address specific ways you buy products or services. You may want to say that based upon a telephone quote from John Doe Company for the widget and comparing that price with a price paid 6 months ago for the same widget, it is fair and reasonable -- you would fill in the blanks in your form, sign it, and file in the procurement file. Alternatively, you may use an existing form such as a buyer's tabulation that is filed. You may want to have another form that indicates the procurement is being made from an existing Blanket Purchase Agreement for which competition was obtained. You may want to prepare a form that addresses sales items -- you are buying this widget from X Company based upon an advertisement that the widget normally sells for $35 each and is on sale for $29.50 and this is fair and reasonable. Finally, you may want to have a form that simply addresses a standard commercial item -- the price is fair and reasonable because it is a standard commercial item sold in the open marketplace. [9]

In implementing this requirement at the Federal level, the regulations recognize the paperwork cost of verifying the reasonableness of price may more than offset the potential savings. The price is also essentially assumed to be reasonable unless the contracting officer suspects or has information to indicate that the price may not be reasonable (higher than recent price paid or has personal knowledge of price for the supply or service), or a supply or service is being purchased for which there is not comparable pricing information readily available. [10]

Other Federal Precedent - In response to requests from its own field offices for more guidance, the Federal Government recently revised its regulations dealing with direct Federal micro-purchases. [11] Because these changes give more flexibility to procuring agencies, you might want to review these provisions as you consider policies and guidance for your agency's micro-purchases. Among the changes were:

- the Government-wide commercial purchase card is the preferred means (but not the only means) to purchase and pay for micro-purchases; [12]

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9 - Although it is written for the more detailed "price analysis" required in competitive procurements, FAR § 15.805 discusses price analysis techniques that may be used or adapted to support your determinations for these micro-purchases.

10 - FAR § 13.106(a)(3).

11 - These changes were published as part of Federal Acquisition Circular 90-40 in Volume 61 of the Federal Register on pages 39189 through 39199 (61 Fed. Reg. 39189-39199 (July 26, 1996)).

12 - FAR § 13.103(e).

- agencies are encouraged to delegate micro-purchase authority to employees of the agency who will actually be using the supplies or services being purchased; [13]

- contract clauses are not required for micro-purchases; and

- documentation to support micro-purchases is to be minimized. [14]

A recent report by the General Accounting Office [15] that addresses use of credit cards by Federal agencies is expected to result in more relaxed guidance being issued by the Federal agencies and increased usage of the credit card. The report discusses the savings in time and money that an agency can realize by utilizing credit cards for micro-purchases and the fact that there has been no apparent increase in procurement fraud through the utilization of these cards.

There is no absolute guidance that can be given in this area as to what works best or even well. The authority to use micro-purchases is intended to provide a very flexible procurement method which will allow you to buy low-priced items in a cost-efficient manner.

4.1.1 Purchase Cards

DISCUSSION

This section deals with the use of purchase cards for micro-purchases, which are those of $2,500 or less. Since micro-purchases are exempt from the requirements of publicizing and obtaining competitive quotes, they are well suited to being delegated by the procurement department to the end users of the supplies or services. And since purchase cards have proven to have certain advantages in making micro-purchases, the delegation of authority to use purchase cards will be the focus of this section.

A *purchase card* works like a personal credit card, such as VISA or MasterCard. Purchase cards offer a number of tangible advantages over the traditional purchasing methods of issuing individual purchase orders or blanket purchase orders, but they also present new challenges, especially in the area of internal controls and the equitable distribution of the agency's business to various vendors, including Disadvantages Business Enterprises (DBE's).

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13 - FAR § 13.106(a)(3)(i) and 1.603-3(b). See also Section 2.1.2, "Autonomy" regarding decentralization, generally.

14 - FAR § 13.106(b).

15 - GAO/NSIAD-96-138 (8/6/96). GAO Reports are available on the Internet at the Government Printing Office web site: www.access.gpo.gov.

Best Practices

The San Francisco Bay Area Rapid Transit District (BART) instituted a pilot program for purchase cards on July 1, 1996. The results of the BART program have generally been very positive. The BART experience has demonstrated a number of important lessons, which other grantees should be aware of, and these are discussed below. The detailed procedures adopted by BART for implementing its purchase card system are included in Appendix B.13, *BART Purchase Card System.*

Delegation of Authority - All purchase cards should be centrally controlled out of the Procurement Department**.** The Procurement Department must be responsible for training those individuals who are to be given authority to use the purchase cards. In order to maximize the benefits of micropurchasing with purchase cards, the persons authorized to use the card should be those whose department will be using the supplies or services being purchased. The delegation of authority to end users should involve the appointment in writing of these end users as "contracting officers" (or such other title as the grantee may use to describe those having authority to award contracts). Such an appointment procedure has been adopted by BART, and is also followed by Federal agencies (See FAR 1.603-3, *Appointment*). All purchase card activity would function, therefore, as re-delegated procurement authority requiring a valid warrant, training and periodic review by the Procurement Department. Cardholders would be subject to the same *Standards of Conduct* as other procurement personnel (See BPPM § 2.4.2.2.2 - *Written Standards of Conduct).* They would also be subject to the procurement policies issued by the Procurement Department. The grantee's written procurement procedures must be expanded to give specific guidance for purchase card activity, including the internal controls and the best business practices for users to follow.

Advantages of the Purchase Card - BART has identified a number of advantages in using the purchase card. These include:

- Vendors are now getting paid much more quickly; i.e., within 1-2 days.

- Vendors are responding rapidly to the agency's orders; i.e., within 20-30 minutes of an order.

- If a vendor does not have the needed part, the end user "shops" the street until they can find another vendor who has the part, instead of ordering the part from the initial vendor who would have to "buy" the part and pass it through the blanket purchase order with an additional "markup."

- There is more price competition with the card than with using the traditional blanket purchase order system. In the past, vendors knew how difficult it was to get a blanket purchase order established, so their pricing tended to be inflexible. With the card, vendors know that BART has the ability to go to other vendors, so there is now more

price competition. The bottom-line result is that there are fewer vehicles out for parts and the budget performance has improved.

- The card provides a complete electronic listing of all cardholder activity. This activity can be analyzed using PC software such as MS Office-Access and Excel to look at trends in the data; for example:

- Were any individual transactions over the micro-purchase threshold of $2,500? Are requirements being artificially split to stay within the $2,500 limit?

- Were purchases of similar items for different vendors reasonably uniform in pricing? In other words, does the data prove the reasonableness of prices being paid?

- Is the business being equitably distributed among vendors?

- Are Disadvantaged Businesses receiving an equitable portion of the business? This can become a problem area with the card, and end users need to work to identify potential DBE vendors. The agency's written procedures for the card should make the cardholders responsible for meeting the agency's reasonable and attainable DBE goals.

4.1.2 Consolidation of Micro-Purchases

If you have a large volume of repetitive buys, you should consider whether it is feasible to consolidate these purchases into larger quoting packages in order to get better pricing, reduce inventory levels, and make the procurement operation more efficient in terms of effort expended. The best practice described below may be something you should consider for your agency if you have circumstances similar to those at the Whidbey Island Naval Air Station.

Best Practices

This describes an initiative taken by the Purchasing Manager at Whidbey Island Naval Air Station to analyze the repetitive procurements for standard items from the several different shops at this government facility, and consolidate them into larger quoting packages. The result was a dramatic lowering of unit prices and a much more efficient procurement office in terms of effort spent. This procurement manager also used this technique for her next employer, Community Transit, with similar savings.

When she assumed the duties of Purchasing Manager, this individual began to develop lists of items bought repetitively during the last six-month period. She entered the items into a database for easy retrieval and updating. A list of items was developed for each of the functional user shops that initiated procurements. These included: paint supplies, building supplies, plumbing supplies, grounds keeping supplies, liquid oxygen plant supplies, vehicle maintenance, office supplies, electrical supplies and waste & heating plant chemicals. Once the historical purchases

information was developed, the Procurement Manager sent the data to each of the shop managers and had them review it and update it for their anticipated needs in the upcoming six-month period.

With the anticipated six-month requirements lists in hand, the Purchasing Manager then developed vendor lists for each of the different shop's requirements. Vendors were notified that the anticipated needs for the next six-month period were based on actual historical usage so that there was a certain degree of confidence that the items on the list would be ordered during the upcoming period, although no guarantee was given to the vendors that the Navy would buy the same quantities they had bought in the past. It should also be noted that the six-month contract period was chosen after dialogue with vendors who suggested they would be willing to bid prices without contingencies for inflation if the contract was six months and not, for example, one year. So the contract terms were chosen with the vendors' advice as to what would achieve the best pricing arrangement. For each list of standard items bid, no more than two or three vendors were awarded each list. Then blanket agreements were processed with unit prices that were firm for the six-month period of the contract. This entire procedure was then repeated every six months. The end result was not only dramatically lower pricing and more efficient procurement operations, but also lower inventory levels since the vendors were willing to stock the various items knowing they would in all likelihood get orders for the items. This meant the Navy received the items expeditiously when orders were placed. [16]

4.2 SMALL PURCHASES

REQUIREMENT
Small purchase procedures may not be used if the services, supplies, or other property costs more than $100,000. If small purchases procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources. FTA Circular 4220.1E § 9.b.

DEFINITION

Small Purchase - Acquisition of services, supplies or other property that cost less than the federal simplified acquisition threshold, currently fixed at $100,000.

Small Purchase Procedures - Those relatively simple and informal procurement methods used to make small purchases. If these procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.

[16] - For further information contact Ms. Sandra Kuykendall at skuykendall@islandtransit.org.

DISCUSSION

As a method of procurement, small purchase procedures recognize that up to some statutory level ($100,000 for federal procurements) it could cost more to conduct formal competition than the value expected to be yielded by the formal competition. This procedure requires obtaining only limited competition from an "adequate" number of "qualified" sources (at least two). Solicitations and quotations for small purchases may be either oral or written.

Best Practices

State and Federal Thresholds - As with most other procurement methods, it is important that you determine the dollar threshold for small purchases in your state law and local requirements. In many cases, the definition will not define a small purchase but, rather, will establish at what dollar value competitive sealed bids or proposals are required -- e.g., "before a contract can be awarded in excess of $15,000, the procedures of this statute relating to competitive sealed bids or competitive sealed proposals shall be used." Contracts awarded at the lower of this state level or $100,000 are considered small purchases for the purposes of this discussion and the provisions of FTA Circular 4220.1E.

If your state and local threshold for small purchases is substantially less than $100,000, you may wish to recommend that these requirements be changed to conform more closely to Federal requirements. Alternatively, if the state's requirements above its small purchase threshold are substantially less cumbersome than Federal requirements, you may wish to create an intermediate procedure for small Federal / competitive state purchases. For example, if your state required that in all construction and equipment contracts over $10,000, competition be obtained by a simple posting and solicitation without advertisements, you could establish a procedure for bids between $10,000 and $100,000 that avoided the time and expense of advertising the procurement and relied on direct solicitation to known sources.

Initiating a Small Purchase - **What documentation do you use to initiate this procurement method?** Most transit properties use some sort of requisition that is typically prepared by the unit that has the requirement (your customer) which details how many widgets are required and by when. Many times, this same document will include estimated pricing and this estimate will frequently dictate which method of procurement you will use. Obviously, if the requirement is for $500,000 worth of widgets, you will use a competitive process (IFB or RFP). Your procedures can encourage your customers to attach a draft specification or scope of work to the requisition, particularly if the small purchase method is to be used; otherwise you may assist your customer. (See Chapter 3, "Specifications.")

Should you establish a practice of rotating buyers that are involved in using these procedures from one commodity to another? In rare instances, it has been found that a buyer gets "too close" to a particular vendor and, because of the informality of the procedures, that vendor starts to receive most of the purchase orders for those requirements. Purchase order

records can be reviewed (perhaps through your agency's accounts payable records) to see if one vendor has received an abnormal amount of purchase orders. On the other hand, a buyer who is familiar with the supply industry characteristics of a commodity, such as the manufacturing cycle, lead time, distribution practices, etc., can bring both efficiency and more optimal buying to the work.

Solicitation - **What level of competition is required?** Stated another way, how many individuals or firms must be solicited? It is not unusual to have a requirement that three firms be solicited up to an expected contract value of $5,000 and between $5,000 and $15,000 (the hypothetical maximum), five firms would be solicited. If your source list has more firms than you are required to notify, do you have a procedure to rotate sources? For example on one procurement you will contact firms 1 through 5 and on the next one, you will contact firms 6 - 10. It is not unusual to have procedures that require you to rotate your sources in this manner. By doing so, you are broadening your base of competitors and enhancing your competition.

Is the small purchase for architectural or engineering (A&E) services? If so, A&E services may be procured using small purchase procedures. However, the language in FTA Circular 4220.1E that requires the procurement of A&E services using the Brooks Act procedures also applies. [17] The selection must be based initially on qualifications; price may be considered only for the most qualified offeror. You may proceed to the next most qualified if you cannot agree on a fair and reasonable price. [18]

What level of documentation is required to solicit prices for small purchase non-Brooks procurements? Can you use oral descriptions only, up to a certain dollar value? Are written descriptions (specifications or statements of work) required above a certain level? It is not unusual for small purchase procedures to allow oral descriptions, (particularly if the procurement is decentralized or the buyer has expertise in the item), up to one estimated dollar level and then require written descriptions above that level. Remember, that for construction using federal dollars, the Davis-Bacon Act requirements apply to all procurements (including small purchases) over $2,000. [19] The level of documentation may also be tied to whether or not an off-the-shelf item is being bought or whether the item or service being bought is as per an agency specification. Oral solicitations and quotations may be allowed at a higher dollar level for off-the-shelf products than for products built to agency specifications.

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17 - *See* FTA Circular 4220.1E § 9.e -- "Grantees shall use [the Brooks Act] for contracting for A&E services. . . (emphasis supplied)" *See* Section 6.5 - *Architect-Engineering Services* for a complete discussion.

18 - *See* Section 6.5 - *Architect-Engineering Services*.

19 - *See* discussion of these requirements in Section 8.1.3, "Davis Bacon Act."

Is there a requirement that you include a certain number of DBE firms in the firms you contact? This is a fairly common requirement transit properties use for DBE participation. Compliance with your policies can be systematically documented.

How do vendors indicate their price(s) to you in response to your request? Do you accept oral prices? Do you require written quotations? If so, do you allow faxes? You could do any of these. You must, however, determine what complies with the laws governing your property and then develop and follow appropriate procedures. The format and level of detail in these procedures should be commensurate with the size of your agency and they can be well enough promulgated so that they are well known to members of your procurement staff and your internal customers.

Award - **What happens if the quotations are all higher than your small purchase threshold?** Can you still issue a purchase order or do you have to change methods and perform a competitive procurement? In many states, you will not be able to award an order that is in excess of your state's small purchase threshold. This is why it is a good idea to try to develop an estimate prior to initiating the quotation process. If it is "close", it will probably be better to commence a formal competitive procurement to begin with.

How do I award a small purchase? The most common contractual instrument used to accomplish a small purchase is a purchase order. Typically, after you determine who will provide the best price for the widget, you will prepare a purchase order with the price and other terms and conditions required by your agency and send it to the vendor. In most instances, this document transmission does not create a binding contract -- it is your offer to the vendor to do the work or provide the widget at the price quoted. A contract comes into existence when the vendor demonstrates some level of acceptance of the offer -- usually when accepted in writing, performance commences, or delivery is made. [20]

Documentation - **How much documentation of the procurement process do I need to keep?** One standard you may find useful is to how much would satisfy a third party (an auditor), that you have complied with your agency's policies and procedures and that the price you are paying is "reasonable." This will typically include the requisition (or purchase request), what specification was used (if any), who were quotations requested from, when and what quotations were received and from whom (a simple abstract of quotes received), and a copy of the purchase order. Much of the documentation for small purchases can be accomplished on pre-printed forms or completed on-line if your computer system will allow for that type of input. Remember, it is supposed to be simple, but never forget that we must make an audit trail that can

20 - A "delivery order" as opposed to a purchase order, is issued typically under the terms of a requirements type contract that has been competitively procured under formal procedures. The delivery order is simply an ordering mechanism under that contract and is not an independent contract like a purchase order.

be followed – the clearer and more complete the trail is, the better. Procurement documentation is discussed in Section 2.4.1, "File Documentation."

4.3 COMPETITIVE PROCUREMENT METHODS

4.3.1 Overview -- Sealed bids v. Competitive Proposals

REQUIREMENT

There is no Federal requirement that grantees use the sealed bid or competitive proposal method of procurement for any procurement. These are methods identified by the FTA as methods that may be used as appropriate. [21] The following conditions should be present for sealed bidding to be feasible:

1. A complete, adequate, and realistic specification or purchase description is available;
2. Two or more responsible bidders are willing and able to compete effectively for the business;
3. The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price; and
4. No discussion with bidders is needed. [22]

Sealed bidding is the preferred method for construction if the above conditions are present. [23] If sealed bidding is used, FTA Circular 4220.1E places general requirements on the advertisement, bid period, bid opening, price adjudication, and contract award or rejection of bids. [24]

If, however, a grantee decides to use the competitive proposal method of procurement, the FTA prescribes requirements for publication including evaluation factors, solicitation, evaluation, selection, and award. [25]

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21 - FTA Circular 4220.1E § 9.

22 - FTA Circular 4220.1E § 9.c.(1).

23 - FTA Circular 4220.1E § 9.c.(3).

24 - *See* Section 4.4, "Sealed Bids," and FTA Circular 4220.1E § 9.c.(2).

25 - *See* Section 4.5, "Competitive Proposals," and FTA Circular 4220.1E § 9.d.

For some agencies, state law requires the sealed bidding or competitive proposal method in procuring certain goods or services, or in certain circumstances.

DISCUSSION

If you and your customer (using department) can specify what you need accurately enough, you maybe confident you will receive a satisfactory product or service from any responsible and responsive bidder. In these cases you can maximize price competition and simplify the process by using sealed bids. E.g., supply of diesel fuel normally fits this procurement method.

There are commodities and services that your customers need that are very difficult, if not impossible, to obtain through a sealed bidding process under which award is made to the low responsive responsible bidder. You may not be able to define your requirement precisely enough and/or you may be concerned with performance specifications which are, by their nature, more subjective than design specifications. [26]

There may be technical and price tradeoffs in what you are trying to buy. You may be willing to pay a somewhat higher price to obtain a commodity that does more for your system, but there is a limit to what you will pay. You may find that the quantities or time required are unknown. The price risk associated with a fixed price contract may be burdensome on the contractor and would be borne at too high a price to the agency to use that type of contract. Consequently, you need the ability to negotiate cost elements for the contract that could result in a cost reimbursement type contract.

There may be a variety of good sound business reasons why you need the ability to negotiate a contract and are willing to spend the time to do so. The competitive proposal method is a flexible procurement tool for you to use. E.g., development of a new information system to serve a unique need would probably require a negotiated procurement.

Purpose

Sealed bidding (sometimes called "invitation for bid method" or "formal competition") and competitive proposals (sometimes called "request for proposal method, or "competitive negotiation") are the two principal procurement methods. The sealed bid method is preferred because:

[26] - *See* Chapter 3, "Specifications" for a discussion of these and other specification issues.

- it is a simple process without complex evaluation criteria or repeated requests for and receipt of offers;

- it maximizes price competition by basing the selection among responsive, responsible bidders on price alone; and

- it is the most easily understood by suppliers and the public, maximizing public acceptance and minimizing the opportunity for unethical practice.

However, it requires a very clear specification since it could result in you not getting what you want, and the successful bidder can use ambiguity in the specification to reduce its costs and increase its profit. Nevertheless, this method is required by many state laws for many major transit procurements.

Your customers may not embrace sealed bidding as eagerly. In addition to the burden of specification which often falls on them, they may believe that sealed bidding requires them to set minimums on these parameters just to maximize price competition. Hence, the negative connotation of "low bid" equipment or services. Most states require, or at least permit, use of the competitive proposal method for professional services. Computer system procurements were often classified as professional services, recognizing the design and software development content which made it difficult to specify computer systems for price competition. Today, software systems often have their own exemptions from competitive bidding requirements.

Where it is permissible, there is a growing trend to use competitive proposals. An increasing number of states permit competitive proposals for bus procurements and the American Public Transit Association *Standard Bus Procurement Guidelines* encourage the use of this method. The competitive proposal method is intended to permit competition on quality and other factors, as well as on price. [27] It is a good practice to become familiar with your state laws and work with counsel to maximize flexibility of the procurement process to be used.

Best Practices

Similarities between the Sealed Bidding and Competitive Proposal Methods of Procurement - The competitive proposal method has many common attributes with the sealed bidding process:

- Like an Invitation for Bids, the Request for Proposals is a written document published to the "world", soliciting the submission of offers in response to the Request.

- The objective is to promote full and open competition.

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27 - The Brooks Act procedures, required for Architectural and Engineering services and described in Section 6.5, go one step further by prohibiting price competition and requiring selection based solely on technical criteria.

- The terms and conditions of the solicitation and the resulting contract are spelled out in the Invitation or Request.

- If determined necessary, an opportunity is provided (through a pre-bid or pre-proposal conference) for prospective offerors to meet with procuring agency officials to get answers to questions prior to the submission of the bids or initial proposals.

- A reasonable amount of time is provided prospective offerors in which to prepare and submit their offers.

- Rules are normally provided that specify treatment of offers that are submitted late.

- Award will only be made to an offeror determined to be "responsible."

Differences between the Methods of Procurement - The competitive proposal procurement method differs from the sealed bidding process in that:

- A complete, adequate and realistic specification or purchase description allowing for competition primarily on the basis of price alone may not be available.

- The contract award amount, whether a firm-fixed price or some type of cost reimbursement contract, can only be determined on the basis of costs of the contractor derived from a negotiation process.

- Discussions or negotiations may be needed to address technical requirements as well as proposed cost or price aspects of the offeror's proposal. Discussions may be conducted with one or more offerors who have submitted proposals.

- An opportunity may be given to revise proposals and to submit a final proposal at the completion of the discussion phase of the process.

4.3.2 Common Elements of Solicitation Process

4.3.2.1 Advertising and Publicizing Solicitation

REQUIREMENT
§ 8.a. of FTA Circular 4220.1E requires that all procurement transactions be conducted in a manner providing full and open competition. § 9.c. of FTA Circular 4220.1E requires that invitations for bids are to be "publicly" advertised.

§ 9.d. of FTA Circular 4220.1E requires that requests for proposals are to be publicized.

State law requirements are sometimes more specific as to the content and manner of advertising, particularly when using the sealed bidding method.

DISCUSSION

IFBs and RFPs must be publicly advertised and publicized (respectively) but the precise manner and content is at your discretion within your state law requirements. While the major local newspapers in your commercial community are the most commonly used media, varying procurements will dictate varying media and varying notice periods to most cost-effectively notify the greatest feasible number of 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 mailing list enhancement as discussed in Section 4.3.2.2, "Solicitation Mailing List." However, advertising in appropriate media 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, as well as provides assistance to small businesses and DBE firms interested in obtaining contracts and subcontracts.

Best Practices

Your state legislature, in recognizing a causal relationship between advertising and competition, may have addressed the need for advertising procurements by enacting a requirement to advertise. As with other procurement issues, you should check to see what, if any, specific requirements you are obligated to follow under your state's law. The requirement for advertisement generally takes the form of requiring a notice inviting bids be published at least once in at least one newspaper of general circulation in the state not later than the fourteenth day before the day set for receipt of bids -- the numbers vary from state to state but these parameters are typical.

There are many variations to this general type of notice requirement including the number of times the notice must be published, the number of newspapers it must be advertised in, the target circulation of those newspapers, and the number of days prior to receipt of bids it must be published. The contents of the notice itself are frequently mandated as well: e.g., must include a general description of the items to be purchased, must state the location at which bid forms and specifications may be obtained, and must state the time and place for opening bids. The same rules and notice requirements may apply to both competitive bids and competitive proposals. If you have scheduled a pre-bid or pre-proposal conference, this is also one of the first pieces of information upon which the offerors will act. Remember, what you want to gain from this advertisement are responses from potential bidders or proposers to your up-coming procurement and their interest in receiving the solicitation you plan to issue.

If you are in a position to adopt regulations governing the advertisement of solicitations, you should keep in mind that one of your goals through this effort is to maximize competition. With that as your goal, the following may be of assistance:

- Deciding into which newspapers to place your notices, determine which (if you have a choice) reaches the broadest readership, particularly in the business community (i.e., prospective bidder or proposer).

- Because advertisements are such an expense, try to negotiate with the newspaper to include your notices for free as a "public service." It doesn't hurt to ask, particularly if you have competition for the business. Even if you are unsuccessful in having the notices placed for free, you might be able to obtain a reduced rate.

- Does the city or county have a place where they post notices and is it used by bidders? Can you post there? You may have a place where your agency is required by law to post notices of its meetings (a public meeting act notice) which may be a good place to place these procurement notices as well.

- Does your agency have a "home page" on the Internet's World Wide Web? Getting the word out on upcoming procurements is one of the primary purposes many transit agencies establish a home page in the first place (the other is posting job vacancies). You may also want to consider using existing state-level home pages or bulletin boards. Don't overlook this as a real medium to reach potential bidders and proposers. The federal government is really encouraging companies of all sizes to utilize computers in the procurement process, and has many initiatives to go "paperless." This is particularly evident in small purchases. As the procurement community becomes more sophisticated in accessing and effectively using the Internet, consider utilizing this relatively inexpensive medium to advertise your procurements to a national audience.

- If your commercial environment supports many broad-based newspapers, it may be appropriate to competitively procure newspaper advertising.

- If your advertising volume is significant and your media market complex, you may find that an agency can cost effectively negotiate media availability.

- One of the most effective ways to increase DBE participation in your procurement processes is to advertise in media read by that target community. Your DBE program may require you to advertise in target-specific newspapers to enhance participation by those entities. Your agency's program may be large enough to distribute a regular publication to all vendors certified under your program or to membership lists of such organizations as minority chambers of commerce. Whatever is being done by your agency in terms of advertising the program, you can take advantage of that opportunity and advertise up-coming procurements as well. Because of time requirements in advance

of the actual publication, you may not be able to give all of the detail about a specific procurement, but you still can put the community on general notice about the opportunity.

- Does the construction industry in your community (AGC, ASA, etc.) advertise to its membership notices of up-coming procurements in the public sector? If so, try to get your notices published there as well. Frequently there is no charge for this service.

We have identified in the "Requirements" discussion above, the only FTA requirements that exist in terms of publicizing notices about up-coming procurements. Even though there are no detailed discussion or set of guidelines other than these general statements. [28] It is a good practice to advertise your procurements in a manner that will encourage maximum competition. Find out if your "general circulation" newspaper has national circulation. That is the sort of information that circulation departments of newspapers love to pass on to prospective customers! Consider advertising your large rolling stock and systems-type contracts in national trade association publications such as APTA's *Passenger Transport* and other trade magazines. Also, consider advertising your procurements in the *Commerce Business Daily* (*CBD*) which is the required publication for federal government contract actions. [29]

4.3.2.2 Solicitation Mailing List

REQUIREMENT
In addition to the general requirement for full and open competition which we have discussed above, the only additional requirement dealing (indirectly) with a mailing list is the requirement in FTA Circular 4220.1E § 9.c. that, if the IFB method is used, "bids shall be solicited from an adequate number of known sources."

DISCUSSION

The development and use of a solicitation mailing list is a critical part of the procurement process. This list includes all eligible and qualified concerns that have expressed an

[28] - In 1990, the FTA published *Procurement Guidelines for Third Party Contracting* which included, in Chapter II, Paragraph 7.I, a statement that "All IFBs should be advertised in a manner that promotes participation in the bidding by all qualified and capable firms. Advertising only in the local news media is not normally adequate." This document was canceled by the publication of FTA Circular 4220.1C in 1995 and no further guidelines have been issued. The concept of "all qualified and capable firms" is a viable one under federal law, and suggests that you should tailor your publicity programs to the supply markets for your procurement. This is why we have discussed national and local advertisement in the text of this subsection and why, under the subsequent discussion of mailing lists, it is important that all known firms that provide the item or service being procured be solicited.

[29] - If you are interested in more details about the *CBD* and other federal government policies relating to publicizing contract actions, those details are spelled out in FAR Part 5. FAR § 5.207 details with the specifics of preparing and transmitting the notices for inclusion in the *CBD*.

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, your mailing list for some items will stabilize and you will not be adding too many new names to the list, even after an aggressive and comprehensive advertisement campaign. However, it is important that you continue to "manage" that list and ensure it is kept current and that firms expressing an interest or desire to participate in up-coming procurements are added. During the actual solicitation process (after the solicitation is released), the list takes on added significance because it is the record detailing which firms received the solicitation and to whom amendments should be issued.

Best Practices

Procurement Role of Solicitation Mailing Lists - Very simply put, the solicitation mailing list contains the names, addresses and frequently the point of contact for entities that will receive your solicitation.

Development of Solicitation Mailing Lists - This list can be developed from a variety of sources:

- Prior procurements are reviewed and the names of entities that submitted bids or proposals in response to those procurements are included in the list for this new procurement.

- If what you are going to buy is currently under contract, the incumbent contractor is normally included on the list. [30]

- Firms that responded to your advertisement expressing an interest in obtaining the solicitation you are issuing should be added to the mailing list.

- You may encourage your internal customer to provide you with names of firms it considers capable of filling the requirements of the procurement for inclusion on your list. If the specifications for your requirement were prepared by third party consultants or

30 - If you are not satisfied with the performance of the current contractor, the appropriate remedy is not to arbitrarily decide not to issue the firm a solicitation for the follow-on procurement. If your performance concerns are well documented, you have two alternatives. First, include the firm on the list, address performance record under any appropriate technical criteria. If it is ultimately the apparent awardee, address your performance concerns as part of the responsibility determinations -- the firm may be able to address your concerns at this time to your satisfaction. Second, if the performance concerns are irretrievably deep, it may even be possible to initiate debarment or suspension at the local, state, or Federal level. Debarments and Suspensions as well as Responsibility Determinations are specific topics that are discussed in subsequent sections of this Manual.

contractors, they may be a source for firms that are considered capable of filling the requirements. [31]

- The DBE program office within your agency can identify any DBE firms that may be interested in receiving the solicitation. Depending upon how your database is established, you may need to identify the Standard Industrial Classification (SIC) Code number (or however your agency identifies firms within your database) and furnish that Code to the appropriate office to aid in their search. Any firms so identified can be added to your list as well.

- National, state, and local agencies may be able to assist with lists; e.g., your state economic development office or national trade associations.

- Particularly in construction solicitations, you will want to add to your mailing list plan rooms that are operated by various trade associations or chambers of commerce and any Dodge Room services in your locale. These are ideal locations for specialty subcontractors to review the plans and specifications that are applicable to only their particular specialty without buying the entire solicitation package. The more knowledgeable multiple subcontractors are about your procurement, the better the competition to the prime contractors who will be submitting bids or proposals.

If you will be charging bidders or offerors for your solicitation package (typically the case in construction service solicitations), you may want to send out a pre-solicitation notice indicating the cost and how payment (or deposit) is to be made. Have that payment information returned to your office. You may then include those firms that have provided the required payment or deposit in your ultimate solicitation list.

Similarly, if your mailing list is very long, you may want to mail a pre-solicitation notification to all entities on your list advising them of the upcoming solicitation and asking if they want to receive the solicitation for this procurement. If they fail to respond, you may assume they do not wish to receive the solicitation. This action could result in a smaller (and therefore less expensive) solicitation process, while still allowing everyone on your list the opportunity to compete in the procurement. You may also ask in some or all of these mailings if the firm wishes to withdraw from the list; the quality and maintenance of the mailing lists is important to fostering robust competition.

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31 - If you do receive names of firms from the consultant that prepared the specifications, it is recommended you try to ensure there are no conflict of interest situations existing (e.g., the recommended firm is wholly-owned subsidiary of the specification preparer) or that the specifications are not drafted in such a manner as the only product that will meet the specification requirement is the product of the firm they want added to the list. Don't let this caveat discourage your solicitation of recommendations from that consultant (they are a very good source), just be sensitive to the firms provided.

Management of Solicitation Mailing Lists - You are now ready to issue your solicitation using the list that has been developed. There are a number of management issues associated with the list at this time:

- When mailing the solicitation to the entities on the list, some agencies include a post card indicating that if the entity does not respond to the solicitation (furnish a bid or proposal) it will be removed from the list for future solicitations unless they indicate (on the post card) that they want to be included on future lists. This is a practical recognition that the issuance of solicitations is an expensive process for the agency and only entities that have a real interest in the procurements should receive future solicitations.

- If you have a separate mail room, that group may be responsible for the actual physical issuance of the solicitation. You may wish to double check that the list of entities furnished for the solicitation is the same as the list you have maintained -- be particularly concerned that the incumbent contractor (if there is one) is on the list. Notify the mail room that if a solicitation is returned because of an incorrect address or no forwarding address is available for the entity, you are to be notified immediately so that you can try to determine the cause of the return.

Once the solicitation has been issued, using the mailing list to ensure that any solicitation amendments are furnished to all entities that received the original solicitation is important, as discussed in Section 4.3.2.5, "Amendment of Solicitations."

After the solicitation process is completed, the final administrative task associated with the mailing list is to update it. Indicate which firms on the list responded to the solicitation, which firms did not but asked to receive future solicitations (if you asked for this), and which firms did not respond nor indicate they wanted future solicitations. An updated list will make preparation of the next solicitation that much easier to accomplish.

4.3.2.3 Solicitation

REQUIREMENT
§ 9.c.(2) of FTA Circular 4220.1E requires that invitations for bids be issued with sufficient time to prepare bids prior to the date set for opening the bids. Further, the invitation for bids will include any specifications and pertinent attachments and shall properly define the items or services sought in order for the bidder to properly respond. § 9.d.(1) of FTA Circular 4220.1E requires that requests for proposals identify all evaluation factors along with their relative importance. [32]

[32] - While the IFB requirements of § 9.c.(2) are good practices for both IFBs and RFPs, the evaluation criteria requirement of § 9.d.(1) is relevant only to RFPs and is discussed in Section 4.5.1, "Solicitation & Receipt of Proposals."

DISCUSSION

Your solicitation, whether an invitation for bids or a request for proposals, identifies the procurement, the agency and the contact person(s). It contains simple, clear instructions for preparing an offer, often including a checklist of the items in the offer. It clearly states the time and manner for submitting the offer, and the length of time for which the offer must remain firm (not subject to withdrawal). Many agencies use a three-part, one page form for simple bids; called a "solicitation, offer, and award form." The form invites bids on a list of items, provides space for prices and the bidder's execution of the offer, and space for the agency acceptance.

In more complex procurements where the specification or scope of work is more extensive, a two-part "Offer and Award" form incorporates the specification by reference but still crystallizes the essence of the solicitation in one page to be signed and submitted by the offeror, and signed upon award by the contracting officer. The most expeditious procurements often result from the inclusion of a complete contract in the solicitation. When this is incorporated in the offer, no further terms have to be discussed or executed when the agency accepts the offer.

It is important not to include any unnecessary requirements and keep the solicitation as simple as possible. Large or complex solicitation packages discourage some potential offerors.

Best Practices

Regardless of the method used, there are certain common elements that will be present in a solicitation issued under either the competitive bidding or competitive proposal method of procurement. [33] Many transit properties have developed procurement forms that detail what is included as "boilerplate" in the solicitation process and include the common elements of both methods. Other properties have established, as a procedure, a requirement that "boilerplate" common provisions be included in all solicitations that are then prepared as originals for each procurement. Regardless of which method you use (or any variation of them), the common elements include:

33 - As a matter of information only, reference is made to the FAR § 14.201-1 and 15.406-1 for the "Uniform Contract Format" and FAR § 14.201-9 for the "Simplified Contract Format" used in bidding fixed price contracts. These are optional formats used by Federal departments which include a good discussion of what is included in those formats and why.

Common Solicitation Contents (IFB and RFP)

1. **A form which acts as the solicitation document -** When signed by the bidder or proposer, this acts as the offer which, if accepted by the contracting officer or buyer, results in a binding contract. Although it is typically a single page, it is not unusual for the acceptance document (the contract) to be a separate form. The form typically identifies:

    - A solicitation number for reference;
    - Who to contact for questions;
    - If there will be 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;
    - What additional documents are included in the solicitation and what documents will be included in the contract;
    - Space for the price (offer) to be included;
    - Space where amendments to the solicitation can be acknowledged;
    - Space where the firm can be identified; and
    - Space for the firm official to sign and date the bid or proposal.

If the form is multi-purpose and also acts as the contract, it will typically have space for the contract number, contract amount, line items awarded (if applicable), and a place for the contracting officer to sign and date the contract.

If the instructions are lengthy, and because of the many certification forms typically required, it is becoming more common to provide a separate checklist of all the documents or other submissions required in a responsive offer.

Of special importance is the **address to which offers should be submitted**. Many agencies utilize post office box addresses for their mail, and that is all that is included in the solicitation. All solicitations normally clearly indicate a mailing address to which offers can be mailed as well as a street address to which offers can be delivered, because of the increased use of overnight and courier services. If your agency has the ability, it is recommended that you have a

unique post office box number to which only offers are mailed. In your "delivery" address, you reduce errors by including a specific room number to which offers should be delivered. [34]

2. **A document that describes the various representations and certifications that are required to be made by the bidder or offeror in conjunction with the procurement at the time of bid or proposal submission.** [35] Many of these relate to responsibility-type issues and typically include:

   - A representation as to the type of business the offeror is (individual, partnership, sole proprietorship, etc.);
   - A representation as to the DBE status;
   - A representation that no gratuities have been offered or given with a view toward securing the contract;
   - A certification of independent price determination (prices in offer have been arrived at independently without any communications for the purposes of restricting competition);
   - A certification regarding compliance with the DBE provisions of the contract;
   - A certification of restrictions on lobbying; [36]
   - A certification regarding debarment, suspension, ineligibility and voluntary exclusion; [37]

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34 - A very helpful item to include with your solicitation package is an address label which includes the exact address you want offers mailed to and a separate address label which includes your street address and room number for offers that are delivered to you. With these labels, offerors can affix the applicable one to their offer and you will be assured it is coming to the right place. It is also a good idea for you to include the solicitation number on the labels which is of aid to your mailroom and your staff responsible for receipt of offers.

35 - These representations and certifications have legal significance that should not be overlooked by either the offeror or the agency. The offeror certifies, for instance, that it is not presently debarred or suspended by any federal agency. The contracting officer can rely on that certification and does not have to "look behind it" in determining the firm's responsibility. If it is later discovered that the firm was in fact debarred by a federal agency, it has made a false certification. There are administrative sanctions that can be imposed (contract terminated for default) and possible criminal sanctions under either federal or state laws (or both) for submitting a false statement.

36 - This certification is discussed in more detail in Section 4.3.3.2.3, "Lobbying Certification."

37 - This certification is discussed in more detail in Section 4.3.3.2.1, "Certification Regarding Debarment, Suspension, and Other Responsibility Matters."

- A certification regarding compliance or non-compliance with the Buy America provisions of the Federal Transit Act and 49 CFR Part 661 and; [38]

- Any submissions required by state law.

3. **A document that includes solicitation instructions and conditions -** These typically include instructions relating to: offer preparation; instructions relating to acknowledging amendments to the solicitation; rules relating to late submissions, modifications and withdrawals of offers; instructions relating to the DBE participation goals and program; instructions as to how the contract will be awarded; advice as to agency and FTA bid/proposal protest procedures; advice as to ability of agency to cancel the solicitation; and establishment of an order of precedence covering how inconsistencies between provisions of the solicitation are to be resolved.

4. **A document that includes special contract requirements or provisions (as opposed to general provisions) relating to this particular solicitation and contract that are not addressed elsewhere in the solicitation** - These provisions typically address such things as bonding requirements; insurance requirements; any special permits or licenses required; what property the authority will furnish the contractor and rules relating to that property; liquidated damages; warranties; indemnity provisions; options; contract administration; and rules relating to royalties and patents. If you are going to award a cost-type contract, special provisions relating to those contracts are typically included in the special provisions.

5. **Special provisions required by the FTA through FTA Circular 4220.1E or the Master Agreement which must be included in the solicitation and the contract -** Model clauses for compliance with these requirements are discussed in Section 8.1 and Appendix A.1, and include such provisions as EEO clauses; affirmative action clauses; DBE program clauses; Contract Work Hours and Safety Standards Act provisions; Davis-Bacon Act provisions; Title VI of the Civil Rights Act of 1964 compliance provisions; Clean Air and Water Acts provisions; Energy Policy and Conservation Act provisions; Cargo Preference Act clause; Buy America Provisions; Officials Not to Benefit clause, and Restrictions on Lobbying provisions. Some properties include these as part of the special provisions document, and state law may require similar provisions.

6. **The contractual requirements of the DBE programs -** (Sometimes included in special provisions.) Although the DBE programs for FTA funded projects must comply with 49 CFR Part 23, the contractual language details included in the contracts vary between the individual authorities. Chapter 8 includes model DBE contract clauses that could be used in your contract.

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38 - This certification is discussed in more detail in Section 4.3.3.2.2, "Buy America Certification."

7. **The last of the "boilerplate" forms are the general provisions.** You may have different forms for construction services, A&E services, supplies, services contracts and cost type contracts. It is in the general provisions that you include such clauses as: changes clause; termination for default and convenience; inspection; assignment; the impact of federal, state and local taxes; differing site conditions; excusable delay; variation in quantity; disputes; governing law; indemnification; order of precedence; pricing of adjustments; examination of records; and payment terms.

8. **Each solicitation will have some sort of specification or statement of work or scope of work describing what it is that you are buying**. As we discussed in the Specification section of the Manual, the detail furnished will vary from contract to contract, but it is against this document that you will measure satisfactory performance of the contractor -- did the contractor furnish you with what you requested?

There is no real "best" way to create your solicitation. We have presented the common elements of the solicitation and highlighted those issues or matters that solicitation documents typically address. How you package it is in many respects a function of what is already in place in your organization or, if you are creating a solicitation for the first time, a function of what your prior procurement experiences have been.

The bottom line is that you want to create a document that will get you through the solicitation and contract award process with little or no controversy and through contract performance on time and within budget while complying with the terms of your contract.

4.3.2.4 Pre-Bid and Pre-Proposal Conferences

DISCUSSION

Pre-bid and pre-proposal conferences are generally used in complex acquisitions as a means of briefing prospective offerors and explaining complicated specifications and requirements to them as early as possible after the solicitation has been issued and before offers are received. This is also an open forum for potential respondents to address ambiguities in the solicitation documents that may require clarification. Notice of the conference is included in the solicitation at the time of issuance.

Best Practices

When utilized properly, a pre-bid or pre-proposal conference is a valuable tool for both the agency and the prospective offerors. There are certain common practices and policies relating to this conference that will aid you in achieving a successful procurement.

You will decide with your customer in your solicitation preparation process whether or not you will conduct a pre-proposal or pre-bid conference. It is recommended that you hold one if you believe that your acquisition is so complex or contains peculiar requirements that can only be

addressed by holding a conference for the benefit of your prospective offerors. It may be advantageous if you anticipate that the offerors will not be familiar with your procurement process. Determine if a conference is necessary and put the time and location details in your solicitation.

If you hold a conference, it is helpful to include in your solicitation a format for questions submitted in advance of the conference that will be answered at the conference. Explain that if you have the questions in advance, better and more timely responses can be made to those questions. You normally do not preclude questions from being raised at the conference itself.

Develop an agenda for the conference and arrange to have the appropriate staff members at the conference who can respond knowledgeably to questions. In addition to the procurement official, large agencies generally have a technical representative and a representative from the DBE department, if appropriate, at the conference.

At the conference, have someone present who can develop a record of what transpired, including a sign-in list of attendees. Normally, this list is made available to attendees as a matter of information. One of the uses of this list by potential offerors is determining who else is interested in the project and who might be interested in teaming.

At the conference, advise conferees that remarks and explanations at the conference shall not qualify the terms of the solicitation, unless a written amendment is furnished to everyone. You may actually want to develop a script for this and make it a matter of practice to repeat this at every conference -- it is that important.

Your pre-bid conference or general provisions in your solicitation document may also limit the effect of unwritten statements at the conference or of any other oral or unauthorized changes or qualifications of the solicitation terms. The specifications and solicitation document must stand alone representing the contractual commitment.

During the conference, in addition to responding to any questions raised by the conferees, explain anything unusual about the special provisions or bidding conditions. Your DBE staff member may explain the DBE program and the goals set for the procurement. Your technical staff member may give an overview of the specifications or scope of work. If you have received questions in advance, you can provide both the questions and answers.

At the conclusion of the conference, determine which questions have been raised that will necessitate the issuance of a solicitation amendment. You may have received other questions during this period of time that highlighted the need for an amendment, or an issue might have been raised by internal reviews that necessitated an amendment. It is recommended that you do not leave material questions unanswered - if you don't answer them, you may end up shifting the risk for that ambiguity, conflict or other problem from the contractor back to your agency.

As soon as possible after the conference, finalize the record of the conference and promptly furnish it to all prospective offerors (those on your final solicitation mailing list); whether they were in attendance at the meeting or not. It is important that all prospective offerors be furnished the same information concerning the proposed acquisition. This can be furnished with the amendment if one is to be issued.

Although it is not normally part of a pre-bid or pre-proposal conference, if you want to offer prospective offerors an opportunity to actually visit the site (in an appropriate procurement) it is a good time to do this in conjunction with this conference. You should be sensitive to the cost offerors incur in preparing a bid or proposal and try to allow them to accomplish multiple tasks on the same trip, particularly for those entities that are traveling to your location from another city, state or country.

Mandatory Attendance – The question sometimes arises as to whether grantees may require prospective offerors to attend pre-bid or pre-proposal conferences in order to submit bids or proposals. The answer to this question is that FTA has issued no specific policy statement on this issue. However, the consensus of opinion is that attendance at pre-bid conferences should not be made mandatory. Anything that happens at a pre-bid conference to change what is expected under the contract must be included in the contract document by means of an amendment to the solicitation. It's true that a better understanding may be obtained by being present for face-to-face discussions regarding contract issues but the bottom line remains the clarity of the contract. Experience would suggest that pre-bid conferences sometimes bring out the existence of ambiguities or inconsistencies in contract language. These are then changed in the solicitation/contract and made available to all offerors. The result of this process is that changes in the contractual obligations of the parties find their way into the solicitation by means of an amendment to the original solicitation that is issued to all potential offerors. [39] It can also be conjectured that mandatory attendance at the conference could work a hardship on some potential bidders, especially small businesses. Mandatory attendance may also tend to promote poor contract language because of the feeling that everyone understands the intent of the contract as a result of the discussions at the pre-bid conference, with the result that clarifications to the written contract requirements are not issued.

4.3.2.5 Amendment of Solicitations

DISCUSSION

Frequently, in the course of the solicitation process and prior to receipt of offers, you will find something within the solicitation package that needs to be corrected. This is

[39] - FAR Part 15.201(f), for example, requires the CO to make available to "all potential offerors," upon request, any information distributed at a pre-solicitation conference. The clear presumption of the FAR is that "potential offerors" may not be (and need not be) present at the conference.

something that can be done easily and may enhance competition if the changes are significant (i.e., impact quantity, specifications, or delivery). Each recipient of the solicitation should receive the amendments and should acknowledge that receipt by the time of submitting its offer. You should consider extending the time for receipt of offers, if necessary, to permit offerors to compete effectively under the modified terms.

Best Practices

In many solicitations, someone will bring to your 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 what (or who) requires the amendment, there are a few simple steps/considerations that are normally followed.

As we discussed in the pre-bid/pre-proposal conference section, even if a change was mentioned during that conference, an amendment to the solicitation should be issued. When you change the written terms of the solicitation, it must be done 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. Those forms normally include the following elements (which can also be included in your amendment if you do not use a form):

- Identify the solicitation number of the original solicitation;
- Identify the amendment number;
- Identify the contact person and phone number within your department for further information;
- Indicate whether or not the time and date specified in the original solicitation is changed as a result of the amendment;
- Advise offerors of the need to and how they should acknowledge receipt of the amendment;
- Advise offerors what the changes are; and
- Have 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 mailing list to ensure that any solicitation amendments are furnished to all entities that received the original solicitation is

important, as discussed in Section 4.3.2.2, "Solicitation Mailing List." This is an obvious issue, but some agencies don't realize there is a problem until bids are received that do not acknowledge a material amendment. You then declare the 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 a bidder held non-responsive, it will not necessarily transform the bid into a responsive or acceptable one.

You cannot over-emphasize the administrative importance of furnishing amendments to all entities who received the original solicitation. It is important to have a single point of contact within your organization responsible for issuing solicitations and addenda. Some agencies post a notice at the receipt of offers of the addenda that have been issued. While there is little an offeror can do other than hold back the offer at that point, the offeror may be able to perfect the acknowledgment of addenda and live with the rest of the offer as prepared without the addendum.

One of the critical issues when issuing an amendment is whether or not to extend the time and date for receipt of offers. You should consider the impact of the changes you are making in light of the time it will take a prudent offeror to incorporate those changes. 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 "cookie cutter" answer to how much additional time, if any, should be allowed -- you want to allow sufficient time for the changes to be considered in a meaningful manner.

One "warning:" this may be the first time in the solicitation process you run into the schedule your internal customer has established. Your instincts may say that the time and date set for receipt should be extended but your customer may say the change is negligible and no time is warranted. Early planning and communication with your customer may build in some time for changes like this. If not, the consequences may be fewer competitors, a protest, pricing that includes unnecessary contingencies, or post-award discovery of specification conflicts that require compensation for changes.

If a decision is made to amend the solicitation with bids due in two days, consider notifying prospective offerors by telephone, FAX, or telegram of the new date and time and follow that notification up with an amendment to the solicitation. If you have already received offers in your bid room, it is recommended that you notify the offeror of the amendment to inquire if they want their offer returned. [40]

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40 - If you cannot identify who the offeror is in this situation without opening the bid or proposal, it is recommended that you open it in the presence of a witness. Write down the name and address of the offeror only, and reseal the envelope or package. Return it to the offeror with a cover letter that the package was opened only so the offeror could be identified. It is also recommended that a memorandum to the file be made by you and your witness describing what happened and why. You might want to copy the outside of the envelope to show no identification but it is recommended that no copies be made of any of the offer documentation.

There are special rules regarding solicitation amendments that incorporate revisions or modifications of Davis-Bacon Act wage determinations. These rules are discussed in detail in Section 8.1.3.

If, because of schedule distress, you proceed with the procurement without a necessary amendment, adverse consequences are likely when the change is brought forward with the ultimate contractor and the contract must be modified. [41] It is even possible that the change would constitute a cardinal change if attempted after award, and would require a new competition; in this case you have little choice but to amend and postpone.

4.3.3 Common Elements of Offers

4.3.3.1 Receipt of Offers

DISCUSSION

The culmination of your solicitation process is the receipt of bids or proposals. Regardless of the method used, great importance is attached to the time of receipt. Preparations are made to ensure that offers are not delayed and are properly recorded. Your solicitation may contain a checklist of items to be submitted with the offers, and the individual submittals are discussed in the following sections.

Best Practices

Timeliness [42] - Why do you care if a bid or offer is late or not? If the price is the lowest or the best response of the group, what difference does it make if it was received on time or not? 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 that 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 language has been developed to address what rules would be followed if an offer is received late. [43] That language is typically

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41 - *See* Section 9.2, "Changes" for a more general discussion of the costs of changes.

42 - *See* also the discussion of timeliness in Section 4.4.2, "Bid Opening."

43 - As a matter of reference, your attention is invited to FAR § 52.214-7 and 52.215-10 for language addressing late submissions, modifications, and withdrawals of offers that is incorporated in FAR-covered solicitations for IFBs and RFPs respectively. For commentary in the FAR itself relating to those solicitation clauses, *see* FAR § 14.304 and 15.412 respectively. Primarily because of the body of law that has developed interpreting these clauses, many transit properties have either adopted this language or have modified it slightly to meet their individual requirements.

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. A solicitation provision, and the explanatory rules relating to the provision, generally include some or all of the following:

1. **What are the consequences of an offer that is received after the exact time specified for receipt?** Generally, the offer will not be considered at all. [44] You may want to carve out exceptions to this absolute rule, and some will be suggested below. These exceptions consist generally of the sets of circumstances which you can determine in advance and set out in your solicitation which, when proven within a specified time by the offeror, would demonstrate that the delay was due solely to some independent event or action, such as the documented failure of a registered delivery service. If the offer is received after the contract is awarded, there are generally no exceptions. That offer will not be considered at all.

2. **If you decide to allow consideration of "late" offers, under what conditions will you consider them?**

   - *Will you consider offers that are hand-delivered late?* It is the responsibility of the offeror to make sure its offer is at the place designated in the solicitation by the time indicated. If it chooses to use a delivery/courier service or deliver its offer in person, it must allow sufficient lead time to get it there on time. Normally, such excuses as "I was in an accident", "The traffic was heavier than usual", or "I couldn't find a place to park" are not acceptable to excuse a late hand-delivered offer. If, however, the reason the proposal is late is because of problems at your agency (e.g., your security guard directed the courier to the wrong room) you may want to consider those excuses -- in effect, you (the agency) were the reason the offer was late.

   - *Will you consider offers that were mailed but not received until after the time and date set?* It is not unusual to consider mailed offers if certain facts can be established. If they were sent by registered or certified mail five calendar days (or some greater or lesser number of days) prior to the date specified for receipt of offers, they will be considered if the postmark on both the envelope or offer wrapper and the original receipt clearly establishes the offer was mailed before the five day window. If you want to allow this exception, a provision which clearly and unambiguously establishes the rules which will be acceptable to you will save extended argument and resentment in the inevitable test cases.

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44 - Some practitioners erroneously refer to the consequences of a late offer as one of "non-responsiveness." In fact, you never open the offer (unless needed to for identification purposes) and thus cannot determine whether it is responsive to the material requirements of the solicitation (the general definition of responsiveness). Had the offer been received on time, it may well have been responsive but, in this case, the offer is not even considered!

- *Will you consider an offer that was mailed (not registered or certified) but you are able to ascertain that it was mishandled in the mailroom?* It was properly addressed and, in the normal course of business at your agency, should have been delivered to your bid room on time. However, it was sent to the wrong department or fell behind a desk in the mailroom. Again, if you can establish it was received in your agency prior to the time and date set for receipt but didn't get to you until "late", your policy might want to allow consideration of that offer. If so, spelling that exception out in your solicitation clause avoids many questions.

- *Will you consider offers that were sent via an "overnight" service? If so, which service(s) will you consider?* It is not unusual to limit the service to the U.S. Postal Service Express Mail Next Day Service and, even in that limited situation, the package must be dispatched by 5:00 p.m. at the place of mailing two working days prior to the date set for receipt of offers. If you include Federal Express and other reliable overnight courier services, be sure you spell out exactly what service(s) you will allow.

- As a result of an increase in procurements being conducted via electronic commerce, rules have been developed addressing late offers received through that medium. Generally, the offer must have been received by the contracting agency no later than 5:00 p.m. one working day prior to date specified for receipt of offers. If you are into electronic commerce procurements, you need to consider the consequences of late offers through that medium as well.

"I've got this great policy patterned after the FAR clauses on consideration of late offers and here it is, a day after I opened bids and another bid comes to my office through the mail. What do I do?" If it was mailed "regular" first class mail, you normally would retain the bid, unopened, and advise the offeror that its bid was received late and will not be considered. If the envelope or wrapping indicates it was mailed registered or certified (the clause may have been complied with), you need to notify the bidder that its bid was received late and will not be opened unless, by a reasonable date established in your notification, it can furnish you with the original post office receipt establishing compliance with the exceptions you have adopted in your provision.

Because these issues have such a high probability of being protested or litigated, it is recommended that as soon as you become aware of the receipt of a late offer, you notify your legal counsel for advice on what action to take. Many of the exceptions recognized in the law are very fact-intensive and care must be taken in ascertaining all of the facts and responding appropriately to what facts existed.

Completeness of Offer - Besides the obvious things (like the bid or price schedule), there are a number of matters that are normally submitted with the offer, whether it is a bid or a proposal. These items either are required by law or the natural development of the procurement process

has resulted in this being a good (or the best) time for some things to get into the hands of the procurement officials. Many of these matters are taken care of in the various representations and certifications that are submitted with the offer and which normally address responsibility-type questions that aid in processing the ultimate contract for award. Others, such as acknowledgment of solicitation amendments and bid bonds can go to the issue of whether the offeror is responsive -- did it consider a material amendment when it submitted its offer?

In our discussion on common elements of the solicitation (see Section 4.3.2.3), we covered the common practice of developing a separate document to include in your solicitation for all the representations and certifications that you want each offeror to complete and return with its offer to you. If they are all in one place, it is much easier for the offeror to ensure it has furnished you everything you need as well as you don't have to worry about forgetting to ask for something -- Everything you need is on one form.

4.3.3.2 Federally Required Submissions with Offers

REQUIREMENT
§ 16 of FTA Circular 4220.1E, entitled "Statutory and Regulatory Requirements" states that: "A current but not all inclusive and comprehensive list of statutory and regulatory requirements applicable to grantee procurements (such as Davis-Bacon Act, Disadvantaged Business Enterprise, Clean Air, and Buy America) is contained in the FTA Master Agreement. [45] Grantees are responsible for evaluating these requirements for relevance and applicability to each procurement. For example, procurements involving the purchase of iron, steel and manufactured goods will be subject to the 'Buy America' requirements in 49 CFR Part 661. Further guidance concerning these requirements and suggested wording for contract clauses may be found in FTA's Third Party Procurement Manual."

DISCUSSION

The FTA has included a comprehensive listing of contract clause requirements in the Master Agreement. A copy of that Agreement is an appropriate item for the procurement official's desk book of reference materials. We will, in this subsection, highlight generally the federal requirements that are germane to our discussion here of items that should be submitted to the transit property as part of the solicitation process involving either IFBs or RFPs. We will also discuss in more depth four specific certifications that are federally required. [46]

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[45] - These requirements and applicable clauses are discussed in depth in Chapter 8.

[46] - *See* also Chapter 8, "Contract Clauses," and Appendix A.1, "Federally Required Model Clauses."

4.3.3.2.1 Certification Regarding Debarment, Suspension, and other Responsibility Matters

REQUIREMENT
Executive departments and agencies shall participate in a government-wide system for (nonprocurement) debarment and suspension. [47]

DISCUSSION

Much like the "common grant rule" (49 CFR Part 18), the federal government has adopted a "common rule" on the government-wide effect of debarments and suspensions. DOT's implementation of that common rule is found at 49 CFR Part 29. The policy behind this rule is that a person or entity who is debarred or suspended shall be excluded from Federal financial and non-financial assistance and benefits under Federal programs and activities. As stated in the regulations, debarment [48] and suspension [49] are serious actions which should be used only in the public interest and for the protection of the federal government and not for the purposes of punishment. [50]

In order to protect the public interest, it is the policy of the federal government to conduct business only with responsible persons. [51] Persons who have been debarred or suspended are not "responsible" and, unless approved by the FTA, contracts will not be awarded to those persons. [52] The certification required by this common rule must be submitted with the offers, and is also an aid to expedite the procurement process by providing critical information as to the responsibility determination that the contracting officer must ultimately make. [53]

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47 - 49 CFR Part 29, "Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)."

48 - "*Debarment*. An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is 'debarred'." 49 CFR § 29.105.

49 - "*Suspension*. An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is 'suspended'." 49 CFR § 29.105.

50 - 49 CFR § 29.115(b).

51 - 49 CFR § 29.115(a).

52 - *See* § 3b of the Master Agreement, Form FTA MA(12).

53 - Because it is discussed as an aspect of responsibility, and can be objectively determined at any time up to the time of award, late submission of the debarment certification can be permitted.

Best Practices

The debarment and suspension certification found at Appendix B of Part 29 (and as set forth in Appendix A.1 of this manual) is mandatory for use in contracts over $100,000 involving federal funds.

Include the instructions for the certification as well as the certification. Don't try to save space in your solicitation by only including the certification -- the instructions are too critical. It is recommended that you make this certification a topic at your pre-bid or pre-proposal conference if the resulting contract will exceed $100,000.

Even though you request this certification from all offerors, failure to receive it with a bid (in the sealed bidding method of procurement) is not a responsiveness question -- this goes to a contractor's responsibility and may be received and talked about after bids are received. It must be received prior to award.

The certification and regulations allow you to rely on your contractor's certification that it is not debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in your contract as an element of your responsibility determination. However, if you know that the certification is erroneous, you may not rely on the certification.

The certification and regulations state that you may, but are not required to, check the *List of Parties Excluded from Federal Procurement and Nonprocurement Programs* to determine the eligibility of your contractor and its subcontractors. The *List of Parties Excluded from Federal Procurement and Nonprocurement Programs* is available from the General Services Administration in either a printed version or an electronic version. The printed version is published monthly and may be obtained by purchasing a yearly subscription. [54] The electronic version is updated daily and provides access to the names of firms and individuals on the list through your computer. [55] GSA also offers a telephone inquiry service to answer general inquiries about entries on the *List* at (202) 501-4873 or 4740. [56]

Although not required by the FTA, some transit properties check the *List* on all their procurements, whether or not federally funded. Even if you are using local dollars, do you want to award a contract to, or approve a subcontract for, a contractor/subcontractor that has been

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54 - You may subscribe by writing the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 or by calling the Government Printing Office Inquiry and Order Desk at (202) 783-3238.

55 - The list can be accessed 7 days a week, 24 hours per day and aside from normal costs of local or long-distance telephone calls, the access is free to the user. To obtain a copy of the user's manual for accessing the system, contact GSA at (202) 501-4740.

56 - GSA advises that responses to these inquiries should be furnished within one working day.

debarred, suspended, or proposed for debarment by the federal government? Is that entity responsible? You may at least want to inquire about the action prior to making your final responsibility determination. If you know you would want to use debarment information in a non-Federally funded procurement, you may wish to mention it in your solicitation's responsibility clause.

If the apparent awardee of your solicitation (e.g., the lowest responsive bidder) has submitted a conditioned certification, you can use that information in arriving at your responsibility determination and find the firm non-responsible. However, the firm may have submitted information you believe is extenuating enough to warrant award consideration. Remember, if you want to award a contract to a firm that has submitted a conditioned certification, you cannot make an award until you have received approval for the award from the FTA. [57] It is recommended as soon as it appears you will be faced with this situation, you notify your regional FTA office for guidance and instructions on what information they need and submit it promptly.

4.3.3.2.2 Buy America Certification

REQUIREMENT
§ 14.a of the Master Agreement states that: a. Buy America. The Recipient agrees to comply with 49 U.S.C. § 5323(j), FTA regulations, "Buy America Requirements," 49 C.F.R. Part 661, and any implementing guidance FTA may issue.

SUMMARY

The Buy America requirements apply to all contracts for rolling stock, steel, iron, or manufactured products with a value greater than $100,000. For these contracts, the grantee must obtain a certification of compliance or non-compliance with the Buy America requirements with each bid or offer. If the bidder or offeror is not able to comply by using the requisite American content and certifies non-compliance, it may qualify for a waiver, which the grantee must request before award. FTA may grant a waiver if it is found that it is in the public interest, there are no U.S. products available, or there is a 25 percent price-difference between the foreign and domestic products.

REQUIREMENTS

Steel and iron: All steel and iron manufacturing processes must take place in the U.S. These requirements apply to all construction materials made primarily of steel or iron and used in

[57] - *See* § 3b of the Master Agreement, Form FTA MA(12).

infrastructure projects such as transit or maintenance facilities, rail lines, and bridges. The requirements do not apply to steel or iron used as components or subcomponents of other manufactured products or rolling stock. 49 C.F.R. 661.5(a), (b), and (c).

Manufactured products: The product itself must be manufactured in the U.S. with 100 percent U.S. components; foreign subcomponents are allowed. 49 C.F.R. 661.5(d).

Construction contracts - Except for the iron and steel used in a construction contract, FTA treats the procurement of a construction project as the procurement of a "manufactured product" subject to 49 CFR 661.5(d). Final assembly of the project takes place at the construction site, and items directly incorporated into the project at the job site are considered "components." For instance, if the deliverable under a particular contract is the building of a passenger terminal, the terminal itself is the end product, and the main elements incorporated into the terminal, e.g., shelters, elevators, and platforms, are components of the end product. These main elements are generally specified in the construction contract. *However, you must first satisfy the steel and iron requirements, as discussed in 661.5(b) and (c), before applying the manufactured product section as discussed above, to the balance of the construction contract.*

Rolling stock (including train control, communication, and traction power equipment): The cost of components and subcomponents produced in the U.S. must be more than 60 percent of the cost of all components and final assembly must take place in the U.S. 49 U.S.C. 5323(j)(2)(C) and 49 C.F.R. 661.11. Part 661.11 is a road map for grantees and contractors to follow when determining compliance with the domestic content requirements for rolling stock. It discusses in detail what constitute components and subcomponents. It also illustrates train control equipment, communication equipment, and traction power equipment (at subsections (t), (u), and (v)); and provides a list of typical components of rail and bus rolling stock in the Appendix. The March 18, 1997, Dear Colleague letter lays out the requirements for final assembly. The March 30, 2001, Dear Colleague letter discusses calculation of domestic content, specifically noting that all items included in the list of typical components in the Appendix to 661.11 must be considered components, not subcomponents. For more discussion, please see the Notice of Dear Colleague letter published in the Federal Register. 66 Fed. Reg. 32412 (June 14, 2001).

[Note: The Buy America requirements are different from the *Buy American* requirements. The latter applies to direct federal procurements. The Buy America regulations discussed here, apply only to federal assistance programs funded by the Federal Transit Administration.]

Best Practices

If you spend much time in procurement, a copy of 49 C.F.R. Part 661 is one of those "mandatory" documents for your procurement desk book. You will be constantly referring to these rules throughout your career in transit, whether you are buying buses, rail cars, computers or a construction project. Because these rules are so critical, it is also important that you keep abreast of FTA guidance and final rules impacting these regulations as published in the *Federal Register* or on the website. FTA's Buy America web page is

http://www.fta.dot.gov/legal/buy_america/14328_ENG_HTML.htm. The web site has links to the regulations, all relevant Federal Register publications, waivers and letters of interpretation, frequently asked questions, rolling stock handbooks, and related Dear Colleague letters.

Notice Requirements

When a contract for rolling stock, steel, iron, or manufactured products is estimated to exceed $100,000, 49 C.F.R. 661.13 requires that the solicitation include "an appropriate notice of the Buy America provision." A model clause addressing that requirement is included in Appendix A.1, "Federally Required Model Clauses" of this Manual. This suggested language is written as a preamble to the certifications required by Parts 661.6 and 661.12.

Other grantees have satisfied this notice requirement in their general or special provisions by including language substantially as follows:

> *Buy America Provision*
> *This solicitation and the resulting contract are subject to the Buy America requirements of 49 U.S.C. §5323(j) and the Federal Transit Administration's implementing regulations found at 49 C.F.R. Part 661. These regulations require, as a matter of responsiveness, that the bidder or offeror submit with its offer a completed certification in accordance with Part 661.6 or 661.12, as appropriate. These certifications are set forth in this solicitation at [identify where the certifications are].*

Certification Requirements

49 C.F.R. 661.13(b) requires that you include in your solicitation a requirement, as a condition of responsiveness, that the bidder or offeror submit with the bid or offer a completed Buy America certificate in accordance with Part 661.6 for steel, iron, and manufactured products, or Part 661.12, for rolling stock (including train control, traction power, and communication equipment). In a sealed bid, the bidder is bound by its certification and cannot change it after bid opening, except as provided for clerical error. If the bidder does not submit a signed certification with the bid, submits the wrong certification of compliance, or certifies both compliance and non-compliance, that bid is non-responsive and cannot be considered. Except as discussed below for clerical error, you cannot go back and ask, in a competitive sealed bidding procurement, for the bidder to complete the certification and submit it after bids are opened.

In competitive negotiated procurements (i.e., requests for proposals), certifications submitted as part of an initial proposal may be superseded by subsequent certifications submitted with revised proposals, and the certification submitted with the offeror's final revised proposal (or best and final offer) will control. However, where the grantee awards on the basis of initial proposals without discussion, the certification submitted with the initial proposal will control.

The clerical error provision allows bidders and offerors to change a certification of non-compliance to one of compliance *only if the bidder or offeror certified wrongly due to a clerical or inadvertent error*. 49 C.F.R. 661.13(b). More explanation of this provision can be found in the Final Rule published in the Federal Register. 68 Fed. Reg. 9797 (Feb. 28, 2003). If the bidder or offeror certifies it will comply with the Buy America requirements, it will not be eligible later for a waiver of those requirements. 49 C.F.R. 661.13(c).

The certification requirement for procuring steel, iron, or manufactured products is at 49 C.F.R. Part 661.6. This certification language refers to sections of the Surface Transportation Assistance Act of 1982 (steel and manufactured products) and not to the most recent version of the statute, found in 49 U.S.C. 5323(j) (steel, *iron*, and manufactured products). The certification language in Appendix A.1, "Federally Required Model Clauses" accurately references the correct statutory provision. You should use this until the FTA publishes technical corrections to this C.F.R. section. The bidder or offeror has a choice of two certifications to complete, either:

- it will comply with 49 U.S.C. 5323(j)(1) and 49 C.F.R. 661.5; or
- it cannot comply with 49 U.S.C. 5323(j)(1) and 49 C.F.R. 661.5, but may qualify for an exception under 49 U.S.C. 5323(j)(2)(A), 5323(j)(2)(B), or 5323(j)(2)(D), and 49 C.F.R. 661.7.

The certification requirement for procuring rolling stock (including traction power, train control, and communication equipment) is at Part 661.12. This certification language also refers to sections of the Surface Transportation Assistance Act of 1982 and not to the most recent version of the statute, found in 49 U.S.C. 5323(j). The certification language for 661.12 in Appendix A.1, "Federally Required Model Clauses" of this Manual accurately references the correct statutory provision. You should use this until the FTA publishes technical corrections to this C.F.R. section. The bidder or offeror has a choice of two certifications to complete, either:

- it will comply with 49 U.S.C. 5323(j)(2)(C) and 49 C.F.R. 661.11; or
- it cannot comply with 49 U.S.C. 5323(j)(2)(C) and 49 C.F.R. 661.11, but may qualify for an exception under 49 U.S.C. 5323(j)(2)(A), 5323(j)(2)(B), or 5323(j)(2)(D), and 49 C.F.R. 661.7.

Waiver Requirements

If a bidder or offeror executes the certification indicating that it cannot comply but may qualify for an exception, you must review the circumstances to determine if you should request a waiver from FTA. If you do not request a waiver or you request it and it is denied, you must award to a compliant bidder or offeror if you plan to use federal funds. The Buy America requirements may be waived in three specific instances:

- <u>If the requirements are inconsistent with public interest</u> - Unless a general exception is set out in the Appendix to Part 661.7 of the regulation, this waiver requires a determination

by the FTA Administrator, on a case-by-case basis, that to require compliance is "inconsistent with the public interest." 49 U.S.C. 5323(j)(2)(A) and 49 C.F.R. 661.7(b).

- If the materials are not available in from the U.S. - This waiver requires a determination by the FTA Regional Administrator that the materials for which a waiver is requested are not produced in the U.S. in sufficient and reasonably available quantities and of a satisfactory quality. If no responsive and responsible bid is received offering an item produced in the U.S., it will be presumed the conditions exist to grant this non-availability waiver. In the case of a sole source procurement, the waiver will be granted only if the grantee provides sufficient information which indicates that the item to be procured is only available from a single source or that the item to be procured is not produced in sufficient and reasonably available quantities of a satisfactory quality in the U.S. 49 U.S.C. 5323(j)(2)(B) and 49 C.F.R. 661.7(c).

- If the cost of the domestic product is more than 25 percent higher than the foreign product - This waiver requires a determination by the FTA Regional Administrator that including a domestic item or domestic material will increase the cost of the contract between the grantee and its supplier of that item or material by more than 25 percent. This waiver cannot be applied to components or subcomponents. 49 U.S.C. 5323(j)(2)(D) and 49 C.F.R. 661.7(d).

- General waivers - Appendix A to Part 661.7 lists specific waivers for which applications are not necessary. This list includes all waivers published in 48 C.F.R. 25.104, [58] Chrysler vans, microcomputers and small purchases under $100,000. A general waiver has also been granted under the rolling stock requirements of Part 661.11 at Appendix A. Under this waiver, the provisions of this section do not apply when foreign source spare parts for buses and other rolling stock whose total cost is 10 percent or less of the overall project contract cost are being procured as part of the same contract for the major capital item. If the product offered qualifies for a permanent discussed here, the bidder or offeror should certify compliance with Buy America.

Generally, only grantees may apply for a waiver. However, if a bidder or offeror is seeking a waiver under Part 661.7(f)(waiver for component or sub-component under rolling stock procurements) or Part 661.7(g) (waiver for specific item used a manufactured product), FTA will consider a request for waiver directly from the bidder, offeror, or supplier.

The grantee may request a waiver from FTA when there is a viable public interest argument supporting award to a non-compliant bidder or offeror when there is a compliant bidder or offeror; when there are no compliant bids or offers (including a justified sole source to a non-compliant bidder or offeror); or when there is more than a 25 percent price difference between

58 - The text of the regulation refers to Part 25.108, but this section has been moved to Part 25.104.

the compliant and non-compliant bid or offer. *Otherwise, the grantee must award to the compliant bidder or offeror meeting all requirements for award.*

Applications for waivers are processed following 49 C.F.R. 661.9. Except as noted above, the waiver request must be obtained "in a timely manner" through the grantee. Grantees should therefore review the bids or offers and request a waiver, if one is necessary, before award. The grantee's request for waiver must be made in writing and include all facts and justification to support the waiver, and be submitted to the FTA Administrator through the appropriate FTA Regional Office. The Administrator (or Regional Administrator, in cases where authority has been delegated) will issue a written determination setting forth the reasons for granting or denying the waiver.

Investigations

FTA's Buy America investigative procedures establish a presumption that a bidder who has submitted a Buy America certificate is in compliance with the regulation. FTA will investigate if it finds that this presumption has been overcome. FTA may initiate an investigation on its own or in response to a third-party petition. The regulation requires that the petition include a statement of the grounds of the petition and any supporting documentation. 49 C.F.R. 661.15.

Intentional Violations

49 C.F.R. 661.18, states that any person determined by a Federal agency or court to have intentionally affixed a false "Made in America" label to, or misrepresented the origin of, a product that was used in the project but which was not produced in the United States is ineligible to receive an FTA-funded contract.

For instance, if a person has been convicted by a court of making a false certification under these provisions, that person would be ineligible for award of a contract. If there was a violation but not a conviction, the information could still affect your responsibility determination. Similarly, if it was determined (perhaps through a suspension or debarment proceeding conducted by a federal agency) that the person falsely represented the American origin of a product, that person would similarly be ineligible for award of a contract.

If the violation is discovered after award, the contractor remains responsible for performing the contract, including satisfying the Buy America requirements. A typical resolution is to permit the contractor to substitute a different product that meets the specifications including the Buy America requirement at the contractor's expense. In rare instances, FTA may approve a public interest waiver allowing the non-compliant product to be used.

4.3.3.2.3 Lobbying Certification

REQUIREMENT
§3.d of the Master Agreement states that: d. Lobbying Restrictions. The Recipient agrees as follows: (1) Refrain from using Federal assistance funds to support lobbying, and (2) Comply, and assure the compliance by each third party contractor at any tier and each subrecipient at any tier, with applicable requirements of U.S. DOT regulations, "New Restrictions on Lobbying," 49 CFR Part 20, modified as necessary by 31 U.S.C. § 1352.

DISCUSSION

The requirements set forth above have been included in all grants between the FTA and its grantees with a requirement that the certification flow down to all contractors and subcontractors for whom a contract involving federal funds in excess of $100,000 is contemplated. The requirement has two aspects to it: First, the certification itself must be executed and returned with the bid or proposal. Second, in the event funds of any sort have been used for lobbying activities [59] by the contractor or any subcontractor; a Standard Form-LLL, "Disclosure Form to Report Lobbying" must also be completed. It is your ultimate responsibility to ensure that these certifications and disclosure forms are submitted to the FTA. [60]

Best Practices

Certifications Required - In all solicitations that are expected to result in contract amounts in excess of $100,000, the certification set forth in Appendix A to 49 CFR Part 20 must be included. The certification is also included in Appendix A.1, "Federally Required Model Clauses" of this Manual under the "Lobbying" contract provisions.

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[59] - The payment to any "person" to influence or attempt to influence an officer or employee of any federal department or 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. 49 CFR § 20.100(a).

[60] - Because the language of the regulations refers to needing the certification and applicable disclosures at time of award, unless your solicitation specified otherwise, failure to submit the executed certification with the offer would probably not be considered a responsiveness issue in a competitive bidding procurement, and would not disqualify the offer.

Although it is not required that you include a copy of the Standard Form LLL in the solicitation, it is recommended that you have a copy available to furnish to an offeror if one is requested. A copy is included in the CFR section and may be reproduced. [61] A copy may also be available from your legal counsel or federal grants office because the agency had to furnish a copy to the FTA as well as part of the Grant-making process.

Timeliness - The certification (and Standard Form LLL if applicable) should be executed and returned with the bid or proposal. Because the language of the regulations refers to needing the Certification and applicable disclosures at time of award, failure to submit the executed certification with the offer would not be considered a responsiveness issue in a competitive bidding procurement.

Subcontracts - You may not always know who your prime contractor subcontracts with, particularly in fixed price contracts. It is recommended that during any pre-performance conference you have with the prime, you remind him or her of the requirement to forward the certification and disclosure statements made by subcontractors at any tier who have subcontracts in excess of $100,000 through the tiers to the contracting officer.

4.3.3.3 Other Submissions

4.3.3.3.1 Acknowledgment of Solicitation Addenda

DISCUSSION

Although the topic has been discussed in different contexts, [62] one of the most critical submissions that should be received with offers is an acknowledgment of any amendments to the solicitation. These are the changes to the terms of the solicitation (including to the "boilerplate," the drawings, specifications, scope of work, etc.) that in all likelihood have an impact on price or schedule. If an amendment is not acknowledged, you do not know if the offeror is really offering the same product or service that you want.

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61 - The "Lobbying Disclosure Act of 1995" (Pub. L. 104-65) made some amendments to 31U.S.C. § 1352, which simplified the information that needed to be disclosed on this Form. Those changes are detailed at 61 *Fed. Reg.* 1412 (January 19, 1996) and will be eventually incorporated into a new Standard Form. Three items of the SF-LLL are impacted: Item 10a is amended by revising "Name and Address of Lobbying Entity" to read "Name and Address of Lobbying Registrant"; in Item 10, the statement "(attach Continuation Sheet(s) SF-LLL-A, if necessary)" is removed; and Items 11 through 15 are removed.

62 - *See* discussion at Section 4.3.2.5, "Amendment of Solicitations."

Best Practices

There are two ways most agencies allow offerors to acknowledge receipt of amendments. As we discussed in the section on the Solicitation, [63] many agencies include on the **solicitation form** itself, space for solicitation amendments to be acknowledged.

A second way is for the offeror to actually sign and date the amendment cover sheet and return it either at the time of receipt or include it with the offer.

Seldom is it required by the agency, but it is not unusual for an offeror to fill in the space on the solicitation form and return the amendment too. No problem from your standpoint -- just "overkill" by a concerned offeror. If you see this situation frequently, you may want to check the instructions you have provided to offerors and determine if there is some ambiguity about your acknowledgment requirements.

If you receive a bid or proposal and one or more of the issued amendments are not acknowledged, what do you do?

Many times you are initially only looking at the low bidder's bid -- look at the other bidders and see if they acknowledged the amendment. If not, there may be a mailroom or timeliness problem.

Are the changes to the solicitation made by the amendment material?

If the amendment is material, accumulate the documents and seek the advice of your legal counsel. Particularly in an IFB procurement, you may have a low bid that is non-responsive and cannot be considered for award. Depending upon how your agency conducts RFPs, the failure to acknowledge an amendment is not usually "fatal" and you can ask for an acknowledgment during negotiations or discussions.

You may wish to include in your procedures or solicitations a provision for your determination regarding the responsiveness of offers which do not acknowledge material addenda. Such a provision will reinforce your discretion.

63 - *See* discussion at Section 4.3.2.3, "Solicitation."

4.3.3.3.2 Bid Guarantee

REQUIREMENT
In discussing bonding requirements, § 11 of FTA Circular 4220.1E provides: For those construction or facility improvement contracts or subcontracts exceeding $100,000, FTA may accept the bonding policy and requirements of the grantee, provided FTA determined that the policy and requirements adequately protect the Federal interest. FTA has determined that grantee policies and requirements that meet the following minimum criteria adequately protect the Federal interest: a. A bid guarantee from each bidder equivalent to five (5) percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of its bid, execute such contractual documents as may be required within the time specified; §15.m of the Master Agreement states that: (m) Bonding - The Recipient agrees to comply with the following bonding requirements. (1) Construction Activities – The recipient agrees to provide bid guarantee, contract performance, and payment bonding to the extent deemed adequate by FTA and applicable Federal regulations, and comply with any other bonding requirements FTA may issue. (2) Other Activities – The Recipient agrees to comply with any other bonding requirements or restrictions FTA may impose. [64] State laws are sometimes specific in requiring or prohibiting security and guarantees in public procurements. Performance bonds are often required, and the requirement may also affect bid guaranties.

DISCUSSION

The primary function of obtaining a bid guarantee is to financially protect the owner from loss should the successful offeror fail to execute further contractual instruments and furnish performance bonds or insurance certificates as required. As required by the FTA,

64 - The requirements of § 15.m of the Master Agreement mirror those of § 11 of FTA Circular 4220.1E and refer the grantee to the provisions of 49 CFR § 18.36(h).

this financial protection on construction contracts is 5% of the amount of the offer. Bid guaranties are usually used only where there is a requirement for performance and/or payment bonds are required prior to the commencement of performance.

We will discuss in other sections of the Manual bonding requirements in particular types of procurements, such as for construction, [65] equipment and supplies, [66] and rolling stock. [67] In this section, we will discuss the submission requirements for the various types of bid guarantee, such as bid bonds, certified checks, and other allowable negotiable instruments.

As with many other aspects of the procurement process, the use of bid security and the types of security may be addressed in your state laws. In these cases, you will be obligated to follow those laws as long as they meet the minimum requirements of the federal regulations set forth above.

Best Practices

Solicitation - If a bid guarantee is to be required, a solicitation clause is included that details:

- the requirement;
- the amount of the guarantee (typically 5 percent of offer price) and how it should be calculated;
- acceptable forms of guarantee (usually, cashier's check, letter of credit, or bond from a licensed agency); and
- that the guarantee must be submitted with the offer.

Nonresponsiveness - You can include in your policy regarding bid guaranties the actions to be taken if one is not furnished in accordance with the solicitation requirement.

- Normally in a *bidding* environment, if the proper guarantee is not furnished with the bid, the bid is non-responsive. If you allowed the bidder to submit the missing guarantee or correct a defective guarantee after the bids were "exposed", you would be allowing "two bites from the apple." Once the bids are known, the bidder could decide to submit (or not) the bid guarantee based on how much money is left on the table!

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65 - *See* Section 6.1, "Construction."

66 - *See* Section 6.2, "Equipment and Supplies."

67 - *See* Section 6.3 "Rolling Stock."

- In a *competitive proposal* process, if a guarantee was required and was not submitted, your solicitation document would determine whether it could be asked for during negotiations. But what do you do if you could award a contract without negotiations, (a right you will frequently reserve to yourself)? If you have to ask one offeror for its bid guarantee, is that considered discussions or negotiations? If so, that would necessitate opening discussions with all offerors in the competitive range. [68] For these reasons, and because proposers have other means of effectively withdrawing from competitive proposal processes, proposal guarantee is less frequently used than bid guarantee (even if a performance bond is ultimately required).

What if the bid guarantee is not signed, but the bid is? What if you only received one offer and the guarantee was not included with that offer? What if the guarantee is received late? What if the amount of the guarantee is insufficient? What if the guarantee is not dated or has an incorrect date? These are all questions that could arise and can be considered in your policy formulation.[69] Your policy would provide, e.g., that deficiencies affecting offer price would be material and would establish nonresponsiveness.

Custody of Guarantee - What do I do with the bid guarantee? It is recommended that if the guarantee is a bond or letter of credit, it be retained with the procurement file. If it is other than a bid bond, it is recommended that it be placed in a secure area (safe or locked file cabinet) with a notation in the procurement file its location.

Unused Guarantee - Guaranties have a financial impact on proposers as long as they are in effect. Therefore, you will want to return it to the unsuccessful offerors as soon as it is prudent to do so (e.g., you have awarded the contract or the offeror is too far down the bid list to reasonably expect an award). You may establish a rule that all offerors beyond a certain rank (e.g., the fourth lowest and all higher bids, all proposers outside the competitive range) will immediately have their guarantee returned.

Return unused guarantees to contractors after the contingencies have been met -- all contractual requirements have been met and the required performance and payment bonds and insurance certificates are in place as protection for the owner in the event of default or non-performance of the contractor.

Collection of Bond - Although you will seldom be involved in collecting funds from a bonding agency under a bid bond, collection is like the capture of the king in chess. It dictates many of the moves you will want to make to use a bid bond effectively without imposing unnecessary

68 - *See* discussion in Section 4.5.4, "Discussions and Clarifications."

69 - As an example of how these and other situations have been addressed in the federal environment, *see* FAR § 28.101-4.

burden on your offerors. The conditions which discharge the bond should be specified in your solicitation. Generally, the principal condition that discharges the bond or guarantee is the furnishing of a performance bond. Often the terms of the bid guarantee also guarantee that the offeror will provide executed contract documents, insurance certificates, payment bonds, or evidence of DBE compliance.

Once the performance bond is in place, it guarantees performance of all other contractor obligations. The most likely reasons a performance bond would not be furnished (which are the conditions you might look for in deciding whether to require bid guarantee) are: a financial condition so weak that bonding companies will not participate, such a large amount of bonds already issued that the bond cannot be obtained, second thoughts about the contract based on the information revealed up to the point in time of bonding, or a frivolous bid.

If the performance bond is not provided, you can specify the right under your bid guarantee provision to immediately accept the next ranked offer and to collect *from the defaulting offeror* the price and value difference between the offers. (Estimating this difference is one way to set the amount of the bid guarantee.) If the guarantee is a bond or equivalent letter of credit, you may need to obtain a judgment against the offeror before you can actually collect from the bonding company or bank. As indicated above, it is critical to most suppliers who provide bid guarantee that they retain the confidence of bonding companies. The bonding company's concern may assist in collection from a defaulting offeror.

4.4 SEALED BIDS (INVITATION FOR BIDS)

4.4.0 Overview

REQUIREMENT

The FTA does not require use of the sealed bid (invitation for bids) method of procurement for any particular procurement. This method is simply one of many that may be used, as appropriate. If, however, the grantee decides this method of procurement is appropriate, § 9.c. of FTA Circular 4220.1E sets forth some definitions, parameters for use, and some specific requirements to be followed:

c. Procurement by Sealed Bids/Invitation for Bid (IFB). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price.

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

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

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

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

(d) No discussion with bidders is needed.

(2) If this procurement method is used, the following requirements apply:

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

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

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

(d) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. When specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest;

Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

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

(3) The sealed bid method is the preferred method for procuring construction if the conditions in paragraph c(1) above apply.

State law typically places additional and more specific requirements on the sealed bidding process.

DISCUSSION

Having said there is no FTA requirement that grantees use the sealed bidding method of procurement, it should be recognized that, as a practical matter, many more grantee procurements are accomplished with this method as opposed to the competitive proposal/request for proposal method which will be discussed in more detail below. There is a mixture of history and tradition behind the use of sealed bidding in the public sector

which 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, even by the FTA. Sealed bidding is perceived to be a faster method of procurement; who gets the contract can be determined fairly objectively; and the fixed price contract which results is easy to understand and budget, as well as manage after award.

Purpose

As with so many other aspects of public procurement, we must begin with a recommendation that you check you state or local law or ordinance to determine if a legislative body has decided for you what flexibility, if any, you have to use a procurement method other than the IFB method. If you are limited on what methods you can use under what circumstances, you will be obligated to comply with those laws, ordinances or regulations. We will address this method in this section as though there were no limiting constraints on your ability to use this method. As a practical matter, the constraints you are likely to be faced with would be limitations on your ability to use the competitive proposal method rather than the sealed bidding method.

Because of the way this Manual has been drafted, it is important to read Section 4.3 in conjunction with this Section because many of the features or elements of both the IFB and RFP methods of procurement are, if not the same, very similar. Rather than duplicate the discussion of those features in our discussions of both methods, we suggest you read that section first and then this section on the sealed bidding method**.**

Best Practices

When do I use the sealed bid/IFB method of procurement?

- In deciding whether or not to use the sealed bidding method of procurement, the conditions detailed in § 9.c.(1) of FTA Circular 4220.1E are excellent and very self-explanatory. Go down the list, do all of the conditions exist? If you need more information about a particular condition, this Manual is designed to provide you with that additional detail. For information about specifications, refer to Chapter 3, "Specifications." For more information about "responsibility", refer to Section 5.1, "Responsibility of Contractor." For questions about what a firm fixed-price contract is, refer to Section 2.4.3.1, "Fixed Price."

What steps are involved in the sealed bidding method of procurement? Most of these steps have been addressed in Section 4.3, "Competitive Procurement Methods," but the following is an overview of those necessary steps:

- Preparation of the Invitation
  - The invitation must describe your requirements as completely, clearly, accurately and unambiguously as possible. Stated another way, the invitation should define the items or services sought in order for the bidders to properly respond. In addition to the danger of inadequate goods or services, the claims arising from errors make this a daunting task, but not an impossible one. [70]
  - Requirements that restrict or act as restraints on full and open competition should be avoided. [71]
  - The invitation typically includes all documents (whether actually attached or incorporated by reference) furnished to all prospective bidders for the purpose of bidding.
- Publicizing the Invitation
  - The invitation must be publicly advertised and distributed to prospective bidders. [72]
  - The amount of time after publication and distribution of the invitation to prepare and submit their bids and prior to the time and date set for opening of bids is important.
- Submission of bids
  - Sealed bids are submitted to you by bidders by the time and place stated in the invitation.
  - Bids are publicly opened at the time and place described in the invitation.
- Evaluation of bids
  - FTA requires that sealed bidding be used only if no discussion with bidders "is needed"; bids are, as a rule, evaluated without any discussions with bidders. [73]

70 - *See* Chapter 3, "Specification" for guidance on specification development.

71 - *See* Section 2.4.2.1, "Full and Open Competition Principle," for a discussion of full and open competition and the effect of restraints on competition.

72 - *See* discussion of advertisement and publicizing invitations in Section 4.3.2.1, "Advertising and Publicizing Solicitation."

73 - One instance requiring discussion is the evaluation of apparent errors; *see* Section 4.4.5, "Bid Mistakes."

- Contract Award
  - A fixed price contract will be awarded to the responsible bidder whose bid, conforming to the terms and conditions of the invitation, [74] is the lowest in price.

  - If stated in the invitation, price-related factors may be considered in determining the lowest price -- e.g., discounts, [75] transportation costs, life cycle costs. A provision in the IFB that explains how the calculation of bids will be made will avoid confusion at the time of bid opening. The explanation can include options, escalators, currency issues, unit prices, etc. To preserve the right to exercise options with Federal funds, FTA requires that the option prices be evaluated in the selection process. You can also address how the rare instance of tie bids will be treated, e.g., with the traditional coin toss.

4.4.1 Solicitation

DISCUSSION

In addition to the material in Section 4.3.2.3, (the common elements of the solicitation process for both the IFB and RFP), the rigidity and precision of the sealed bid method require that your solicitation anticipate the procedural issues that may arise. Although these items may be appropriate to an RFP as well, an IFB should be particularly clear regarding requested amendments and approval of items equal to those specified, bid opening time and place, the price schedule, the offer form, and the clarity of the technical specifications.

Best Practices

In this section, we will provide you with a nominal checklist of things for you to consider in the development of your solicitation -- some of the items noted here may not be applicable to every procurement.

Identification of Solicitation	- Solicitation number
	- Date of solicitation issuance

[74] - *See* discussion in Section 4.4.3, "Responsive Bidder."

[75] - As stated in the Requirements discussion, discounts, such as prompt payment discounts, should only be used in the calculation of low bid if the history within your agency indicates discounts offered are usually taken advantage of.

Identification of agency	- Name and address (street and mailing if different) of your agency - Name and telephone number (voice and facsimile) of contact within your agency
Instructions to bidders	- Date, time, and place of bid opening - Instructions channeling communication regarding the procurement – typically with the designated procurement official only - Instructions relating to rules regarding late submission of bids - Instructions relating to how amendments of the solicitation should be acknowledged - Instructions on what documents should be returned with bid Bid guarantee Price schedule Representations and certifications Bid samples Descriptive literature - Notification of bid acceptance period is a concept that may also be addressed in the competitive proposal method, but is more prevalent in the IFB process. You can tell bidders in the solicitation that they must allow a minimum period in which your agency can accept their bid after its submission. Further, if they want to include a lesser period than your minimum, the bid will be rejected as nonresponsive. What is your normal processing time for bids -- 30, 60, 90, 120 days? Be realistic but also understand that the longer the period you allow to accept, the greater will be the contingency the bidder put in its bid to reflect price fluctuations in the marketplace. Also take into consideration that you can (and sometimes will) request offerors to voluntarily extend their offers for an additional period if you encounter a delay.
Boilerplate attachments or exhibits	- Instructions and Conditions of Solicitation - General Provisions - Special Provisions - Bonds (Bid, Performance, Payment)
Specifications, Scope of Work, Drawings	

4.4.2 Bid Opening

REQUIREMENT
"All bids will be publicly opened at the time and place prescribed in the invitation for bids;" [76]

DISCUSSION

The day that you have all been waiting for has arrived. Bids for your project are due in Room 407 at 2 P.M. Will we get any bids? Where will the price of the bids be in relation to the estimate? What do I do if all of the bids exceed my budget? What if there's only one bid? What if a bidder delivers its bid at 2:02 P.M.? What do I actually do at 2 P.M.? Do I read the bids out loud? What if the bidders want to look at the bids we received?

These are some of the many concerns that you probably have every day you receive bids. Although many of these issues are beyond the scope of this manual since they are defined by your agency and its own peculiar personality, a few of these issues are very important to the sealed bidding procurement process. The time and date set for the receipt of bids and the public announcement of those bids are very critical to the success and integrity of a public procurement process.

Best Practices

As with the other sealed bidding issues, the procedures surrounding the receipt and opening of bids may be dictated by your state law or procedures. As a general concept of public procurement, the opening of bids is the point in time when completion of the procurement (acquisition) process begins and the contract administration process starts. It also initiates the rules relating to "responsiveness" and "responsibility" which are discussed in Sections 4.4.3 and 5.1 respectively.

The process of receiving bids. As you approach the date and time set in your solicitation for receipt of bids, you will begin to receive bids. A simple step to eliminate many questions that could arise later is to keep the bids unopened in a secured location, preferably a locked bid box, file cabinet, or safe.

- The identity and number of bids received need not be disclosed within your agency prior to the time and date set for receipt of bids except to those personnel with a real "need to know."

[76] - FTA Circular 4220.1E § 9.c.(2)(c).

- As discussed in Section 2.3.2, "Independent Grantee Cost Estimate," when you receive the “independent estimate" it can also be secured, logically in this same location. It is also a good practice to have on your "procurement checklist" to be sure you have received this estimate, particularly if this is a federally-funded procurement.

- On the day of receipt of bids (maybe an hour ahead of time), you may want to establish a place in the room where the bids will be read where bids can be deposited and time-stamped in.

Opening, reading, and recording bids.

- Bid opening is a public event and is open to the general public.

- As the time for receipt of bids approaches on the day bids are due, if you are the bid opening official, consider checking the time with a reliable source and using that time as the official time.

- Shortly (10 minutes?) before the time for receipt of bids, you may also want to call your office, the mailroom, the security desk, and anywhere else you can think of where a bid might be and get it logged in. "Do you have an envelope indicating it is a bid for IFB No. 123-4456? If so, please bring it to Room 407 immediately."

- Bidders are apt to be coming into the room at the last minute to submit bids. Don't be surprised when a breathless bidder comes running into the bid room frantically waving a bid and wanting you to consider it.

- At the designated time, you may announce to those in attendance that the time set for receipt of bids has arrived and that no further bids will be received.

- At that time, personally and publicly open the bids, read the bids aloud (if practical) to those persons present, and have the bids recorded. Some procedures also include opening, reading aloud, and recording the independent estimate. Other agencies believe this information could help a disappointed bidder to interfere with the process, or could be used by a single bidder to the agency's disadvantage.

- The bids are usually recorded on a document called an Abstract of Bids and this document is available for public inspection after completion.

    - Unless it unduly interferes with the conduct of your business, you may allow time after the bids are read for interested members of the public to review the bids submitted under the immediate supervision of an agency official and under conditions that preclude the possibility of a destruction, substitution, addition, deletion, or alteration of the bid.

- If irregularities or discrepancies are discovered during this review process, or if you noticed something irregular 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. [77]

Late bids - Many instructions for bidders include a clause that addresses the late submission, modification, and withdrawal of bids. The clause may be required by state law or patterned after a Federal provision. [78] The clause specifies any circumstances (e.g. documented failure by specific mail or delivery services) that are exceptions to the general rule - - 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. [79] Whether or not the late bid would have been low in price is of no consequence. It must be rejected, the argument goes, because maintaining the integrity of the sealed bid procurement process is more important than the possible advantage to be gained by considering a late bid in a particular procurement. [80]

- Although the burden of getting the bids to the bid opening location on time is on the bidder, it is easier to take extra precautions to ensure all bids are at the proper location at the proper time, than to explain later the integrity of the process. As we alluded to earlier, you might want to consider the following as "preventive" measures designed to reduce the possibility of this happening to you:

  - Consider placing clear instructions in the mailroom and at the reception area as to what is to happen with bids and bidders, particularly on the day bids are due.

  - Consider calling your mailroom, your office, and the location where bids are "normally" received and secured shortly before the time for receipt of bids and inquire if any bids were received in the last mail delivery or delivered to the other location(s).

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77 - You should understand that if an unsuccessful bidder discovers an error, they will likely file a protest (or formal query) almost immediately. It is very important, therefore, that you proceed very carefully. Some procedures, to discourage false hopes and resulting arguments, prohibit the reading of bids that are clearly defective (e.g., missing bid guaranty).

78 - *See* the extensive discussion of this in Section 4.3.3.1, "Receipt of Offers," where we addressed the considerations that are typically weighed when policies are adopted concerning the receipt of offers. The FAR provision typically used as a "model" is FAR § 52.214-7.

79 - *See, e.g., J. C. Kimberly Co.*, Comp. Gen. B-255018.2, 94-1 CPD 182 79 (A bid that was hand carried to the bid opening room seconds after the bid opening officer declared that time had arrived was properly rejected as late.) One of the exceptions addressed in FAR §52.214-7 and elaborated upon in FAR § 14.304-1(a)(2) addresses the situation when late receipt of the bid is due solely to mishandling by the agency after receipt at the agency location.

80 - *Id. See also, Swinerton & Walberg Co.*, Comp. Gen. B-242077.3, 91-1 CPD 318.

- Include labels or envelopes clearly marked with Bid # and date and time due in the solicitation package for use by bidders.

4.4.3 Single Bid

REQUIREMENT
Within the discussion of sole source contracts, the FTA Circular 4220.1E, Paragraph 9.h – *Procurement By Noncompetitive Proposals (Sole Source)* also deals with the situation when a number of offerors are solicited but only one response is received: *Sole Source procurements are accomplished through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. . . .*[81] FTA Circular 4220.1E, Paragraph 10 requires grantees to perform a cost or price analysis in connection with every procurement action: 10.a. Cost Analysis. A cost analysis will be necessary when adequate price competition is lacking and for sole source procurements . . .unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or on the basis of prices set by law or regulation. 10.b. Price Analysis. A price analysis may be used in all other instances to determine the reasonableness of the proposed contract price.

DEFINITIONS

Single Bid - Only one bid has been received at the time and date set for bid opening.

Single Responsive Bid - Only one responsive bid received at the time and date set for bid opening. This may result from having only one bidder or from all other bidder(s) being nonresponsive.

No Responsive Bids - All bids received at the time and date set for bid opening are nonresponsive.

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81 - This paragraph was changed from prior versions of the circular to eliminate the phrase "or acceptance" of a single proposal when discussing what constitutes a sole source procurement. FTA believes that, upon receiving a single bid (or proposal) in response to a solicitation, the grantee should determine if competition was adequate. This determination may include a review of the specifications to determine if they were unduly restrictive or contacting sources that chose not to submit a bid or solicitation. It is only if the grantee determines that competition was inadequate that the procurement should proceed as a sole source procurement. The mere fact that only one bid or proposal was received does not automatically mean competition was inadequate since many unrelated factors could cause potential sources not to submit a bid or proposal.

DISCUSSION

State or Local Law - As with many other areas of procurement, procedures for handling a single bid in response to an invitation for bid may be addressed specifically by your state or local law. In the absence of a prescribed procedure, this section presents ways to analyze and move forward with your procurement.

Adequacy of Competition - When only one bid is received in response to a solicitation that was issued to multiple sources, you will first have to determine if there was adequate competition. The FTA interpretive comment in the annotated Circular 4220.1E, paragraph 10, makes clear the fact, that when only one bid is received, this does not, in itself, mean that competition was inadequate. In order to make this determination, it may be necessary to talk to those firms solicited to find out why they did not submit bids. If the reason is a restrictive specification or a delivery requirement that only one bidder could meet, you have a situation of inadequate competition. If this is the case then the procurement is a sole source and you must process it as such with internal agency approvals, or cancel the solicitation, change the requirements to allow for more bids, and re-solicit bids. On the other hand, if the reasons given by the non-responders are unrelated to the specification and/or solicitation terms, then you may presume competition was adequate and proceed with the award as a competitive one. You should document your file so that there is a clear audit trail for reviewers to understand how you reached your determination.

Cost or Price Analysis - If the competition is deemed to be adequate, then a *price analysis* must be performed to determine the reasonableness of the bid price. [82] **If, on the basis of a price analysis, you are able to document your determination that the price is fair and reasonable, and if the bid is responsive and the bidder responsible, you may proceed with award. If, however, you cannot determine the reasonableness of the bid on the basis of a price analysis, then you will have to request a detailed breakdown of costs and profit from the bidder and perform a *cost analysis*.**

If competition is deemed to be inadequate, and you decide to process the award as a sole source, then you will have to perform a *cost analysis* (i.e., request from the bidder a detailed breakdown of the estimated costs and profit) unless you can establish the reasonableness of the price based on the bidder's catalogue or market price (note that the item must be sold in substantial quantities to the general public), or the price is set by law or regulation. For a discussion of cost and price analysis techniques, see BPPM section 5.2 – *Cost and Price Analysis*. If the bidder refuses to furnish a cost breakdown for your analysis, then you will have to request a waiver from FTA of the Circular requirement in paragraph 10.a that a

[82] - Section 5.2 - *Cost and Price Analysis* discusses various price analysis techniques, and they include (among others) comparison to previous purchases, comparison to a valid grantee independent cost estimate, and value analysis.

cost analysis be conducted on every sole source procurement, or cancel the procurement and re-solicit bids. [83]

Negotiation - If you have been unsuccessful in determining through a price or cost analysis that the bid price is fair and reasonable, you may wish to enter negotiations with the offeror to attempt to establish a different price that can ultimately be determined to be reasonable. Some authorities view this as canceling the sealed bidding method of procurement and converting, through documentation, the procurement either to a competitive proposal (a negotiated procurement) or a sole source procurement. This is another area that may be controlled or regulated by state law. For instance, your state may require that construction services only be awarded by accepting a sealed bid, with no exceptions. (If this is the case, you really have no choice but to cancel the solicitation and, if your requirement continues, to re-advertise the procurement.) If, however, your state allows flexibility and you are able to justify conversion of the procurement to a negotiated process, this may allow you to negotiate a contract with a price that is fair and reasonable so that award can be made.

4.4.4 Responsive Bidder

REQUIREMENT
The concept of "responsiveness" is discussed in § 9 of FTA Circular 4220.1E as an integral element of the sealed bidding method of procurement: c. Procurement by Sealed Bids/Invitation for Bid (IFB). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. Subparagraph 9.c.(2) of FTA Circular 4220.1E, in discussing the requirements to be used if the sealed bid method of procurement, lists the following: (d) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. When specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest;

[83] - You may have, for example, data from previous purchases, an independent cost estimate, etc. with which to compare the bid price, but not have a "catalogue or market price of a product sole in substantial quantities to the general public' as required by paragraph 10.a of the Circular.

DEFINITION

Responsive - If an offer 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 offeror, the offer is responsive.

DISCUSSION

Although it may be stated differently in the rules or statutes governing your procurement processes, 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, then find the lowest responsive and responsible bidder.

Evaluation Sequence

The following is a sequence of evaluation that is useful for explanation and may also be useful in practice; however, the concepts and correct determinations are far more important to successful procurement than is the sequence. Examination of bids logically begins with the lowest bidder. Once the lowest bidder is determined, look to see if the bidder is responsive. "Responsiveness" is a concept critical to the sealed bidding process. In public contracting, in order for a bid to be acceptable, it must conform in all material respects to the requirements stated in the invitation. Responsiveness is determined from the bid documents themselves and, with very few exceptions, 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 your organization may be stated in your procurement regulations or statute. If the initial low bidder is not responsive (the bid does not conform to the material requirements of the invitation), you need go no further with that bidder. Instead you may go back and look at the second lowest bid and determine if it is responsive.

Once you have determined that you have a low priced bidder who is responsive, you then begin the more subjective process of determining the bidder's responsibility.

"Responsibility" is also a term with specific connotations in procurement. What is involved in determining a bidder's responsibility may vary from jurisdiction to jurisdiction.

FTA defines "responsibility" to be a contractor who possesses the ability to perform successfully under the terms and conditions of the proposed procurement. In determining whether a contractor possesses this ability, you may consider such matters as contractor integrity, compliance with public policy (e.g., EEO record, attainment of DBE goal, not debarred or suspended, etc.), record of past performance, and financial and technical resources. Unlike responsiveness, which normally can be finally determined based on the bids, a determination of

responsibility may be affected by new information up to the time of contract award. Thus, in ascertaining whether or not a bidder is responsible, discussions may be held with the bidder to discuss these factors so that, by the time of award, a positive determination can be made. If you do not determine that the bidder is responsible, look through the list of bidders again to determine a low, responsive, responsible bidder to whom a contract can be awarded.

Strict Responsiveness - To understand the concept of "responsiveness" and its practical rigidity in the public contracting environment, recall that the IFB issued by the agency 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. [84] The following discussion of responsiveness will cover general principles and parameters of Federal procurement precedents. You may have to ensure compliance with your state's laws and precedents and your agency's procedures. The best practice is to establish a clear, unambiguous agency policy on which bidders can rely, so that, in preparing their bids, they can be confident that no material deviations will be allowed to any bidder in complying with the solicitation and its specifications.

Purpose

Requiring strict responsiveness, i.e. compliance in all material respects with the IFB "enables bidders to stand on an equal footing and maintains the integrity of the sealed bidding system." [85] Examples of bids typically considered nonresponsive include:

- The bid fails to conform to material requirements;
- 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 (i.e., affects price, quantity, quality, or delivery of the items offered) or works an injustice on other bidders;

84 - "Bid responsiveness involves the question of whether the bid as submitted, represents an unequivocal offer to do exactly what the government has specified, so that acceptance of the bid will bind the contractor to meet the government's requirements in all material aspects." *Hankins Lumber Co.*, Comp. Gen. B-248101, 92-2 CPD ;50.

85 - FAR § 14.301(a).

The bid contains prices for line items that are materially unbalanced, i.e., figures in the bid conflict with the total bid price;

- date;
- The bidder fails to furnish a bid guarantee in accordance with the requirements of the invitation; [86] or
- Failure to submit Buy America Certification.

Responsiveness is a fairly objective concept and is ascertainable at the time of bid opening. [87] Further, the bidder's intent to be bound by the IFBs requirements can normally be determined from the bid itself. [88] A "second bite at the apple" is a phrase commonly heard in discussions pertaining to the precept that responsiveness be determined at the bid opening solely from the bid documents and without explanation. You will not want an apparently low bidder to re-evaluate its bid after the public opening and effectively withdraw the bid by refusing to respond or responding in a subversive way; the bidder should not have a second bite at the apple. This means that the bid package must be examined thoroughly. Some of the questions you may ask are:

- 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?
- Were all material amendments to the solicitation acknowledged?
- Was the bid signed?
- Were all material representations and certifications completed?
- Is the Buy America certificate required by 49 CFR § 661.6 or § 661.12 signed? [89]

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86 - FAR § 14.404-2.

87 - *Northwestern Motor Co.*, Comp. Gen. B-244334, 91-2 CPD 249.

88 - *Record Press, Inc.*, Comp. Gen. B-229570.2, 88-1 CPD 161.

89 - 49 CFR § 661.13(b) provides: The grantee shall include in its bid specification for procurement within the scope of these regulations an appropriate notice of the Buy America provision. Such specifications shall require, as a condition of responsiveness, that the bidder or offeror submit with the bid a completed Buy America certificate in accordance with § 661.6 or § 661.12 of this part, as appropriate. (emphasis added)

- Were required descriptive literature and bid samples included with the bid?
- If required, was a bid bond or bid guarantee submitted?
- Was the bid defective?
- Was the price offered firm and definite?
- Were 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?

If something is questionable, is the issue one of responsibility or responsiveness? [90] Your customers may want to gain greater confidence in the bids by specifying, purportedly as a condition of responsiveness, that bidders have specific capacities. You may also find a defect (e.g. in certifications or requested information) that relates primarily to the ability of the bidder to perform. Precedent for direct Federal procurement is that merely by the language in an IFB, a contracting agency cannot change a matter of responsibility (ability to perform) into one of responsiveness (unequivocal offer to perform). [91] The best practice is to maintain this distinction.

Materiality - Whole courses are taught on sealed bidding and the issue of responsiveness. The list of questions and issues raised in this discussion should not be considered as all encompassing. Instead, they are intended to raise sensitivity to some of the issues that impact responsiveness. It should be apparent from this discussion that the single most important concept impacting responsiveness is "materiality" -- does the inclusion or omission of the fact, item, or requirement affect price, quantity, quality, or delivery of the items offered? If so, the bid is probably nonresponsive. If not, the bid is probably responsive. There are, however, many facts and situations that do not clearly fall within these parameters and become issues that may require analysis and input from your legal advisor. If in doubt, ask!

DBE - Although DBE program compliance is more often a responsibility requirement, some processes make DBE compliance a condition of responsiveness. This issue is discussed further

90 - The Comptroller General, in *Staples-Hutchinson & Associates, Inc.*, Comp. Gen. B-245007, 91-2 CPD 491 stated: Whereas bid responsiveness concerns whether the bid itself as of the time of bid opening unequivocally offers to perform in accordance with all material terms and conditions of the solicitation, responsibility refers to a bidder's ability to perform the contract requirements and is determined not at bid opening but at any time prior to award based on information received by the agency up to that time.

91 - *EDT Construction, Inc., et al.*, Comp. Gen. B-240343, 91-1 CPD 374.

in the discussion of DBE submissions and award in Chapter 7, "Disadvantaged Business Enterprise."

4.4.5 Bid Mistakes

DISCUSSION

It may not be as certain as death and taxes, but inevitably and unfortunately, a mistake may be discovered in your low bid. A mistake doesn't necessarily mean you cannot award a contract to the low bidder, but that could be the result. How you typically treat the mistake will depend upon what the mistake is and when it is discovered. State law in some states explicitly addresses bid mistakes.

Best Practices

Mistakes in bids are usually discovered after bids are opened [92] and before the contract is awarded. The mistake, or suspicion of a mistake, may be discovered by the procurement official in its review of the bids. Some procedures call for the identification of clear defects (e.g., absence of a bid bond) at the bid opening and the rejection without reading of the bid. This minimizes the discussion and likelihood of protest. The mistake may be discovered by an unsuccessful bidder (not just the low bidder) when it is reviewing the bids after bid opening. Or it may be discovered by the apparent low bidder upon returning to its office after bid opening -- sometimes driven to an examination of its bid after it has learned how much money was "left on the table!" Regardless of how it is discovered, it is a problem in the sealed bidding method of procurement because of the strict rules of responsiveness, because bids have been exposed, and because the integrity of the procurement process is at stake.

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

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92 - Although unusual, it is possible that before the time and date set for receipt of bids, a bidder may discover a mistake in a bid it has already submitted to you. If you have included a clause in the solicitation (or adopted a policy) as suggested in our earlier discussion on "Receipt of Offers" (*see* Section 4.3.3.1) and the problems with late submissions, modifications and withdrawals of offers, they should be followed. Essentially, the bidder is advised that modification of its bid would be treated the same as the original bid -- must be received timely and should clearly identify the bid it is modifying.

4. Mistakes discovered after award.

If a mistake fits within one of these categories, three things can happen: the mistake can be corrected, the mistake will be recognized and the bid allowed to be withdrawn, or the mistake will not be recognized and the bid not allowed to be withdrawn.

We will discuss each of these categories of mistakes and what the consequences of each are if it is established that a mistake has been made. One final thought before that discussion: many transit properties in their procurement regulations have adopted rules relating to the treatment of these categories of mistakes and, in most cases, have patterned their rules after the rules in either the FAR [93] or the *Recommended Regulations* for the American Bar Association's *Model Procurement Code for State and Local Governments*. [94] If you have rules addressing this common problem, it makes the administration of your procurement process much easier because the rules are known, not decided on a case-by-case basis.

The following tables analyze the types of mistake and one set of actions; many variations on the illustrative rules presented here are successfully in use.

Minor informalities or irregularities in bids prior to award of the contract. Merely a matter of form and not of substance. May be an immaterial defect in a bid that can be corrected or waived without being prejudicial to other bidders. The defect is "immaterial" when the effect on price, quantity, quality, or delivery is negligible when contrasted	**Remedy:** the contracting officer shall give the bidder an opportunity to cure the deficiency or waive it, whichever is in the best interests of the owner. **Examples** of minor informalities or irregularities include failure of the bidder to: Return the incorrect number of signed bids required by the IFB (1 submitted, 3 required). Sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound, such as a bid guarantee or letter signed by the bidder referring to and clearly identifying the bid itself. Acknowledge receipt of an amendment to the IFB, but only if it is clear from the bid itself that the bidder received the

93 - *See* FAR § 14.406.

94 - *See* § R3-202.13 (Mistakes in Bid), *Recommended Regulations* approved August 2, 1980, implementing *The Model Procurement Code for State and Local Governments*, approved by the American Bar Association on February 13, 1979 (hereinafter referred to as the *Recommended Regulations*).

with the total cost or scope of the requirement being procured.	amendment and intended to be bound by its terms [95] or the amendment involved had no (or a negligible) effect on price, quantity, quality, or delivery. Furnish required information that goes to the issue of responsibility (e.g., number of employees bidder has, information concerning parent company and any affiliates, certifications concerning EEO and Affirmative Action programs, certification concerning Lobbying. [96])
Obvious or apparent clerical mistakes discovered prior to award. [97] Mistake must be obvious or apparent on the face of the bid. This is the category of mistake most frequently discovered by the contracting officer during its examination of the bid after bid opening. If you know, or have reason to know or suspect, that a mistake in a bid has been made, there is a real issue of whether you can, in good faith, accept that bid.	**Examples** include: Obvious misplacement of decimal point. Obvious reversal of the price f.o.b. destination and price f.o.b. origin –higher price for you picking the product up at the origin than for the bidder to deliver the product to the place designated by you. - Obvious mistake in designation of unit. - Typographical errors. - Error in extending unit prices. - Transposition errors. - Arithmetical errors.

95 - For instance, Amendment Number 1 to the solicitation changed the quantities for line item 4 on the Schedule from 5 to 12. The bid included a Schedule that showed the quantity for line item 4 to be 12. No other amendments were issued and the bidder did not formally acknowledge Amendment No. 1. There was no way it could have used the correct Schedule page unless it had received the Amendment -- clear from the bid that it received Amendment No. 1.

96 - *See* discussion at Section 4.3.3.2, "Federally Required Submissions with Offers."

97 - The *Recommended Regulations* to the *Model Procurement Code* [at § R3-202.13.4(b)] refers to this type of mistake as "mistakes where intended correct bid is evident." The mistake and the intended bid are clearly evident on the face of the bid document.

The bidder may also discover this category of mistake and bring it to your attention and request that it be allowed to correct the mistake.	**Procedure:** What do you do if you have this category of mistake? Recommend you make your legal counsel aware of situation so proper legal advice can be obtained as you proceed through the mistake evaluation process. This is an area that is prime for a later protest by either the firm requesting relief from a "mistake" or from another bidder that feels it could be impacted by your decision regarding the mistake. Request verification of the bid. This is necessary to assure the contracting officer that the bid as confirmed is without error, or to elicit the allegation of a mistake by the bidder. This process normally includes the following steps: Prepare a written request to the bidder that it verify its bid price. The request puts the bidder on notice of a mistake suspected by the contracting officer as appropriate. For instance, the bid is so much lower than the other bids or the agency independent estimate as to indicate a possibility of error. Or, highlight important or unusual characteristics of the specification. Point out the fact that there were changes in the specifications or requirements from previous purchases of a similar item. Your notice can include any information, which is proper for disclosure, that lead you (as the contracting officer) to believe that there is a mistake in the bid. Evaluate the verification response from the bidder. If the bidder verifies its original bid, you may consider the bid as originally submitted. If, however, the bidder alleges a mistake was made, it is recommended you take the following actions. Advise the bidder to make a written request to withdraw or modify its bid. Advise the bidder that it must support its request with any and all evidence to support the position it is taking. Advise the bidder of definite time deadlines in which to provide the information requested.

	Be suspicious – don't forget that everyone's bid has been exposed to the world! **Remedy**: After verification, the contracting officer may correct an apparent or obvious clerical mistake. It is recommended that you: Attach the verification to the original bid. Reflect the correction in the award document. Document the procurement file to indicate why you took the action you did. You should only allow a bid to be corrected if the bid, as submitted, was responsive -- you should not allow correction of a bid that would make a non-responsive bid a responsive bid. If correction of the bid would displace one or more lower bids, it is recommended that you not allow correction unless the evidence of the mistake and bid actually intended are ascertainable substantially from the invitation and bid itself as opposed to evidence brought in to you by the bidder in response to your request for verification. Do not allow the bid to be withdrawn.
Mistakes other than minor informalities or irregularities in bids, or obvious or apparent clerical mistakes that are discovered prior to award. [98] These mistakes are generally raised by the bidder along with a request to withdraw its bid.	**Procedures:** It is recommended that you follow the procedures outlined in the previous discussion when a bidder alleges a mistake has been made. Pay particular attention to the evidence the bidder furnishes that establishes the existence of the mistake – remember, it is not obvious from the bid itself. Be particularly sensitive to the bidder that wants out of its bid simply because it made a judgmental error in preparing its bid and, after bid opening, discovered it "left too much money on the table."

[98] - The *Recommended Regulations* to the *Model Procurement Code* [at § R3-202.13.4(c)] refers to this type of mistake as "mistakes where intended correct bid is not evident."

Examples include: A pricing element from a vendor was received but not included in the bid – the electrical subcontractor's quote was not included. The material cost for an element of work was included but the labor to install it was not included.	**Remedy:** You should allow the bidder 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 which clearly and convincingly demonstrates that a mistake was made. You may make a determination to correct the bid and not allow its withdrawal if: The bidder requests permission to withdraw a bid rather than correct it; [99] The evidence is clear and convincing both as to the existence of a mistake and as to the bid actually intended; and The bid, both as originally submitted and as corrected, is the lowest bid received.
Mistakes discovered after award.[100] Although it is much rarer than other allegations of mistake, a contractor may raise the issue of mistake in bid after award of the contract is made. Obviously, the burden of proving a mistake was made at this time is great and must be carried by the contractor. [101]	**Remedy**: What you do with mistakes discovered and proven after award are really policy questions that you should consider when adopting your regulations. There really is no "best" practice in this area but it appears that transit properties have taken one of the two approaches outlined below: The "hard line" approach: do not allow correction except where the contracting officer makes a written determination that it would be unconscionable not to allow the mistake to be corrected. [102]

99 - You should consider all the long run costs of forcing the bidder to perform unwillingly.

100 - For an extended treatment of this topic (and also as the source for most policies of transit properties on the matter), it is recommended that you review FAR § 14.406-4 and the *Recommended Regulations* at § R3-202.13.5.

101 - *See* FAR § 14.406-4(e) for recommended procedures to follow in the event this type of mistake has been alleged or disclosed.

102 - This is the position taken in the *Recommended Regulations* at § R3-202.13.5.

	The FAR approach [103] offers more alternatives other than the "unconscionable" approach: The mistake may be by contract amendment if correcting the mistake would be favorable to the transit property without changing the essential requirements of the specification. Additionally, a determination could be made to (a) rescind the contract; (b) reform the contract to delete the items involved in the mistake or to increase the price if the contract price (as corrected) does not exceed that of the next lowest acceptable bid under the original IFB; or (c) allow no change to be made. It is recommended that you proceed very carefully through this process and with advice of legal counsel.

4.4.6 Bid Withdrawal

DISCUSSION

It's two days after bid opening. You're sitting at your desk basking in the great procurement you conducted and all the competitive bids you received. The phone rings, breaking the self-congratulatory mood, and you pick it up. "Hi, I'm Mr. Low Bidder and we have decided we really don't want this contract and want to withdraw our bid!" Talk about messing up your day. What do you do next?

Section 4.4.5 addresses the rules relating to the withdrawal of bids because of a mistake in bid. Those rules govern almost all of the instances in public contracting in which a bidder is allowed to withdraw its bid after bid opening in the sealed bidding process. Bidders are usually permitted to modify or withdraw their bids prior to bid opening.

Best Practices

When to allow withdrawal of bids

If you receive a written request from a bidder prior to the time and date set for receipt of bids that it wishes to withdraw a bid it has previously submitted, that request is honored under most

103 - *See* FAR § 14.604-4(a) and (b).

procurement policies. If the request to withdraw is received after the time and date set for receipt of bids, the same rules apply to that request as would apply to the late receipt of a bid.

As we discussed in Sections 4.3.2.3, "Solicitation," and 4.4.1, "Solicitation" (Sealed Bids), we recommended inclusion of a clause that addresses the Late Submissions, Modifications, and Withdrawals of Bids. This clause sets forth the only contractual period during which bids can be withdrawn. Subparagraph (g) of the FAR clause, which forms the basis for many transit property clauses, provides:

> (g) Bids my be withdrawn by written notice or telegram (including mailgram) received at any time before the exact time set for receipt of bids. If the solicitation authorizes facsimile bids, bids may be withdrawn via facsimile received at any time before the exact time set for receipt of bids, subject to the conditions specified in the provision entitled 'Facsimile Bids.' A bid may be withdrawn in person by a bidder or its authorized representative if, before the exact time set for receipt of bids, the identity of the person requesting withdrawal is established and the person signs a receipt for the bid.

If a bidder has established the existence of a mistake in its bid prior to award of the contract, it 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 which clearly and convincingly demonstrates that a mistake was made.

What if the request to withdraw does not fit into those categories?

For the reasons that follow, you will probably not allow the bidder to withdraw its bid without legal counsel. This is an issue that may be impacted by an interpretation of your state law on public contracting, particularly in the absence of a clause as will be discussed next.

Of critical importance to being able to take this position is the inclusion in your solicitation document of two clauses which we have referred to in previous sections of the Manual. The first clause (which we have included a suggested provision earlier in this discussion) is the Late Submissions, Modifications, and Withdrawals of Bids clause. The second is a clause addressing the bid notification period as discussed in Section 4.4.1, "Solicitation." Just as an example, the following is the clause that accomplishes this level of protection by federal agencies:

> **Period of Acceptance of Bids**
>
> In compliance with the solicitation, the bidder agrees, if this bid is accepted within ____ calendar days (60 calendar days unless a different period is inserted by the bidder) from

> the date specified in the solicitation for receipt of bids, to furnish any or all items upon which prices are bid at the price set opposite each item, delivered at the designated point(s), within the time specified in the Schedule. [104]

There is nothing magical about the particular language in this clause, but the legal context is very important. If this language is part of the solicitation that the bidder signs when submitting its bid, as part of its offer, it is telling you that you have 60 days to accept its bid. It has agreed to hold its offer open for that period of time and you can take that long to act upon that offer. Under this example, you do not, however, have 61 days to accept the bid!

"What is the rationale for this result? I thought you could always withdraw your offer prior to it being accepted." There is a lot of law on this subject, but one of the earliest articulations of this philosophy is contained in the quote from a 1909 decision of the United States Court of Claims that is still good law on this issue:

> What are the rights of bidders as to the withdrawal of their bids after they have been opened and they have been informed thereof, but before they have been accepted? The agents of the Government stand upon a different footing from private individuals in the matter of advertising for the letting of contracts in behalf of the United States. They have no discretion. They must accept the lowest or the highest responsible bid, or reject all and re-advertise. Private individuals are not required thus to act. Hence, it is apparent that the government agents should be allowed a reasonable time after the opening of bids before they are allowed to be withdrawn, so they can be afforded opportunities to ascertain whether collusion or fraud had been perpetrated against the United States by the parties engaged in the bidding. It is also apparent that if the rule of allowing immediate withdrawals after the results of the bidding are known, frauds innumerable could be perpetrated against the United States and thus public justice would be greatly hampered. [105]

You need to check with your legal counsel to see how this language might be addressed under your particular state law. If the matter has not been challenged and you are faced with a challenge, this case is a good starting point to see how and why this rule has developed in the way it has. This rule is also referred to as the "firm bid rule."

"But I didn't have that language in the solicitation. What do I do?" Again, the answer may well lie in your state laws and your lawyer will have to advise you on what to do.

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104 - FAR § 52.214-15.

105 - *W. A. Scott v. United States*, 44 C.Cl. 524, 527 (1909).

However, in the absence of this clause, you might want to check § 2.205 of the Uniform Commercial Code, which may be the law in your state. [106] In addressing the FAR clause (or a predecessor clause), the General Services Board of Contract Appeals opined (and reiterated the *Scott* rationale):

> This rule for Government procurements also finds support in commercial settings. Under the Uniform Commercial Code, UCC 2-205, 'firm' offers are irrevocable. In *Western Adhesives*, GSBCA No. 7449, 85-2, BCA § 17,961, the appellant attempted to dispute the validity of a contract and default termination on the basis that it withdrew its bid prior to award. The Board found that Government acceptance of a bid during an extended acceptance period granted by the bidder created a valid contract because the solicitation was a formally advertised procurement for which bids were irrevocable during the acceptance period. Failure to perform after acceptance justified default termination. The Board concluded, 'this appeal turns on the firm bid rule. A bid submitted in a formally advertised procurement -- sealed bid -- is irrevocable, and an acceptance after an attempted withdrawal will create a contract.' *Western Adhesives*, 85-2 BCA [§17.961] at 90,018. [107]

If a bidder withdraws its bid according to the allowances in the prior section, you will normally 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), you may be in a position to terminate the bidder for default, minimize your damages by awarding to the next lowest bidder, and recover the damages including the bid differential from the defaulting contractor. You should evaluate all the costs of undertaking this course of action, (including long run effect on competition and pricing) if any, before proceeding.

4.5 COMPETITIVE PROPOSALS (REQUEST FOR PROPOSALS)

4.5.1 Solicitation & Receipt of Proposals

REQUIREMENT
Requests for proposals shall be publicized. [108]

106 - *See, e.g.*, § 2.205 of the *Texas Business and Commerce Code* which provides: § 2.205. Firm Offers.

An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

107 - *Nation-Wide Reporting and Convention Coverage*, GSBCA No. 8309, 88-2 BCA 20,521 at 103,741.

108 - FTA Circular 4220.1E § 9.d.(1).

RFPs shall identify all evaluation factors along with their relative importance. [109]

Proposals will be solicited from an adequate number of qualified sources .[110] You shall make award only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed agreement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. [111]

Awards will be made to the responsible firm whose proposal is most advantageous to the grantee's program with price and other factors considered. [112]

In architectural and engineering services procurements, grantees shall use competitive proposal procedures based on the Brooks Act, which requires selection based on qualifications and excludes price as an evaluation factor provided the price is fair and reasonable. (See Section 6.5 – *Architect-Engineering Services.*) [113]

DISCUSSION

A request for proposals typically includes all of the elements of an invitation for bids, and in addition shall contain the evaluation factors and their relative importance, e.g., by stating that the factors are listed in declining order of importance. The request can specify the information needed to perform the evaluation, and may require that cost/price information be physically separated so that the technical evaluation can be performed separately from price evaluation. RFPs are typically publicized in newspapers and/or trade journals, and are issued to qualified mailing lists maintained in a manner similar to IFB lists. (See Section 4.3.2.2, "Solicitation Mailing List")

Purpose

The required feature that principally distinguishes an RFP from an IFB is the listing of evaluation factors. These factors typically include not only responsibility factors (such as financial, human, and physical capacity to perform), but also technical factors (such as the degree to which the proposer is expected, based on information submitted and available, to achieve the performance objectives, to provide the quality expected, and on the relative

109 - FTA Circular 4220.1E § 9.d.(1).

110 - FTA Circular 4220.1E § 9.d.(2).

111 - FTA Circular 4220.1E § 7.h.

112 - FTA Circular 4220.1E § 9.d.(4).

113 - FTA Circular 4220.1E § 9.e.

qualifications of the proposer's personnel). Many RFPs go beyond listing these factors in order of importance, and also describe the evaluation process in detail, listing weights for each factor, illustrating the scoring method, and specifying the procedure for weighing price into the selection.

The purposes for disclosing of the evaluation process are so that:

- offerors can more accurately respond to your needs rather than solely rely on the technical specifications alone;
- proposers will be able to clearly present the information you need to conduct your evaluation; and
- the appearance of favoritism or unethical practice in offeror selection will be diminished.

The competitive proposal process involves a subjective evaluation process and discussions that are typically confidential. Public acceptance and acceptance by disappointed offerors might be less than in the case of sealed bids, if the evaluation and selection process is not well documented and disclosed in advance.

Best Practices

Evaluation and Award - The following is a listing of elements commonly found in the competitive proposal method of procurement.

- Both a technical and cost proposal are requested so that they may be evaluated, frequently by separate staff. Where the appearance of technical objectivity is important, it is a better practice 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 attack on the agency decision;
- Disclosure Advantages. The full description of the process guides proposers in understanding your needs, bolsters the objectivity of your 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 clearly, that the initial proposal should be their best effort.

Proposal Guarantee - Although performance bonds are often appropriate and required by RFPs, the use of a proposal guarantee is less common than bid guarantee. Because the proposers generally have unavoidable opportunity during negotiations to render their proposals unacceptable, part of the purpose of bid guaranties cannot be achieved in the case of proposals. (See Section 4.3.3.3.2, "Bid Guarantee" and Section 8.2.1, "Performance Bonds.") However, if it is particularly important that the initial proposals be firm commitments by the offerors, that frivolous proposals not be submitted, or that proposers be 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 cost-effective.

4.5.2 Evaluation of Proposals

REQUIREMENT

FTA Circular 4220.1E, paragraph 9.d, requires the following when procuring by competitive proposals:

d. Procurement By Competitive Proposal/Request for Proposals (RFP). . . . If this procurement method is used the following requirements apply:

(1) Requests for proposals will be publicized. All evaluation factors will be identified along with their relative importance;

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

(3) Grantees will have a method in place for conducting technical evaluations of the proposals received and for selecting awardees;

(4) Awards will be made to the responsible firm whose proposal is most advantageous to the grantee's program with price and other factors considered; and

(5) In determining which proposal is most advantageous, grantees may award (if consistent with State law) to the proposer whose proposals offer the greatest business value to the Agency based upon an analysis of a tradeoff of qualitative technical factors and price/cost to derive which proposal represents the “best value” to the Procuring Agency as defined in Section 6, *Definitions*. If the grantee elects to use the best value selection method as the basis for award,

however, the solicitation must contain language which establishes that an award will be made on a "best value" basis. [114]

In architectural and engineering services procurements, grantees shall use competitive proposal procedures based on the Brooks Act, which requires selection based on qualifications and excludes price as an evaluation factor provided the price is fair and reasonable. (See Section 6.5 – *Architect-Engineering Services.*) [115]

DISCUSSION

FTA Circular 4220.1E – The most recent edition of the FTA Procurement Circular added an item (5) in paragraph 9.d. -*Procurement By Competitive Proposals/Request for Proposals (RFP)* in order to recognize the concept of best value in evaluating offerors' proposals and selecting successful contractors in negotiated procurements. The FTA Circular, paragraph 6.g, defines *best value* in these terms:

> ***Best Value: A selection process in which proposals contain both price and qualitative components, and award is based upon a combination of price and qualitative considerations. Qualitative considerations may include technical design, technical approach, quality of proposed personnel, and/or management plan. The award selection is based upon consideration of a combination of technical and price factors to determine (or derive) the offer deemed most advantageous and of the greatest value to the procuring agency.*** [116]

For purposes of this discussion it may be helpful to distinguish the concept of "best value" selections from the more traditional practice of identifying the lowest price, technically acceptable proposal (although that too actually represents what the grantee feels will be the "best value" selection given the nature of the requirements it is procuring). Both approaches will require technical evaluations and price analysis, and both will require the solicitation to clearly inform the prospective offerors of how the selection decision will be made:

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[114] - Sub-paragraph (5), like paragraph 6.g., recognizes the concept of *best value*. Once again, FTA does not wish to dictate any particular factors or analytic process. Solicitations must, of course, tell potential competitors for the contract what the basis for award will be.

[115] - FTA Circular 4220.1E § 9.e.

[116] This new definition was intended to recognize the concept of best value. The language is intended neither to limit nor dictate qualitative measures grantees may employ.

- ***Best value*** **- requires tradeoffs between price and non-price factors to select the best overall value to the grantee.**

- ***Lowest price technically acceptable proposal*** **- requires selection of the lowest price proposal meeting the minimum RFP requirements.**

The FAR Background - The concept of "best value" owes its origin to acquisition reforms espoused in the Clinton-Gore administration's "Report of the National Performance Review: Creating a Government That Works Better and Costs Less." In that report, it was recommended that Federal acquisition regulations should be revised and restated with a major objective being (among others) a " . . . shift to a new emphasis on choosing best value products." [117] That reform objective was eventually translated into a completely re-written Federal Acquisition Regulation (FAR) Part 15 – *Contracting By Negotiation.* [118] Now the FAR makes *best value* the one stated objective of every negotiated procurement:

> ***15.302 – Source Selection Objective*****:** ***The objective of source selection is to select the proposal that represents the best value*****.**

Best Practices

The Federal Approach

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. [119] Where, however, the agency's requirement is less definitive, or where there is development work, or greater performance risk, then the less important price will be and the more important will be technical or past performance considerations in the source selection. [120]

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. Several important

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117 - Federal Register Vol. 62, No. 189, Sept. 30, 1997.

118 - FAR Part 15 was reissued by Federal Acquisition Circular (FAC) 97-02 dated October 10, 1997.

119 - The FAR now sees lowest price technically acceptable proposal selection as one end of the best value spectrum but we have distinguished it from best value for clarity of discussion purposes.

120 - FAR Subpart 15.101 – *Best Value Continuum*.

principles may be noted from the FAR guidance on source selection that grantees should consider in their own acquisitions:

1. Best value selection methodology affords the agency 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 grantees, agencies are now encouraged to structure selection procedures based on the realities of their requirements, and they are not expected to force-fit 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.

2. When the 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.

3. When the agency decides that its requirements are not defined with sufficient precision, or where there are performance risks, so that selection of the lowest priced 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 which gives the greatest degree of flexibility in selecting the best value proposal is to place equal weight on the price and technical factors. This then allows a choice in either direction as circumstances warrant.

4. 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 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 proposal A offers a better value to the grantee than proposal B is why a mathematically driven selection decision is not appropriate.

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. Grantees may employ any rating method or combination of methods, including: color or adjectival ratings, numerical weights and ordinal rankings. Whatever the method, the important thing is that a statement of the relative strengths, deficiencies, significant weaknesses, and risks supporting the evaluation ratings 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 determining 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, grantees must be allowed the flexibility of making 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, is a mistake. Rather, agencies should evaluate the prices offered but not score the price proposals. Prices should be evaluated and brought along side 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 see 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 is smart enough to 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$ more that 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 grantee does not want to get "locked in" to 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 to not use numerical scores to evaluate technical proposals and they have gone to adjective ratings instead; e.g., "Acceptable," "Very Good," and "Excellent." 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.

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 of the criteria that will be most meaningful in assessing the relative advantage of the proposals to your agency. You will generally include:

1. Past Performance – The solicitation should advise offerors of your 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 your 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 5.1.

2. 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 your solicitation. These factors must represent the key technical areas of importance that you intend 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.

3. 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 these key personnel relevant questions to determine the depth of their knowledge in critical areas.

4. 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. [121] Competition normally establishes price reasonableness. Therefore, when contracting on a fixed price basis, comparison of the proposed prices will normally 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 grantee should realistically expect to pay for the proposed effort. Grantees 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. The award decision would be made with the cost realism analysis in mind.

5. 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 if price is approximately equal to, less than, or greater in importance than the technical evaluation factors as a whole.

One agency with extensive experience in conducting negotiated procurements uses language in its solicitations that informs offerors of how the agency will select that proposal that is the most advantageous to the agency, which may not necessarily be the highest ranked technically nor the lowest proposed price. They also inform offerors of how price may become a more important selection factor than technical merit when the technical proposals are evaluated as essentially equal. Following is the language used:

> *The Authority will make the award to the responsible Proposer whose proposal is most advantageous to the Authority. Accordingly, the Authority may not necessarily make an award to the Proposer with the highest technical ranking nor award to the Proposer with*

121 - See Section 6.5 – *Architect-Engineering Services.*

the lowest Price Proposal if doing so would not be in the overall best interest of the Authority. . . .

The overall criteria listed below are listed in relative order of importance. As proposals are considered by the Authority to be more equal in their technical merit, the evaluated cost or price becomes more important so that when technical proposals are evaluated as essentially equal, cost or price may be the deciding factor. [122]

Evaluation Criteria:

A. Technical Qualifications (With Details)
B. Overall Price
C. Other Relevant Matters (With Details)

4.5.3 Competitive Range

REQUIREMENT
Grantees will have a method in place for conducting technical evaluations of the proposals received and for selecting awardees. [123] As discussed in this section, "competitive range determination" is a concept that can be used when developing methods for selecting awardees under the competitive proposal method of procurement.

DISCUSSION

At this stage in the competitive proposal procurement, you have received the proposals from interested offerors and have 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. You may not wish to expend this effort on all the proposals for two reasons:

- **certain proposals, upon evaluation, may be so much worse than others for price or other reasons, that the possibility of accepting a subsequent offer is so remote as to make negotiations unnecessary; and**

122 New York City Transit – for more information call Mr. William DeSantis at 718-694-4339.

123 - FTA Circular 4220.1E § 9.d.(3).

- **you may have enough proposals so that you can be assured of negotiating the best buy in dealing only with several of the best; negotiating with more would be wasteful of both your resources and 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 which stand a reasonable chance of being found acceptable, not to unduly limit competition by eliminating viable proposers.

Purpose

Competitive range is a difficult concept to define in specific terms which would apply to all potential procurements, 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.

The competitive range can be determined so that it is:

- Not used to unfairly eliminate offerors;
- Based on factors and criteria known to all offerors;
- Applied uniformly to all proposals; and
- Well documented in the procurement files.

One of your considerations may be that as many offerors as possible be given the opportunity to be considered within the competitive range, so as to attain the goal of full and free competition. Only those offerors whose proposals are determined to be so deficient or so out of line as to preclude meaningful negotiation need be eliminated from the competitive range.

The competitive range can consist of those offerors whose proposals have a reasonable chance of being selected for award, i.e., are acceptable as submitted or can be made acceptable through modification. 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.

Best Practices

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/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/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, you may paint yourself into a corner if you commit to competitive range determinations based on predetermined "cutoff scores."

- Borderline proposals need not automatically be excluded from the competitive range, if they are reasonably susceptible of being made acceptable. Remember that as a general rule, if there is doubt as to whether a proposal should be in the competitive range, the goal of competition is served by including it.

- Only those proposals that are judged to be 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 systems notify, in writing, any 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 in writing. This combines complete fairness for each offeror, with competitive incentive for each to make its best realistic offer. For a discussion on best and final offers, reference Section 4.5.5.2 "*Request for Best and Final Offer*."

4.5.4 Discussions and Clarifications

DEFINITIONS

Negotiation - A procedure that includes the receipt of proposals from offerors, permits bargaining and usually affords offerors an opportunity to revise their offers before award of a contract.

Discussion - Any oral or written communication between a procurement official and a potential offeror (other than communication conducted for the purpose of minor clarification) whether or

not initiated by the procurement official, that (1) involves information essential for determining the acceptability of a proposal, or (2) provides the offeror an opportunity to revise or modify its proposal.

Clarification - A communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in a proposal.

DISCUSSION

You may wish to obtain clarifications from one or more proposers, or hold discussions with all proposers immediately after receipt of proposals. However, it is also possible to proceed with evaluations and determination of a competitive range as described in the following sections, before discussions are held. Most typically, the first discussions are oral presentations made by a short list of proposers within a competitive range. If discussions are held with any proposer at any phase of the procurement, holding discussions with all remaining proposers (not already excluded from the competitive range as described in Section 4.5.3, "Competitive Range") will increase the likelihood and the appearance of the most accurate and objective evaluation and negotiation.

Best Practices

You are not required to conduct discussions with any offeror provided: (1) the solicitation did not commit in advance to discussions or notified all offerors that award might be made without discussion, and (2) the award is in fact made without any written or oral discussion with any proposer. Normally, however, you will need to conduct discussions. If this is the case, you will preserve the competitiveness and fairness of your procurement by conducting discussions with all offerors who submitted proposals in the competitive range. The competitive range is determined on the basis of cost or price and other factors and includes the proposals that have a reasonable chance of being selected for award. The content and extent of the discussions is a matter of your judgment based on the particular facts of the procurement.

Confidentiality has many advantages during the evaluation process. The name and number of proposals received is not normally considered a public record and need not usually be released to the competitors or the public at large. Your control of this information may ease the proposers' competitive tension and allow you to conduct more meaningful negotiations. Competitive information provided relative to both the technical and cost proposals may include trade secrets protected by statute and can usually be kept confidential during the evaluation process, and, in some instances, after the award of contract. However, state public information laws and the Federal Freedom of Information Act can also affect your latitude, particularly if there is public interest in the procurement and inquiries are made by non-competitors.

If you enter negotiations or discussions (as opposed to simple requests for clarification) with one offeror, an automatic impression of unfairness is avoided by entering them with all remaining offerors. An occasional mistake is to circumvent the process merely by requesting "clarifications" when you are in fact conducting discussions. If the questions, and the concurrent

opportunity to respond, are sufficient to lead an offeror into areas of perceived deficiency in its proposal, discussions have been held. If discussions are held, what should the content be or how should they start? Competition and fairness are served by conducting meaningful discussions with offerors.

This includes advising them of deficiencies in their proposals and affording them the opportunity to satisfy the requirements by the submission of revised proposals. You are not, however, obligated to afford offerors all-encompassing discussions, or to discuss every element of a technically acceptable, competitive-range proposal 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, you are not required to include the proposal in the competitive range for discussion purposes.

Sometimes you may be in the uncomfortable position of having concluded discussions only to discover there is a significant mistake or an aspect the evaluators do not understand in one proposal. Since allowing one bidder to correct its proposal would constitute discussions with that firm, discussions must reopened with all bidders in the competitive range and the must be allowed the opportunity to submit revised proposals.

During discussions with offerors, you may be requested to ask all proposers to submit proposals with an advantageous approach proposed by one of them. Someone on your team may suggest that a technique used by proposer A would complement proposer B's approach well and could result in an advantageous offer from B. Also, after price proposals have been evaluated, someone may suggest that a proposer with a high technical score should be asked if it can meet a price which happens to be the price of a competitor. Such techniques are considered technical leveling, technical transfusion or auctioning. The disadvantage of these techniques is that proposers may react adversely. Because they are concerned about their position relative to their competitors, and want to keep their strengths confidential from their competitors, they may become more secretive in their discussions with you if they sense you may relay their ideas, pricing, or positions to 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 proposer's information to another. They may hold back their strengths and valuable information, waiting for a BAFO. This can greatly inhibit the negotiation of the most advantageous proposal.

4.5.5 Additional Submissions

4.5.5.1 Request for Revised Proposals

DISCUSSION

The most common tool used by procurement officials in competitive negotiations is a request for a revised proposal. Typically, the deficiencies of a proposal are listed and explained. 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. The proposer should identify all changes in the revised offer. The submission of the revised offers can trigger another round of evaluations, determination of a new competitive range, and discussions. You may repeat this cycle as many times as necessary to obtain the most advantageous offers. If you conclude you have obtained the most advantageous offer possible, you may recommend award.

Purpose

The purpose of the request for revised proposals, like the original request for proposals, is to harness the competitiveness and creativity of the proposers to produce the most advantageous proposal for your customers. You and the proposer may understand only gradually each other's capabilities and constraints. Each written proposal may raise new questions and new possibilities. You can elicit the best improvement each time a revised proposal is prepared by listing clearly the deficiencies of the current proposal as you understand it.

Although you expect proposers to respond primarily to your requests in preparing revised offers, you also want to learn how your requests affect other aspects of their proposals. Based on the format of the proposals and the nature of the changes you are requesting, you may require that revised proposals be submitted in a form that will both easily allow you to identify the changes and also form the basis of a coherent contract, if accepted.

Private parties in bilateral negotiations would probably make counter-offers to each other to advance the process. There are disadvantages to your making a counter offer in a competitive proposal procurement. Not only would a counter-offer on your part extinguish the proposer's last offer, it would place the proposers (possibly more than one) in the position to accept or reject. Therefore counter-offers are usually not made by procuring agencies.

4.5.5.2 Request for Best and Final Offer

DEFINITION

A best and final offer (BAFO) can be requested of each offeror in the competitive range at the conclusion of discussions (negotiations) with those offerors. If an offeror does not respond to your request, your procedures may allow you to consider the most recent offer to be the best and final offer.

DISCUSSION

As the procuring official, you are now at the stage of your competitive negotiation process where you are ready to receive final offers from the offerors still within the competitive range. You now ask for a "best and final offer" from those offerors. If the other offers have no viable chance of being made competitive by this time, then you may request the

BAFO from only one proposer; of course there is little competitive pressure under those circumstances. Upon timely receipt of the BAFO(s) and final evaluation by the agency, you should be in a position to recommend award to a firm or individual in accordance with the terms and conditions of the solicitation.

Purpose

During the course of the evaluation process of the competitive proposal procurement, you have entered into discussions (negotiations) and clarifications [124] with those offerors still in the competitive range. [125] As a result of those discussions, you may have amended some parts of the solicitation and may have asked for revised proposals during the negotiation process. You now feel that you have completed negotiations and are ready to ask for and then evaluate the offerors' best and final offers. If you believe there is a significant possibility that even if a BAFO is requested, you will probably want to improve further on the next offers, then you are not ready to request BAFOs and should, instead, request revised offers. This provides the offerors an opportunity to respond to the requests and to provide their best offer in response to the current solicitation.

Best Practices

The ability to enter into discussions with offerors in the competitive range is one of the greatest advantages of utilizing the competitive proposal method of procurement. This process allows offerors to resolve questions and concerns they may have about the commodity or service being procured and the public agency to resolve questions and concerns it may have about the offerors' proposals. At some point during the negotiation process, a decision is made that all out-standing issues have been resolved to the satisfaction of the parties involved. This is the time to formally conclude the discussions by requesting that each offeror remaining in the competitive range submit its best and final offer. The request normally would include 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.

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124 - *See* discussion in Section 4.5.4, "Discussions and Clarifications."

125 - *See* discussion in Section 4.5.3, "Competitive Range."

Following receipt of the best and final offers, you will evaluate them in accordance with terms of the solicitation and recommend award in accordance with those terms.

Request for subsequent best and final offers - It is the preferred practice to only ask for one "best and final offer." Requests for additional best and final offers should be avoided if at all possible. [126] 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 best and final offers would be issued to all offerors still within the competitive range.

4.5.6 Award Based on Initial Proposals

REQUIREMENT
You shall make award only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed agreement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. [127] Awards will be made to the responsible firm whose proposal is most advantageous to the grantee's program with price and other factors considered. [128]

You may accept one of the initial proposals if it can be clearly demonstrated that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price. 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 initially on the most favorable terms possible, from a price and technical standpoint.

You are not required to conduct discussions with any offeror provided: (1) the solicitation did not commit in advance to discussions or notify offerors that award might be made without

126 - Multiple rounds of best and finals tend to create suspicion in the minds of offerors about what the motive is for the subsequent requests, particularly if does not appear that negotiations are being reopened for a discussion of substantive matters. The preparation of proposals can be a very time-consuming and expensive process and it is possible that, for one of these or some other reason, an offeror may decide not to submit a response to a 3rd or 4th request for a best and final offer. Also, if you make a practice of multiple BAFOs, you may not receive "best" offers in the first round during future procurements.

127 - FTA Circular 4220.1E § 7.h.

128 - FTA Circular 4220.1E § 9.d.(4).

discussion, and (2) the award is in fact made without any written or oral discussion with any proposer. 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 you accept an initial offer, the determination of fair and reasonable price will be an important document in your file. Normally, however, you will need to conduct discussions.

4.5.7 Withdrawal of Proposal

DEFINITION

Firm offer - A promise to undertake specified obligations in exchange for consideration which promise may be accepted for a specified or implied period of time; a firm offer cannot be withdrawn during the period for which it remains firm.

DISCUSSION

Your 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 4.3.2.3, "Solicitation") Competition is best served and unnecessary alternate proposals are avoided by allowing proposers to withdraw or modify their proposals up to the time due. However, after the due date, the proposals are usually firm and cannot be withdrawn during the validity period. To ensure the legitimacy of proposals and discourage frivolous proposals, you should have the right to accept an initial proposal without regard to whether the proposer has had second thoughts.

Purpose

As in the case of sealed bids, it is important to the integrity of your procurement that all offers are serious and not submitted for exploratory reasons or to cast a certain light on other offers. Although the negotiation process, in contrast to sealed bidding, reduces the incentive to this sort of gamesmanship, the concern is still valid, particularly where you may wish to accept an initial offer. It will be important to proceed from offer to offer, eliminating offerors from the competitive range on a firm basis, to ensure that you arrive smoothly at a conclusion. It is customary, therefore, not permit proposals to be withdrawn after submission.

Best Practices

The terms of your solicitation and your requests for revised offers or BAFOs can state a period during which the offers remain firm. (See Section 4.3.2.3, "Solicitation") A good practice is to note this period on the offer form used by proposers to summarize their proposals.

Solicitations also often state that modifications or withdrawals will be permitted until the time due. In the case of a revised offer or BAFO, your solicitation can provide that the withdrawal of the offer would result in the continued validity of the most recent offer.

4.5.8 Debriefing Unsuccessful Offerors

DISCUSSION

Proposers excluded from the competitive range or from award may request a debriefing or you may offer to provide a debriefing. A candid explanation of the process can serve the purposes of defusing any potential dispute by the disappointed proposer and encouraging future proposals. If a dispute is already probable, there is no requirement to notify or debrief unsuccessful offerors, but the litigation and other risks must be carefully weighed.

Best Practices

Your decision not to include a proposer in the competitive range or to recommend award to another proposer may have to be explained to the public and to the offeror. [129] If the reasons and rationale are documented, you can proceed with confidence. Here, the advantages of an objective, quantified scoring process [130] implemented by a qualified committee become obvious; even if you choose not to reveal the details of the scoring, you will be more convincing when speaking with the support of a wealth of independent, objective data. In some cases, the details of the scoring may be subject to disclosure as public information after the contract is awarded.

By notifying the disappointed firm expeditiously, you will not permit doubts to grow, you can approach the firm on the basis of openness and candor, and you will share the common perspective of the events to date of your decision, rather than any subsequent developments which may cast a different light. Be prepared to discuss the reasons with the offeror. This may be a good opportunity to educate a firm or individual on the competitive proposal process. Avoid comparisons to the successful offeror. Focus on the strengths and weaknesses of the offer itself -- be specific. If done properly and professionally, you may see this "smarter" proposer again in a future procurement. This is your ultimate goal, to maximize competition.

On the other hand, unless your procedures require you to notify the disappointed proposer immediately, you may be able to wait to inform the firm until contract award is made to the successful proposer. Particularly if you have reason to believe a firm is inclined to dispute or delay the action, you may be able to proceed unilaterally without encouraging any delaying tactics. To maximize the likelihood of award without delay, this alternative school of thought faces a number of problems. The disappointed firm may be suspicious because you have not contacted him/her about any further discussions, or may otherwise learn that its offer is not being

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129 - A very significant caveat must be issued at this time. If your governing body (city council, county commissioners, board of directors, etc.) has reserved unto itself the sole authority to reject bids for whatever reason, you, as the procurement official, have no authority to make that final determination and notify the bidder until your governing body has concurred with your recommendation.

130 - *See* Section 4.5.2, "Evaluation of Proposals."

considered for award. If you wait until award is made (which is a public action), the proposer will be left with only two choices, to do nothing or to file legal action. If the firm chooses the first course of action, he/she may be reluctant to propose on your jobs again because they may believe "games" were played. If the proposer 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 and substantial other costs to your agency.

4.6 NON-COMPETITIVE (SOLE SOURCE) PROPOSALS

4.6.1 Justification for Use

REQUIREMENT

In addressing the various methods of procurement that may be used, Section 9.h of FTA Circular 4220.1E provides:

> Procurement By Noncompetitive Proposals (Sole Source). Sole source procurements are accomplished through solicitation or acceptance of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. A contract amendment or change order that is not within the scope of the original contract is considered a sole source procurement that must comply with this subparagraph.
>
> 1. Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and at least one of the following circumstances applies:
>
> (a) The item is available only from a single source;
>
> (b) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
>
> (c) FTA authorizes noncompetitive negotiations;
>
> (d) After solicitation of a number of sources, competition is determined inadequate; or
>
> (e) The item is an associated capital maintenance item as defined in 49 U.S.C. § 5307(a)(1) that is procured directly from the original manufacturer or supplier of the item to be replaced. The grantee must first certify in writing to FTA: (i) that such manufacturer or supplier is the only source for such item; and (ii) that the price of such item is no higher than the price paid for such item by like customers.

2. A cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit, is required.

DISCUSSION

Sole source solicitations may not be issued nor may noncompetitive proposals be accepted except under the unusual conditions listed above. Often, there are practical means of obtaining competition which are not at first apparent. If a non-competitive proposal is accepted, a careful cost analysis must be done. Because of the strict scrutiny applied to sole source procurements, painstaking documentation of the justification for the noncompetitive proposal and of the cost analysis is valuable in the long run. FTA approval for noncompetitive negotiation is not required unless you are relying on justification (c) in the Circular. This places a heavy burden on you to ensure you use noncompetitive negotiation only in the public interest and according to the Federal requirements. State requirements may be more restrictive than Federal.

Purpose

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. [131] However, there may be very legitimate reasons or situations when, as opposed to "full and open" competition, limited or no competition exists The FTA, through the requirements set forth above, has established guidelines when sole source procurements may be used if FTA funds are involved.

Even though we will address federal requirements in this section, you should also be aware of any limitations or restrictions that your state law or agency regulations may place on you.

Because procurement by sole source is a noncompetitive procurement, it is treated as an "exception-to-the-norm" in public procurements and, as a result, your ability to use it requires justification and, frequently, pre-approval before you award a sole source contract. In this context, "justification" equates to paperwork and documentation, the bane of all procurement professionals but a necessary part of our genetic make-up.

Best Practices

As quoted above, FTA Circular 4220.1E establishes a matrix that should be followed in justifying the use of noncompetitive or sole source procurements.

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131 - *See, e.g.*, FTA Circular 4220.1E § 8.a.: "All procurement transactions will be conducted in a manner providing full and open competition."

Step One - You must first determine that your requirement cannot be obtained under small purchase procedures, [132] sealed bids, [133] or competitive proposals. [134] Does more than one source exist? Does adequate time exist to obtain your requirement through a competitive process? Is Item B (for which competition exists) an acceptable substitute for Item C (for which there is only one source)?

- Stated another way, contracting officers should take reasonable steps to avoid using sole source procurement except in circumstances where it is both necessary and in the best interest of the agency.

- If one of the three methods can be used (or is feasible), even if you would rather not, sole source is not an option for you.

Step Two - If one of the competitive processes is not feasible in your situation, you may use sole source procurement if at least one of the following circumstances is present:

- The item is available only from a single source - In justifying the use of this circumstance, you will frequently address such factors as:

Single Source Factors:	**Examples**:
How did you arrive at the conclusion this item represents your minimum need or requirement? Is this a "nice to have" with all the "bells and whistles" or does it really represent your requirement or minimum need? How did you determine availability? Did you check on prior procurements for the same or similar items? Are there other sources? Are they responsible? Are identical or compatible parts or equipment available from any other source?	*Utility services* (how many sources do you have for electricity in your community?) *Limited rights in data, patent rights, copyrights, or secret processes* (If one entity owns the patent on a process or product you require, can anyone else meet your need?) *Relocation of a major natural gas distribution line from your rail right of way* (the natural gas utility company is the only source available to work on the gas line)

132 - *See* discussion of small purchase procedures in Section 4.2, "Small Purchases."

133 - *See* discussion of sealed bidding procedures in Sections 4.3 and 4.4.

134 - *See* discussion of competitive proposals in Sections 4.3 and 4.5.

Who prepared the specification or statement of work? Did a vendor or contractor assist? If so, will they benefit somehow by the decision to proceed with a sole source contract?	

- The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation- Two factors: public exigency or emergency and no time to competitively procure!

- When your 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, it can be justified.

- In an emergency situation, it is not unusual for health and safety issues to be a factor in the decision to proceed with a sole source.

- If the agency itself is responsible for being short of time -- i.e., lack of advance planning, delays in procurement administration due to shortage of procurement personnel or incompetence of procurement personnel, money in the budget balance expires the end of next month, particular caution should be exercised in making a determination regarding whether the emergent consequences of delay warrant noncompetitive negotiation and to what extent the agency contributed; an independent opinion may be warranted.

- If the emergency is to repair a hole in the roof of your maintenance facility where a tree limb fell through it because of the storm last night, is the sole source procurement a patch job or a replacement of the roof because it was getting old anyway? One school of thought is that you should only perform the minimal work necessary to alleviate the exigency or the emergency. Don't use it as an excuse to do remedial work or buy a year's supply of something you intended to do competitively next month anyway.

- While many state laws parallel the other conditions under which Federal funds may be used for non-competitive proposals, state laws for emergency situations are often more restrictive. Furthermore, *the most critical delay in an emergency may be obtaining your agency's authority*, e.g. at a monthly board meeting; inquire about (and recommend changes to, if appropriate) your Board's policy for emergency procurements.

- FTA authorizes noncompetitive negotiations - You may have a situation you feel warrants the utilization of sole source procurements but it doesn't quite fit into one of the other circumstances. You are a small transit property with a vehicle monitoring system you installed last year. The accuracy and utility of the system is exceeding all expectations and you now need to display the schedule adherence information in three new downtown transfer locations. Could you go sole source to Brand X? If you justify why (compatibility requirements, interfaces with proprietary software, unavailability of interested competition,

etc.), this may be the sort of procurement you should discuss with the FTA and request its permission to use sole source.

- After solicitation of a number of sources, competition is determined inadequate - You have issued an IFB and only received one bid from a responsible contractor, but you cannot determine its price to be reasonable. If you are satisfied about the bidding environment and the reasons why you only received one bid, you can negotiate a sole source contract to arrive at a reasonably priced contract.

- The item is an associated capital maintenance item as defined in 49 U.S.C. § 5307(a)(1) that is procured directly from the original manufacturer or supplier of the item to be replaced. - This topic is discussed in greater detail in § 4.6.3, "Associated Capital Maintenance Item."

Step Three - **DOCUMENTATION** of justification. It is recommended that you document very thoroughly and carefully the rationale you went through to justify your sole source procurement. Your agency may have very specific requirements for "Findings and Determinations" that must be followed. You may have pre-approval requirements at a certain dollar threshold that must be met -- your Board of Directors may require its approval of any proposed sole source procurement in excess of $250,000 prior to the commencement of the negotiations. You may have other documentation requirements peculiar to your agency, state, or local government that you must meet prior to the initiation of negotiations which must be met.

4.6.2 Negotiation of Contract

DISCUSSION

"Once I have justified the use of procurement by noncompetitive proposals, what do I do next? How do I negotiate this thing?"

Best Practices

Single Offer after Competitive Solicitation - As previously discussed in Section 4.4.3, "Single Bid," you may conclude after receiving only a single bid that competition is inadequate and that you should negotiate with the single bidder to establish a fair and reasonable price. You may be in this situation because you only received one bid or proposal from one source or you have determined that the competition you received was otherwise "inadequate." To proceed in this case, you must meet the requirements for noncompetitive negotiation. However, you do not need to issue a new solicitation because your requirement is adequately stated. You may, after meeting the requirements of the previous section, proceed to negotiate a reasonably priced contract using the negotiation procedures discussed in Sections 4.5.2, "Evaluation of Proposals," through 4.5.8, "Debriefing Unsuccessful Offerors."

All Other Cases - In other circumstances you have justified, it is recommended that you request a proposal from the source. There is no need to advertise - there will be no competition! Your request for a proposal can be as formal as you want -- from letter requests up to a full blown solicitation document. Regardless of the form used, you want to:

- refer to, or attach, all terms and conditions of the solicitation. You still need to comply with federal representation and certification requirements. You still will want to have special and general provisions. You may have additional agency requirements that must be met. What is the DBE goal for this procurement -- how will it be met?

- refer to, or attach, the specifications or statement of work for the supply or service being procured.

- request the applicable cost or pricing data. [135]

Allow adequate time for the contractor to prepare its proposal prior to submission back to you.

Review the proposal with impacted internal agency staff -- really prepare for your negotiations with this sole source.

Negotiate the final terms and conditions of the contract using the negotiation procedures you would use in your competitive proposal method of procurement. [136] These negotiations can be more pointed and open because there is no competitive environment involved -- the integrity of a procurement process is not involved so issues like "technical leveling" and "transfusion" do not have to be considered.

As discussed in Section 5.2, "Cost and Price Analysis,"{and as required by FTA Circular 4220.1E § 9.h.(2)}, a cost analysis is required. This includes verifying the proposed cost data, the projections of the data, and the evaluation of specific elements of costs and profit.

4.6.3 Associated Capital Maintenance Item

REQUIREMENT
Original Equipment Manufacturer components may be procured by competitive negotiations only if: (e) The item is an associated capital maintenance item as defined in 49 U.S.C. § 5307(a)(1) that is procured directly from the original manufacturer or supplier of the

135 - *See* discussion of the submission of cost and pricing data in Section 5.2, "Cost and Price Analysis."

136 - *See* discussion of negotiations under competitive proposal method at Section 4.5.2, "Evaluation of Proposals."

item to be replaced. The grantee must first certify in writing to FTA: (i) that such manufacturer or supplier is the only source for such item; and (ii) that the price of such item is no higher than the price paid for such item by like customers. [137]

DEFINITION

Associated capital maintenance item - Equipment, tires, tubes, or material, each costing at least 0.5 percent of the current fair market value of rolling stock comparable to the rolling stock for which the equipment, tires, tubes, and material are to be used. [138]

DISCUSSION

If you can purchase a replacement part or component for rolling stock only from the original manufacturer, and the item costs at least 0.5% of the vehicle price, then you may procure the item by noncompetitive proposal provided you make the requisite certifications in advance to FTA and determine the price to be reasonable based on a cost analysis.

Best Practices

In order to "qualify" to use this circumstance to justify sole source, the FTA has established the following requirements:

- The item must be an associated capital maintenance item as defined above.
- The item must be procured directly from the original manufacturer or supplier of the item to be replaced.
- Prior to execution of the contract, you must first certify in writing to the FTA that such manufacturer or supplier is the only source for such item; and that the price of such item is no higher than the price paid for such item by like customers.

Approval of the FTA is not required -- just certification of the grantee (you).

When you read these requirements carefully, you are still essentially justifying a sole source {as in FTA Circular 4220.1E § 9.h.(1)(a)} and certifying that fact to the FTA. Also, even though you are certifying that the price of the item is no higher than the price paid for such item by like customers, you are still required to perform a cost analysis as part of the contract negotiation and award process.

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137 - FTA Circular 4220.1E § 9.h.(1)(e).

138 - 49 U.S.C. § 5307(a)(1).

4.6.4 Unsolicited Proposals

DISCUSSION

The subject of unsolicited proposals is one not covered in transit law or the common grant rule. In cases like this, FTA would look to the Federal Acquisition Regulations (FAR) provisions as a guide concerning the circumstances under which a sole source award would be appropriate. The FAR covers this subject as FAR Part 15.6. The FAR is available online at http://www.arnet.gov/far/.

When unsolicited proposals are submitted to a grantee, the agency must never assume that the product being offered in the unsolicited proposal is the only, or best, product available to meet the needs or objectives of the agency. The essential consideration in whether or not to accept an unsolicited proposal without competition (i.e., to make a sole source contract award) is whether or not the proposal is presenting an innovative, proprietary concept that is itself essential to accomplishing the agency's objective. If a company is merely presenting a rationale for doing certain work that could be done by others if given the chance to compete, then there is no permissible basis to award a sole source contract.

In the case of a proprietary software product that is being offered to achieve a certain goal, the transit agency receiving the proposal could not, for example, release the offeror's proprietary programming codes in a competitive solicitation. But the agency should, if it deems the mission one it wants to pursue, compete the contract award in terms of describing what the agency's objective or mission is in order to see what other firms might offer in terms of software solutions.

New York City Transit (NYCT) requires that any contract resulting from an unsolicited proposal be justified in writing by the Procurement Office, regardless of the department that received the proposal. Each proposal is reviewed to determine if the goods or services being offered are essential to NYCT and whether the proposer is simply offering something that can be obtained through open and competitive bidding. If it is determined that the goods or services being offered would benefit NYCT, and could be obtained through competitive bidding, then there is not sufficient justification for a sole source award.

Revenue Contracts - The subject of unsolicited proposals is discussed in the context of revenue contracts in BPPM section 1.3.3.8 – *Revenue Contracts.* With respect to unsolicited proposals in the context of companies seeking to use FTA funded assets for business purposes, the BPPM offers the following guidance:

"Unsolicited Proposals - These may come forth when companies see an opportunity to use the transit system (an FTA-funded activity) to enhance their business interest. It may appear from such proposals that no other company could offer the same product or service. However, this does not justify a sole source contract. If the idea or activity is of

interest to you, the concept should be evaluated on its own merit and revenue producing potential. If the decision is to implement it, then a competitive process should be used to select the contractor, *unless you determine that the proposed concept itself is proprietary*."

New York City Transit (NYCT) was approached recently by a company, which submitted an unsolicited proposal, wanting to install an electronic information system on the subway cars. The company wanted to program the system so that riders would know what was overhead, e.g. Wall Street, theater district. New York City decided to investigate the concept first to determine if it was something that they wanted to do to enhance the subway system. Deciding that they liked the idea, they then prepared an RFP and solicited vendors on a competitive basis.

Metropolitan Atlanta Rapid Transit Authority (MARTA) received an unsolicited proposal from a company about use of subway right-of-way for linking Atlanta with fiber optic cable using MARTA's system-wide conduits. MARTA determined that they had unused conduits and could lease space in them to various telecommunication companies. They contacted the regional FTA office and received their approval for a non-exclusive RFP to seek competitive proposals for twenty-year leases. This has produced successful revenue contracts.

4.7 SPECIAL PROCUREMENT METHODS

4.7.1 Multi-Step Procurements

DISCUSSION

You have discussed in detail the differences between the competitive bidding process and the competitive proposal process but I've got one of those 'tweeners' -- something that falls somewhere between those two processes. There are a number of various technical approaches that would probably meet our requirement and, if we determined which firms met our minimal technical requirements, we could compete amongst them on the basis of the lowest responsive, responsible bidder. But we may have to enter into discussions with all offerors in order to determine technical acceptability. Can this be done?

FTA Circular 4220.1E permits a great number of procedures that vary from the classic procedures discussed in most of this Manual. For example, a variation that has long-been recognized in public procurement is referred to as the two-step, sealed bidding method of procurement. While it has some characteristics of both sealed bidding and competitive proposals, it complies with all FTA Circular 4220.1E requirements for the competitive proposal process. This process allows, in the first phase, for the submission of unpriced technical proposals in response to the request. 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, as though it were a regular sealed bid procurement. Award is then made to the lowest, responsive and responsible bidder.

Best Practices

Overview

Two-step bidding is a two-phase process generally consisting of a technical first phase composed of one or more steps in which bidders submit unpriced technical proposals (and discussions are held with offerors of those proposals, if necessary) to be evaluated by the transit property, and a second phase in which those bidders whose technical offers are determined to be acceptable during the first phase have their priced bids considered.

The process is designed to:

- Obtain the benefit of sealed bidding by award of a contract to the lowest responsive, responsible bidder, and, at the same time,

- 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 your state law as a separate method of procurement or may be allowed as a variation of a sealed bidding statute, particularly in those states where limitations on the use of the competitive proposal method exists.

Conditions for Use

Transit properties generally follow one of two stated policies. Either this method may be used when it is not considered practical to initially prepare a definitive purchase or contract description which is suitable to permit an award based on price. Or alternatively, in the absence of factors or laws that require the use of sealed bidding, some authorities [139] establish a preference of the two-stepped process over 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), of the technical aspects of the requirement to ensure mutual understanding between each source and the Authority;

- Definite criteria exist for evaluating technical proposals;

- More than one technically-qualified source is expected to be available;

139 - This is also the position taken in the FAR § 14.502.

- 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.

Phase One of Process

This process normally includes the following steps:

Solicitation phase - In addition to the normal requirements for an IFB, [140] the first phase solicitation also generally provides:

- That unpriced technical offers are requested; [141]
- That the procurement is a two-step sealed bid procurement and that priced bids will be considered in the second phase and only from those bidders whose unpriced technical offers are found to be acceptable in the first phase;
- The criteria to be used in evaluating the unpriced technical offers;
- That the Authority, 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 Authority 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 shall be furnished generally in accordance with the bidder's technical offer as found to be technically acceptable and shall meet the requirements of the solicitation.

140 - *See* discussion at Section 4.4.1, "Solicitation."

141 - One variation that could be used if time is particularly tight, would be to ask, as part of Phase One, that the bidders include a sealed bid in a separate envelope that would only be opened in the event the technical offer was considered acceptable. This creates some additional security on the part of the procurement staff because you would want to ensure that the technical acceptability determination was made without knowledge of the prices for the different offers.

Amendments to solicitation in two-step process:

- Amendments issued prior to the receipt of technical offers are important to all prospective bidders as in a "normal" IFB. [142]

- 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. [143]

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 authority employees as witnesses.

- Offers are usually not disclosed to unauthorized persons.

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 susceptible of being 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. [144]

- 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.

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142 - *See* Section 4.3.2.5, "Amendment of Solicitation."

143 - If, in the opinion of the Contracting Officer, a contemplated amendment would significantly change the nature of the procurement to the extent that other entities (who did not submit unpriced technical offers) would likely become a proposed offeror as a result of the amendment, consideration should be given to canceling the solicitation and issue a new solicitation.

144 - Documentation of an unacceptable finding cannot be over stressed. Disputes over this determination are the most common area of bid protest in the multi-step process.

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 § 4.5.4 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.

Phase Two of the process may be initiated without discussions if there are a sufficient number of acceptable proposals to ensure adequate price competition under Phase Two. Based upon the results of Phase 1, you may wish to revise the technical specifications (minimum technical requirements) in your Phase 2 IFB, in a manner that does not conflict with the final unpriced proposals. While you have no assurance that the prices will be close to each other, you know to what degree the proposals have competitive technical merit.

Phase Two of the Process

The procedures discussed in Section 4.4, "Sealed Bids," can be followed in Phase Two. Each bidder who submitted an unpriced offer that was determined to be acceptable in Phase One is invited to submit a priced offer. The IFB states that the bidder shall comply with the specifications and the offeror's acceptable technical proposal. No additional public notice or advertisement of the IFB need be given because such notice was given during the Phase One Process.

Award would be made to the lowest, responsive responsible offeror as discussed in Section 4.4, "Sealed Bids."

4.7.2 Governmental Prices and Contracts

4.7.2.1 Procurements from General Services Administration Schedules

CURRENT STATUS

The Federal Supply Schedule program has provided Federal agencies with a simplified process of acquiring commonly used supplies and services in varying quantities at lower prices while obtaining discounts associated with volume buying. Congress, in enacting ' 1555 of the Federal

Acquisition Streamlining Act of 1994 (Public Law 103-455), [145] extended the cooperative purchasing provisions of GSA enabling legislation:

> (b)(2)(A) The Administrator may provide for the use of Federal supply schedules of the General Services Administration by any of the following entities upon request: (i) a State, any department or agency of a State, and any political subdivision of a State, including a local government. . .

However, Section 4309 of the National Defense Authorization Act for Fiscal Year 1996 [146] suspended the authority of the Administrator of the General Services to allow state and local governments to use the federal supply schedules. The provision suspended the authority until the later of the period ending 18 months after the date of enactment of this Act or the period ending 30 days after the date after the Administrator has reviewed a General Accounting Office report that assesses the effects of state and local governments use of the federal supply schedules and has submitted the report and comments on the report to Congress. The Act also directed the General Accounting Office to include in its report to the Administrator an assessment of the impact on costs to federal agencies from the use of federal supply schedules by state and local governments.

In light of this recent legislation, what is the status of state and local government (including most transit properties theoretically) being able to use the GSA federal supply schedules? It is understood that at least one transit property (Washington Metropolitan Area Transit Authority) has at least limited authority from the GSA to utilize the federal supply schedules. However, we are not aware of other Authorities being able to utilize those Schedules. With this legislation, we must await at least until August 1997 (18 months from the date of enactment of the Defense Authorization Act of 1996) before we know what the GSA and GAO reports to Congress will say and it could be longer than that if the required reports are later than then. This does not appear to be a source that we should expect to be able to use anytime soon.

At such time as this matter is clarified, the FTA, through this Manual, will provide instruction and guidance to its grantees.

4.7.2.2 State and Local Schedules

REQUIREMENT
An additional general procurement standard applicable to third-party procurements included in FTA Circular 4220.1E encourages (at § 7.e) the use of intergovernmental procurement agreements as follows:

145 - Codified at 40 U.S.C. § 481(b).

146 - Public Law 104-106, § 4309, 110 Stat. 186, 670 (1996).

(e) Intergovernmental Procurement Agreements.

(1) Grantees are encouraged to utilize available state and local intergovernmental agreements for procurement or use of common goods and services. When obtaining goods or services in this manner, grantees must ensure all federal requirements, required clauses, and certifications (including Buy America) are properly followed and included, whether in the master intergovernmental contract or in the grantee's purchase document.

(2) Grantees are also encouraged to jointly procure goods and services with other grantees. When obtaining goods or services in this manner, grantees must ensure all federal requirements, required clauses, and certifications are properly followed and included in the resulting joint solicitation and contract documents.

(3) Grantees may assign contractual rights to purchase goods and services to other grantees if the original contract contains appropriate assignability provisions. Grantees who obtain these contractual rights (commonly known as 'piggybacking') may exercise them after first determining the contract price remains fair and reasonable.

DISCUSSION

FTA has historically encouraged grantees to consider combining efforts in their procurements to obtain better pricing through larger purchases. Joint procurements offer the additional advantage of being able to obtain goods and services that exactly match each cooperating grantee's requirements. FTA believes this is superior to the practice of "piggybacking" since "piggybacking" does not combine buying power at the price stage and may limit a grantee's choices to those products excess to another grantee's needs.

Does your state, county, city, or other local government have a schedule program similar to the GSA Federal Supply Schedule? Are you legally eligible to utilize those schedules? In many ways, this is a topic that is so State and locale-specific, it is impractical to address with any specificity in this Manual. This is an area of the Manual where we solicit comments and best practices from your jurisdiction that would (or could) have application on a national basis.

Purpose

One of the challenges of a transit authority's procurement office is to try to be more responsive to its customers from timeliness and cost-efficient perspectives. It is almost inevitable that someone will take months trying to decide what is required and then is perplexed that the procurement staff cannot procure it "yesterday!" We devoted an extensive discussion in Chapter

2 on the importance of planning in the procurement process and the need for cooperative efforts among the different staff elements of the Authority.

One of the ways that Federal and State governments (to a greater extent) and local governments (to a much lesser extent) have tried to address the timeliness issue is through the use of "schedule" contracts that can be mandated for use on a government-wide basis. If an entity at the state-wide level has a contract that consolidates all requirements for sedans and buys those off a schedule contract, all public purchasers theoretically benefit from this larger quantity buy and do not have to go through a procurement process to obtain those benefits.

Best Practices

Ascertain if your State has a schedule program. It may be for standard commodities such as office supplies and equipment including vehicles of all sorts and sizes as well as computer equipment on either a lease or purchase basis.

Ascertain if your authority is eligible to participate in the program and, if so, how.

- Is an intergovernmental agreement required before you can participate?
- Is the order issued with the State agency or the contractor?
- Do you have any flexibility to make minor changes to the item being bought?
- How is the order funded?

These questions, and obviously many others, all must be worked out with the "parent" agency. It may be difficult to track all of this information down the first time, but after you go through the process once, it will be much easier with each successive procurement you process through these centralized contracts. You will then be able to gauge the savings in time and money that may accrue to your agency by using these contracts.

The same questions can be addressed at the local level. A program might exist at a city, county, parish, school district or any other public special districts. One of the most effective ways to participate in cooperative purchases at the local level is through some sort of inter-local cooperative purchasing agreement. To be able to do this may require special legislative authority, but most States have some sort of Intergovernmental [147] and/or Inter-local [148] Cooperation Act. These statutes usually define not only what can be the subject of agreements consummated pursuant to their provisions, but also define who can participate and under what conditions.

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147 - *See, e.g.*, Chapter 741, Texas Government Code, V.T.C.A.

148 - *See, e.g.*, Chapter 791, Texas Government Code, V.T.C.A.

Never underestimate the buying power (in terms of quantity you) bring to the local public government buying community, particularly in such areas as diesel, vehicle parts, office supplies and vehicles.

There is some real public relations benefit for your agency by being actively involved in the local government buying community in helping all public bodies get "more bang for the buck" through volume buying of similarly-used commodities.

4.7.2.3 State versus FTA Requirements

REQUIREMENT
The requirements and standards of FTA Circular 4220.1E apply to procurements entered into under such agreements using FTA funds. [149]

DISCUSSION

"I've got no control over what the State puts into its contracts in terms of FTA requirements. The State is concerned with state laws and that contracts fully comply with the competitive requirements of the state. What do I do?"

There really is no easy answer! The problem most agencies face with this requirement is not the competitive methods utilized by the State (or local) governmental entity in establishing these contracts -- most States have a small purchase procedures, sealed bidding and sealed proposal methods of procurement that in all likelihood comply with the federal standards set forth in FTA Circular 4220.1E and discussed earlier in Section 4. Most States similarly buy architect and engineering services in a procedure similar to the federal requirements of the Brooks Act and as discussed in FTA Circular 4220.1E paragraph 9.e and in paragraph 6.5 – *Architect-Engineering Services.*

The problem most of us face is squaring State laws or regulations that differ substantively with the FTA requirements of FTA Circular 4220.1E.

- **How do we reconcile State-geographic preference statutes with the full and open competition requirements of the FTA and the Common Grant Rule? These statutes frequently establish a preference for certain services or commodities to in-State sources and may even set-aside certain procurements to in-State sources. If you are using federal funds to procure something off a State schedule and your State has such a restriction, can you participate? Probably not.**

[149] - FTA Circular 4220.1E § 7.e.

- **Recent changes in the applicability of the Buy America provisions of 49 CFR Part 661 (and discussed in Section 4.3.3.2.2, "Buy America Certification") make compliance with those requirements less of an issue now than it used to be because of the $100,000 threshold. However, for procurements in excess of that amount, you will probably have problems participating because of the certification requirements imposed by Part 661.**

- **The current $2,000 threshold of the Davis-Bacon Act may preclude you from participating in any State construction contract because, in all likelihood, any wage rate requirement of the State is going to be a State law issue, not the Davis-Bacon Act.**

The list could go on. Under current federal statutory and regulatory guidance and requirements, some of the conflicts between those requirements and the procurement procedures and practices of your State are irreconcilable. Unless the State or local agency is willing to include the FTA requirements in its solicitations and contracts, you may be effectively precluded from participating in those intergovernmental or inter-local procurements. Some relief could come in the future as the FTA continues to examine its policy relative to the applicability of FTA Circular 4220.1E to all procurements if the grantee accepts operating assistance. [150]

Until more clarification is obtained and as long as operating assistance is an issue, you may not be able, realistically, to participate in these procurements. You can, however, effectively participate at the truly local level where you can either control the procurement (you buy the diesel fuel using all the federal requirements) and allow the city and school district draw off your contract or, because of the one-on-one interface this process requires, you are able to have the city or school board include the federal requirements in its unleaded regular gasoline contract you want to order from. That works!

Again, we specifically solicit input from you on your successes (and failures) in the area of utilizing State and local government contract schedules or inter-local/intergovernmental procurement agreements and how they have been reconciled with conflicting State and Federal requirements.

4.7.3 E-Commerce: Reverse Auctions

REQUIREMENT
Reverse auctions are subject to all the procurement requirements of FTA Circular 4220.1E, Paragraph 7.q.

[150] - FTA Circular 4220.1E § 4.

> "E-Commerce is an allowable means to conduct procurements. If a grantee chooses to utilize E-Commerce, written procedures need to be developed and in place prior to solicitation and all requirements for full and open competition must be met in accordance with this Circular."

We would note that *some* states, such as New York, require a sealed bid procedure for competitive procurements. *Where state law requires sealed bidding, reverse auctions may not be legal*. In these situations grantees may still make use of online bidding but the bids must be kept sealed and not disclosed. Grantees must check their state procurement statutes to determine if reverse auctions are permissible. For example, the state of Texas recently enacted legislation allowing reverse auctions. Grantees should consult with their counsel to determine whether reverse auctions are legally permissible under State law.

DISCUSSION

One of the innovations arising out of e-commerce has been the use of *reverse auctions*. The term *reverse auction* refers to a live online auction in which the roles of buyer and seller are "reversed." In a *normal (forward) auction*, sellers offer to sell at prices determined by the bids of buyers. In a *reverse auction*, buyers are offering to buy something at prices being bid by sellers. "Reverse" refers to the relationship of buyer and seller and who does the bidding. Sellers bid for the right to sell to the buying organization and buyers agree to buy at the price established by the auction process. In a reverse auction proceeding, the buyer advertises and defines on line the commodity for which it is soliciting bids. The buyer may also post a price at which the bidding will begin. These prices will usually be the buyer's "last good buy" price or an industry standard price, and it should be a price that will encourage suppliers to bid. If the price is set too low, it will discourage sellers from participating. Suppliers, whose identity is kept confidential, then post prices online anytime within the duration of the auction (usually one day to several weeks) so that suppliers can see their competitors' bids and respond immediately with counter offers. Suppliers can reevaluate and adjust their bid in response to other bidders' offerings. Some auctions provide for automatic time extensions if a bid is placed in the last five minutes of an auction, in which case an automatic five-minute extension prevents last-second bidding and keeps all participants on an even playing field. It is possible to have several automatic time extensions when bids are submitted in the last five minutes of the event. The transparency of the marketplace creates rigorous competition among the participants, which tends to drive prices lower. Reverse auctions live up to their name by having prices fall. Experience to date with reverse auctions indicates that savings of 15% - 20% from prices previously paid may be possible, especially if additional vendors can be found to bid on the requirement.

Most of the work to be done in a reverse auction takes place prior to the actual event. This includes identifying suppliers who will bid, pre-qualifying them and informing them about the technology that is being used. It is important to define everything up front, including

quality, delivery terms, payment terms, location of use, quantity required and in what lot size. In some cases buyers have issued a Request for Proposals (RFP) as a first step in a "best value" competition in order to evaluate prospective bidders' products, capabilities, etc. A reverse auction is then conducted among qualified suppliers as a technique to elicit the best possible prices.

Anything that can be described well can be reversed auctioned. This includes goods and services. The key is that the item have features that are measurable, with a clear purchase description in terms of quality and specificity, so that suppliers are bidding on a requirement that is clear to everyone. Doing this will ensure you are able to compare bids for essentially identical goods or services. In deciding if a reverse auction is right for a particular commodity, the agency will need to determine if it has long-term relationships with any one or two suppliers for the commodity, and if so, why? What is valuable about the relationship? Would an auction harm the relationship? Another consideration will be whether there are enough suppliers of this commodity to make it competitive. Any efforts taken to increase the number of bidders who participate in the auction will pay dividends in the end. Finally, the commodity must be such that there is a sufficient profit margin to make prices compressible, so that suppliers have room to bid. And finally, as has already been suggested, reverse auctions need not be limited to lowest - price contract awards; they may be used in "best value" procurements where technical proposals are required and price auctions follow, with contract award being made to the firm offering the best overall value to the buying agency, with both price and technical merits considered.

Best Practices

Federal Government Experience - A number of Federal agencies are now using reverse auctions. The Federal Government began to use this technique with the re-write of the FAR Part 15 in 1997. FAR 1.102.4(e) now states that if a practice is not expressly addressed or prohibited by statute or regulation, Government employees should feel free to innovate and use sound business judgment in making procurement decisions. With respect to auctions, FAR 15.306(e)(3) requires bidders to agree to disclose their prices prior to their participation in an auction event. Based on the FAR, government procurement personnel may use reverse auctions as long as the vendors agree to participate. (Grantees are not required to follow the FAR, and this information on Federal procedures is provided for information purposes).

Navy Department - The Navy Department's first auction was for aircraft ejection seat mechanisms. This auction lasted 51 minutes, with three bidders, and Navy estimates it saved over 28% off the historical price for these mechanisms. Navy has conducted over fifteen additional reverse auctions since the first in May 2000, for supplies as well as services, using both price and best value as evaluation criteria. Following are some of the "lessons learned" by the Navy Department, as published at their web site: [151]

[151] - Navy can be contacted by phone at (215) 697-2850. Navy web site info for reverse auctions is: http://www.abm.rda.hq.navy.mil/navyaos/acquisition_topics/contracting_/reverse_auctioning/reverse_auctioning.

- The reverse auction technique may not drastically change or streamline the procurement process.

- It is a highly effective pricing tool.

- Prior to opening the auction, all participating vendors should log on and verify their connection to the system.

- A set period of time for the reverse auction should be established based on the number of participants and the complexity of the acquisition.

- The time established for the auction needs to be flexible in case there is an offer at closing time. For example, if a bid is received within one minute of the closing time for the auction, the auction period should be extended for an additional number of minutes to allow bidders to respond to the last bid.

Marine Corps - The U.S. Marine Corps has also published their experiences with reverse auctions. The Marine Corps took concerted efforts to build a database of vendors for various product types and to include more vendors, train them on the reverse auction tool, and get them to participate in their first auction. The result was significantly increased competition. The average auction has lasted 30 minutes with award made directly thereafter. The average savings for the eight auctions thus far have been 25% from the estimated values based on historical and retail prices. The Marine Corps reports that vendors actually prefer this process to the sealed bid process. The Marine Corps Regional Contracting Office Southwest (RCO SW) received the Department of the Navy Competition Excellence Award for the implementation of this innovative practice.

Army - The Army is using reverse auctions for *best value* types of procurements. Following is an excerpt from the Army procurement procedures guide as reproduced in the DOD *Defense Acquisition Deskbook*:

Applicability to Best Value Acquisitions

> *Reverse auctions are legal as long as the identity of the bidders is not disclosed. You may use them for trade-off acquisitions as a pricing tool. Once you have finished with technical discussions, you may conduct a reverse auction to establish the offerors' final prices. Provide these prices, along with the rest of the evaluation results, to the Source Selection Official for his/her use in selecting the proposal that represents the best value. A potential benefit is that competition will drive the prices down as the offerors have visibility of the other prices being proposed.*
>
> *You may use reverse auctions to purchase a variety of products and services. Reverse auctions work especially well on acquisitions of manufactured items. While you can use*

reverse auctions to buy commodities, these items usually have smaller profit margins and therefore, the potential benefits are less.

When using reverse auctions in a best value acquisition, ensure the auction does not drive prices down to the point that the resultant contract does not provide enough incentive for the contractor to provide quality supplies and services.

Use of reverse auctions is appropriate at different points in an acquisition. For example, you may use them to achieve the offerors' final price or you may use them to downsize the number of offerors, but decide not to use them for the final negotiations. [152]

Air Force - The Air Force *Contracting Policy Memo on Reverse Auctions* (February 19, 2001) was issued after research on how reverse auctions are being used in private industry, and the memo provides a number of "lessons learned." Among these were:

- Reverse auctions are being used by industry more for "best value" acquisitions than for lowest price acquisitions. (The Sun Microsystems' case discussed below under "Private Industry Experience" illustrates this.)
- Suppliers are normally pre-qualified, including past performance, and then a reverse auction is used for the submission of competitive prices.
- A responsibility determination is performed on the apparent successful bidder.

The Air Force procured a motorized security gate for one of its facilities and requested technical proposals first. Those firms submitting acceptable technical proposals then submitted prices online through a reverse auction. The apparent low bidder was then required to submit a cost proposal for evaluation. Finding the proposal satisfactory, a contract was awarded. Air Force was pleased with the results of the process.

Treasury Department – The U.S. Treasury Department (IRS) conducted, in May 2001, its first auction and one of the largest Federal auctions to date: $131 million for PCs, laptops and monitors. Treasury estimates it saved about $68 million in a very successful auction. An example of the savings achieved was the reduction in the unit price of a top-end desktop computer from a pre-auction price of $1,434 to $625 (a savings of 56 percent). There were three distributors that submitted bids, representing IBM, Gateway and Dell. The IRS requirements were solicited on a best value basis. [153]

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152 - Army Source Selection Guide, June 2001, may be found at: http://www.amc.army.mil/amc/rda/rda-ap/docs/assg-2001.pdf. Click on Appendix I for information on On-Line Reverse Auctions.

153 - Contact Mr. Geoff Gauger at Treasury for additional information: (202) 622-0203.

Treasury has also had success with small buys. Many of those buys were below $25,000 and several were below $1,000. More than $300,000 in purchases have been made in 2002, with some impressive results. Customs saved 43 percent on the purchase of a shredder and the Financial Crimes Enforcement Network saved 87 percent on two 265-megabyte memory kits. Vendor interest has been great. For example, the Bureau of Public Debt has been averaging 72 bids per auction. In all, close to 2,000 bids have been received from over 330 firms. Another noteworthy achievement is that the Bureau of Public Debt, the ATF and Customs have awarded 100 percent of their auction results to small businesses. [154]

General Services Administration (GSA) – GSA maintains a reverse auction web site for Federal agencies. On July 25, 2002 the GSA Federal Technology Service awarded a number of contracts for reverse auction services to various companies ("enablers") that provide services ranging from conducting the complete auction ("Hosted Services") to providing enabling software so that the user agency can conduct its own auctions ("Desktop Services"). The enablers that received GSA contracts are listed on the web site. [155]

GSA conducted a reverse auction pilot program from May 2000 to May 2001. GSA reports that various government agencies participating in the pilot program realized savings of 12% - 48% through the reverse auction process. For example, the Defense Financing and Accounting Service paid 22 percent, or $2.1 million less, than normal prices for desktop computers, laptops and printers. The National Institutes of Health (NIH) paid 25 percent, or $395,000, less than normal prices for utility wipes, a type of cleaning supplies. The Coast Guard paid 22 percent, or $300,000, less than normal prices for spare parts for HU-25 Falcon jets.

The Deputy Assistant Commissioner for Service Development, GSA Federal Technology Service, Mr. Manny DeVera, is credited with developing "Ten Commandments for Reverse Auctions:"

Reverse Auction
Ten Commandments

1. *Link reverse auction strategy to acquisition strategy. When developing the acquisition strategy ask, "Could reverse auctioning apply to this requirement?"*

2. *Follow the Federal Acquisition Regulation. These guiding principles still apply.* [156]

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154 - *Electronic Bazaar – Reverse Auctions Save Buyers Time, Money* by Geoff Gauger. Federal Times, November 4, 2002. This article may be accessed at: http://federaltimes.com/index.php?S=1264522

155 - http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentType=GSA_OVERVIEW&contentId=10655

156 - Grantees are not required to follow the FAR. However, they are required to follow FTA Circular 4220.1E, which would apply to procurements using reverse auctions.

3. *Choose a solid performing enabler. (Enablers are firms that perform reverse auctions.) With the troubles currently being experienced in the digital economy, a few enablers may not be around in the future and could present risks.*

4. *Educate suppliers in advance of conducting a reverse auction. Full service enablers provide this service in their fees.*

5. *Be prepared for publicity and use it to your advantage. Publicity happens because reverse auctions are relatively new and the media, trade associations, senior government officials and others are all carefully watching the government's entry into this new way of doing business. Enablers are also aggressively publicizing their activities.*

6. *Begin with simple requirements and move gradually to more complex ones. The more experience an organization has with conducting auctions, the more complex requirements they can put out for bid.*

7. *Establish the rules of the reverse auction up front. Some examples of these rules are the bid increments to be used, time extensions, logistics and other considerations.*

8. *Conduct a mock auction. The adage "practice makes perfect" is very appropriate here.*

9. *Consider conducting an auction where bidders bid to provide a quantity of a commodity, as opposed to price based bidding. For example, reverse auctions are being conducted where the buyer has a set amount they want to spend, say $1 million for PCs, and is not focused on the unit cost. In these auctions, bidders base their bids on the number of PCs that they will provide for the $1 million.*

10. *The Contracting Officer is in control of the reverse auction event at all times.*

FIRSTGOV.gov – The U.S. Government's official web portal is www.firstgov.gov. [157] Inserting "reverse auctions" in the *Search* box will give you access to more than 186 million web pages from federal and state governments where you will find information regarding these agencies' experience with reverse auctions.

Private Industry Experience – The private industry sector has been using reverse auctions since the mid-1990's. A recent white paper presented data indicating that 20 percent of all

[157] - http://www.firstgov.gov/index.shtml.

private industry firms may be using on-line auctions (real-time bidding) to procure a portion of their goods and services. [158]

A current magazine article discusses the experience of one major private industry player in the reverse auction arena – Sun Microsystems. Sun implemented its *Dynamic Bidding* program in May 2000 with a goal of 20 percent reduction of their targeted budget, and they achieved this in their first pilot auction. It has since been used for more than 100 procurements and covers all the commodities Sun buys. One of the important facets of the Sun method is that the company uses a "best value" approach to source selection with their price auctions. Sun believes its supplier relationships are strategic and it will not switch to an untested company simply to get a lower price. Past performance in areas such as quality, manufacturing flexibility, facility location and engineering support are also considered in the final decision. Sun emphasizes that the reverse auction approach does not replace the strategic relationship between companies. Prices bid are only one factor in the final selection decision process, but the auctions mean that less time is spent on negotiating the price, terms and conditions than was previously the case. "The end result is that it takes Sun an hour to find the true market price, eliminating weeks or even months of negotiating back and forth. It has also resulted in significant bottom-line savings for Sun. They used this process on $1 billion of their direct spend in fiscal year 2001, and have raised the goal for this fiscal year." [159]

A recent article in an E-business publication suggested a number of areas that might be good candidates for reverse auctions. [160] The author's recommendations for reverse auctions include:

- *Strategic Relationship is Less Important*
  The author believes it is difficult to build cooperative relationships with suppliers through an auction process and thus auctions are more suitable for purchases of off-the-shelf, near-commodity direct materials.

- *Price is Main Decision Factor*
  Auctions work best for categories where the main discriminator between suppliers is price.

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158 - T*he Strategic Need for Real-Time Competitive Bidding in the Public Sector Procurement Process*, by David C. Wyld and Randall P. Settoon, September 2002, p.18. This paper may be accessed at: http://learningcenter.ariba.com/wp_resource.cfm.

159 - *Reverse Auctions – Strategies and Lessons Learned from a Successful Implementation* by Gillian Verga, Jan 2002. This article may be accessed at: www.apics.org.

160 - *When to Use an Auction* by Ed Goetting, September 4, 2002. This article may be accessed at: www.line56.com/print/default.asp?ArticleID=3983

- *Many Qualified Suppliers*
  Auctions need adequate competition to succeed. Where there is limited competition because of a scarcity of suppliers, a commitment of supply is more important than any incremental price savings that could be achieved through an auction.

- *Low to Medium Strategic Importance*
  The most strategic categories should not be subject to a stand-alone auction. This would include components critical to the company's end product. In these cases the auction, if conducted, should be combined with some sort of face-to-face discussions with key suppliers.

- *Purchases Can be "Lotted"*
  It may be cumbersome to run individual auctions for each of many line items. Line items can be bundled into "lots" and suppliers will be required to bid on all the parts in that lot or none. This concept of "lotting" works well with office products.

- *Benchmarks*
  When a company is satisfied with a current supplier but feels a need to test the market to ensure they are receiving a competitive price, they may do this through an auction. Potential suppliers can be required to respond to an RFP in order to qualify for the auction. The key is to adequately document one's service, delivery, payment terms and other "non price" requirements up-front to ensure that suppliers are bidding on an apples-to-apples basis.

Transit Agency Experience – Transit Agency experience with reverse auctions has been extremely limited in comparison to both the private sector and the Federal government. The Los Angeles County Metropolitan Transit Authority (LACMTA) has used this process successfully on a limited basis but does not feel it has significant potential for their needs. [161] LACMTA believes it can work well for common materials but may be inconsistent with good long-term partnership relationships with suppliers. For example, where there is a need for technical support or for quick reaction time in order to meet critical agency needs, the auction process does not lend itself to the kind of agency/supplier relationships that are required for long-term mission success. But LACMTA believes that if price is the only consideration, and supplier partnerships for the commodity also is not a consideration, then reverse auctioning can work well.

The Southeastern Pennsylvania Transportation Authority (SEPTA) conducted a pilot program to test the process on a procurement of fluorescent tubes and they were successful. But they also do not feel that their agency will adopt this technique to any significant degree. One of the lessons

[161] - For information re LAMTA call the Director of Purchasing at 213-922-7210.

learned by SEPTA is the criticality and difficulty of informing potential bidders of the auction and getting them prepared to bid. [162]

The Houston Metropolitan Transit Authority (MTA) is considering the use of a reverse auction for furniture. [163]

162 - For information about SEPTA's pilot program, call 215-580-8251.

163 - For information about Houston MTA, call Paul Como at: 713-739-4803.

Chapter 5

5 - Award of Contracts

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5.0 OVERVIEW

This chapter concerns the more important procedures and documentation requirements which are closest to and relate most directly to the time of the actual contract award. These are the final steps in the long process leading to the selection decision, the negotiation of a contract, the signing of the contract, and the notifications to unsuccessful offerors and the general public of who the winner is.

5.1 RESPONSIBILITY OF CONTRACTOR

REQUIREMENT
Paragraph 7.h. of FTA Circular 4220.1E states: Awards to Responsible Contractors. Grantees shall make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. Paragraph 7.i. of FTA Circular 4220.1E states: Written Record of Procurement History. Grantees shall maintain records detailing the history of a procurement. At a minimum, these records shall include: …(3) reasons for contractor selection or rejection.

DEFINITION

Responsible - If the lowest responsive bidder possesses, at the time of contract award, the ability to perform successfully and a willingness to comply with the terms and conditions of a proposed contract, the bidder is considered responsible.

DISCUSSION

Responsibility is a procurement issue determined after receipt of bids or proposals and prior to the time of contract award. The contractor must be considered responsible to be awarded a contract, regardless of the procurement method used to select that contractor (sealed bidding, competitive proposal, or sole source). For example, suppose your procurement procedures allow for award of a contract to a sole source, provided there is sufficient justification. As it turns out, the sole source chosen has been debarred by the Department of the Army. If Federal funds are involved, a contract cannot be awarded to the sole source because the contractor is not considered responsible. [1] Your analysis of the factors involved in making a determination of responsibility involves a great deal of subjectivity -- after all, you are grading a firm's "ability" to do a job.

[1] - If Federal funds are not involved check local and state laws to determine whether a contractor that has been debarred by an agency of the Federal government may be considered "responsible."

You may have a procurement where it is necessary to determine the responsibility of a critical subcontractor in order for you to make a positive determination about the prime contractor's responsibility. [2] If that is necessary, you may use the same standards in determining the responsibility of the subcontractor as you would in determining the responsibility of the prime contractor.

5.1.1 General Standards of Responsibility

To be determined responsible, a prospective contractor must meet all of the following requirements:

(a) Financial resources adequate to perform the contract, or the ability to obtain them.

(b) Ability to meet the required delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments.

(c) A satisfactory performance record;

(d) A satisfactory record of integrity and business ethics;

(e) The necessary organization, experience, accounting, and operational controls, and technical skills, or the ability to obtain them;

(f) Compliance with applicable licensing and tax laws and regulations;

(g) The necessary production, construction, and technical equipment and facilities, or the ability to obtain them;

(h) Compliance with Affirmative Action and Disadvantaged Business Program requirements; and

(i) Other qualifications and eligibility criteria necessary to receive an award under applicable laws and regulations.

5.1.2 Special Standards of Responsibility

You may 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 procurements will require that contractors have specialized expertise or

[2] - Normally, the prime contractor is responsible for determining the responsibility of its subcontractors. However, as indicated in FAR 9.104-4, it may be necessary for you as the procurement official to determine a prospective subcontractor's responsibility such as when the prospective contract involves urgent requirements or substantial subcontracting.

facilities in order to perform the contract adequately. 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. An example of a Special Responsibility Standard would be the Special Quality Assurance requirement concerning measuring and testing facilities and manufacturing controls which must be met by prospective bus manufacturers. [3]

5.1.3 Obtaining Information for Determination of Responsibility

Before making a determination of responsibility, you must possess or obtain information sufficient to satisfy yourself that a prospective contractor meets the applicable standards and requirements for responsibility set forth in this section. Appendix B.11 represents an example of a "Responsibility Questionnaire" used by a major transit authority to obtain information from bidders which is necessary in order to make a determination of responsibility.

Sources of information available to your for your determinations could include:

(a) General Services Administration publication titled List of Parties Excluded from Federal Procurement or Nonprocurement Programs;

(b) Records and experience data, including verifiable knowledge of your agency's personnel;

(c) Information supplied by the prospective contractor, including bid or proposal information, questionnaire replies, financial data, information on production equipment, and personnel information;

(d) Pre-award survey reports; and

(e) Other sources, such as publications, suppliers, subcontractors, and customers of the prospective contractor, financial institutions, government agencies, and business and trade associations.

5.1.4 Determination and Documentation

The FTA Circular 4220.1E Paragraph 7(i) requires grantees to maintain a written record of the procurement history, including "reasons for contractor selection or rejection." While the award of a contract itself can in some instances (e.g. small purchases) be considered implicit affirmation that a contractor has been determined to be responsible, where appropriate the written record should state the specific basis for a responsibility determination.

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3 - American Public Transit Association (APTA) *Standard Bus Procurement Guidelines*, Section 1.1.4.3.1 *Qualification Requirements* (III), January 1997.

When an offer on which an award would otherwise be made is rejected because the prospective contractor is found to be nonresponsible, the Contracting Officer should make, sign, and place in the contract file a determination of nonresponsibility which states the basis for the determination.

Documents and reports supporting a determination of responsibility or nonresponsibility, including any pre-award survey reports, should be included in the contract file.

Discussions with Offeror - In doing the research necessary to make a responsibility determination, you are free to discuss with the bidder/offeror any concerns which you may have regarding the bidder's/offeror's responsibility. You are free to discuss issues of "responsibility" with the bidder, unlike issues regarding "responsiveness," which cannot be discussed with bidders (See BPPM Section 4.4.4).

5.2 COST AND PRICE ANALYSIS

REQUIREMENT

Paragraph 10 of FTA Circular 4220.1E requires a cost or price analysis for every procurement action:

> Grantees must perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals.
>
> (a) Cost Analysis - A cost analysis must be performed when the offeror is required to submit the elements (i.e., Labor Hours, Overhead, Materials, etc.) of the estimated cost; e.g., under professional consulting and architectural and engineering services contracts.
>
> A cost analysis will be necessary whenever adequate price competition is lacking and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalogue or market price of a commercial product sold in substantial quantities to the general public or on the basis of prices set by law or regulation.
>
> (b) Price Analysis - A price analysis may be used in all other instances to determine the reasonableness of the proposed contract price.
>
> (c) Profit - Grantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed.

(d) Federal Cost Principles - Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles. Grantees may reference their own cost principles that comply with applicable Federal cost principles.

DEFINITIONS

Cost Analysis - A cost analysis entails the review and evaluation of the separate cost elements and the proposed profit of an offeror's cost or pricing data and the judgmental factors applied in estimating the costs. A cost analysis is generally conducted to form an opinion on the degree to which the proposed cost, including profit, represents what the performance of the contract should cost, assuming reasonable economy and efficiency.

Price Analysis - A price analysis involves examining and evaluating a proposed price without evaluating its separate cost and profit elements. Price analysis is based essentially on data that is verifiable independently from the offeror's data.

Federal Cost Principles - It is important to understand that grant funds may only be used by the grantee to pay for *allowable costs when the contract is a cost-plus-fixed-fee contract or when a fixed price contract is being negotiated on the basis of cost estimates submitted by the contractor*. The term a*llowable cost* is defined in 48 CFR 31.201-2. (48 CFR 31 is Part 31 of the Federal Acquisition Regulation (FAR). The common grant rule, found in 49 CFR 18.22 - *Allowable Costs*, requires that the cost principles found in the FAR (48 CFR 31) be used to determine allowable costs for commercial ("for-profit") organizations. The FAR may be accessed on the Internet. [4] Grantees may use their own cost principles *if they are consistent with the Federal cost principles.* This 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 a price on a fixed-price contract. Thus, whenever you do a *cost analysis* of an offeror's cost/price proposal you will need to use the Federal cost principles (or principles consistent with them) to determine what costs are acceptable.

DISCUSSION

In general, the purpose of cost or price analysis is to ensure that you do not pay unreasonably high prices. However, prices which are unreasonably low can also be detrimental to your 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 to do a cost-realism analysis of cost proposals submitted for cost reimbursement contracts that are

[4] - Internet address for Code of Federal Regulations is: http://www.arnet.gov/far/

to be competitively awarded in order to determine the realism of the various proposals and not permit a "buy in" (an unrealistically low estimated contract cost and fee) that will eventually result in a substantial cost overrun.

Before issuing a solicitation, develop an independent estimate of the proper price level for the supplies or services to be purchased. The estimate 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 estimate can then assist in a determination of reasonableness or unreasonableness of price and/or the estimated costs to do the job. If you will be requesting a proposal with a breakdown of estimated costs, be sure to require a format for the cost proposal that will allow you to compare the cost elements proposed with those that were developed for your in-house estimate.

Best Practices

The Federal Acquisition Regulation (FAR), Subpart 15.404-1(a)(7) – *Proposal Analysis Techniques*, references a five-volume set of *Contract Pricing Reference Guides* to guide pricing and negotiation personnel. These guides are informational and not directive. They are available via the Internet. [5]

The National Transit Institute (NTI) at Rutgers University offers a course for FTA grantees titled "Cost and Price Analysis and Contract Negotiation." It is a four-day course offered free of charge to FTA grantees but it is also open to the public for a fee. [6] Part of the NTI course manual material includes a *Pricing Guide for FTA Grantees* that is based in part on the Defense Contract Audit Agency's (DCAA) *Pricing Manual*. The *Pricing Guide for FTA Grantees* is now available on line at http://www.fta.dot.gov/ftahelpline/Price_Guide.doc, and grantees are urged to utilize this resource.

Price Analysis –

The accepted forms of *price analysis* techniques discussed in the *Pricing Guide for FTA Grantees* are:

1. Adequate price competition;
2. Prices set by law or regulation;
3. Established catalog prices and market prices;
4. Comparison to previous purchases;

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[5] - http://www.acq.osd.mil/dpap/contractpricing/index.htm

[6] - Contact NTI at (732) 932-1700 or online at www.ntionline.com

5. Comparison to a valid grantee independent estimate; and
6. Value analysis.

(1) *Adequate price competition* requires the following conditions:

- At least two responsible offerors respond to a solicitation.
- Each offeror must be able to satisfy the requirements of the solicitation.
- The offerors must 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 expressed requirements of the solicitation.

If the four conditions above are met, price competition is adequate unless:

- 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 the 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.

(2) *Prices set by law or regulation* are fair and reasonable. Grantees should acquire a copy of the rate schedules set by the applicable law or regulation. Once these schedules are obtained, verify that they apply to your situation and that you area being charged the correct price. For utility contracts, this policy applies only to prices prescribed by an effective, independent regulatory body.

(3) *Established catalog prices* require the following conditions:

- Established catalog prices exist.
- The items are commercial in nature.
- They are sold in substantial quantities.
- They are sold to the general public.

The idea behind catalog prices is that a commercial demand exists and suppliers have been developed to meet that demand. You are trying to ensure that you are getting at least the same price as other buyers in the market for these items. You need to be sure that the catalog is not simply an internal pricing document. Request a copy of the document or at least the page on which the price appears.

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 you do not know the names of other commercial buyers and sellers, you may obtain this information from the offeror.

(4) *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. Also ensure that the previous price was fair and reasonable. This determination must be based upon a physical review of the documentation contained in the previous files.

(5) *Comparison to a valid grantee independent estimate* –

Verify the facts, assumptions, and judgments used by your estimator. Have the estimator give you the method and data used in developing the estimate. For example, did prices come from current catalogs or industry standards? Be sure that you feel comfortable with the estimate before relying on it as a basis for determining a price to be fair and reasonable.

(6) *Value analysis* requires you to look at the item and the function it performs so you can determine its worth. The decision of price reasonableness remains with the contracting officer; however, the requiring activity should always be consulted for their expertise, and they should participate in making the decision.

Cost Analysis –

Cost analysis is the review and evaluation of the separate cost elements and profit in an offeror's or contractor'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.

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 grantee'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* are typically associated with negotiated procurements, including modifications and change orders to existing contracts. In order to facilitate the evaluation of contractor cost proposals, it is usually helpful to prescribe the format of the cost proposals in your 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 your evaluation of proposals against the in-house estimate and for purposes of a cost realism analysis.

A *technical analysis* of the proposed types and quantities of materials, labor, special tooling, equipment, travel requirements, and other direct costs will usually 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 mix.

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 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, you should consider contacting the independent CPA firm that audits and certified the contractor's latest annual financial statements. Oftentimes these CPA firms can provide audit assistance. If you do request an advisory pricing audit for the purpose of conducting negotiations, be sure to inform the auditor that the FAR Part 31 cost principles must be used to determine allowable costs. [7] And also be sure to evaluate the proposed costs of any subcontractor that has submitted cost data to the prime contractor.

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.

Negotiation and Documentation –

Pre-negotiation Memorandum - Some form of pre-negotiation document should be prepared for all negotiations. The extent of detail and the content will depend on the magnitude and

[7] - FTA C4220.1E paragraph 10.d.

complexity of the negotiation. *There are a number of important reasons for grantees to make use of a pre-negotiation memorandum*:

1. It will facilitate *effective cost and/or price analysis*. A lack of effective cost or price analysis has been one of the most common problem areas uncovered by FTA Procurement System Reviews (PSRs). [8]

2. It will *encourage negotiations* with the offeror by revealing those areas where the costs or price needs to be questioned and discussed with the offeror. Here again the PSRs have shown that many grantees simply accept contractor proposals without negotiations.

3. It will document the file with an *explanation of the basis for the contract pr*ice and it can be used to *provide a history of the procurement*. This failure to document how the contract price was determined and to provide a history of the procurement is yet another problem area disclosed by PSRs. [9]

4. It will afford the grantee an *excellent method of supervisory/management review and approval of the contract negotiator's strategy for the negotiations*. This would include the concurrence of the technical personnel (user office) in that strategy, which is an important point if the negotiations are to be successful and all of the agency's goals are to be met.

A sample PM is included in the *Pricing Guide for FTA Grantees* and is reproduced below. [10] This PM can be tailored to meet any negotiation scenario that you might have, from large competitive procurements to the negotiation of contract change orders or modifications.

PRE-NEGOTIATION MEMORANDUM (PM) FORMAT

1. Grantee Contracting Activity _____ 2. Date_____
3. RFP/IFB or Contract Number _____
4. Modification Number _____
5. This acquisition is being accomplished by (check one)
   Full and Open Competition _____
   Other than Full and Open Competition _____

8 - FTA C4220.1E paragraph 10.

9 - FTA C4220.1E paragraph 7.i.

10 - APPENDIX C: Negotiation & Documentation.

State reasons for other than full and open competition.

_____

_____

_____

6. Contract Type _____
7. Offeror's (Name, Address)

_____

_____

_____

8. Business Size and Type (Small, Large, DBE, WOB) _____
9. Offeror's Proposed Amount _____
10. Procurement Description (briefly describe the procurement)

_____

_____

_____

11.	Pricing Structure	Prenegotiation Objective
	Cost	$_____
	Fee/Profit (_____%)	$_____
	Total Price	$_____

12. Delivery or Performance Period _____
13. Points of Contact for this Document (name and phone number)
    a. Contracts_____
    b. Technical_____

PART A **INTRODUCTION**

1. In this paragraph, describe the acquisition, including a brief history of the requirement, the place of performance, and any other pertinent information. Questions to be answered include: What is it? Why is it needed? What is it for? Quantity? If this is a contract modification, what events or circumstances contributed to the needed change? State the Grantee's estimated amount of the proposed acquisition.

2. In this paragraph, address the extent of competition under the acquisition. Is the acquisition being accomplished under full and open competition? If other than full and open, include a statement regarding sole source approval. Additionally, was the requirement publicized in accordance with Grantee's procedures? (If not, cite the exception.) How many requests for solicitations were received? How many offers were received?

3. In this paragraph, include your planned negotiation schedule, and identification of the Grantee's negotiating team members by name and position.

PART B SPECIAL FEATURES, REQUIREMENTS AND PRENEGOTIATION COMPLIANCE

The following items should be addressed for all negotiated acquisitions:

1. The use of sealed bid procedures is not appropriate for this acquisition because

   _____
   _____

2. The prospective contractor(s) has/have been determined to be responsible technically and are financially stable. Yes_____ No_____
   Major subcontractors (list their names) have been reviewed and found to be technically responsible and are financially stable.

3. The prospective contractor(s) is/are not on the list of "Parties Excluded from Procurement and Nonprocurement Programs."

   (The following items should be included when applicable:)

4. Pre-contract cost in the amount of $_____ for the period_____ were approved by (name of individual).

5. Authority to enter into a letter contract was approved by (name of individual).

6. Are optional quantities being proposed and are they being evaluated as part of the award decision? [11]

7. The offeror has submitted "Cost or Pricing Data." Yes_____ No_____

8. "Cost or Pricing Data" for major subcontract(s) has been submitted.
   Yes_____ No_____

9. Written waiver of the audit was granted by (name of individual).

11 - FTA C4220.1E paragraph 9.i. (1).

10. The offeror(s) has/have an adequate accounting system as determined by (name of individual). (Cost reimbursement contracts, fixed price with price redetermination, incentive types and contracts containing progress payment provisions.)

11. EEO compliance has been requested or obtained. Yes_____ No_____

12. In the event Grantee property is to be furnished to the offeror, has the Contracting Officer determined that the contractor has an acceptable property control system? Grantee furnished equipment estimated value $_____consisting mainly of _____. Grantee furnished material estimated value $_____ consisting mainly of _____.

13. Address any deviations, special clauses or conditions anticipated.

14. The offeror has _____ has not _____ submitted a subcontracting plan. Briefly discuss the subcontracting plan if applicable.

PART C COST AND PROFIT/FEE ANALYSIS

In this Part C, compare, in summary, the offeror's proposal, the audit and/or other recommendations, and the Grantee's Prenegotiation objective. For example:

Cost Element	Offeror's Proposal	Audit/Technical Recommendation *	Prenegotiation Objective	Numbered Notes **
Direct Labor	$	$	$	(1)
Labor Overhead	$	$	$	(2)
Direct Material	$	$	$	(3)
Mat'l Overhead	$	$	$	(2)
Other Direct Costs	$	$	$	(4)
Subtotal	$	$	$	
G&A	$	$	$	(2)
Subtotal	$	$	$	
Profit/Fee	$	$	$	(5)
Total	$	$	$	(6)

The above is an example of the various cost elements that should be reviewed when analyzing a proposal. These elements are not to be interpreted as all encompassing because the cost elements of each offeror may be different.

***Audit/Technical Recommended:**

In general, an audit report will not include recommendations on direct labor hours or the validity of material and other direct costs. The technical evaluation/analysis generally will not include rate recommendations. Therefore, this column should be a combination of your two reports (audit and technical). In cases where you have not obtained an audit, you need only reflect the "Offeror's Proposal" and "Prenegotiation Objective" columns. The technical evaluation results can be addressed in your discussions, and would normally be used in the establishment of your objective.

For your information, "Technical Analysis" is defined as the examination and evaluation by personnel having specialized knowledge, skills, experience, or capability in engineering, science, or management of proposed quantities and kinds of materials, labor, processes, special tooling, facilities, and associated factors which have been set forth in a proposal. In order to determine and report on the need for the reasonableness of the proposed resources assuming reasonable economy and efficiency, special knowledge is required. Therefore, a technical evaluation that doesn't address individual elements of cost (i.e., labor categories, labor hours, material, other direct costs, etc.), but merely states that the proposal is acceptable, is not considered adequate.

****Numbered Notes:**

(1) Direct Labor

Compare, in detailed discussion, the proposal, the audit and/or technical recommendations, and the prenegotiation objective direct labor categories, hours and rates. For example:

Labor Category	Offeror's Proposal			Audit/Technical Recommendation			Prenegotiation Objective		
	Hours	Rate	Amt.	Hours	Rate	Amt.	Hours	Rate	Amt.
Engineer	xx	$	$	xx	$	$	xx	$	$
Programmer	xx	$	$	xx	$	$	xx	$	$
Clerical	xx	$	$	xx	$	$	xx	$	$
Total			$			$			$

Offeror's Proposal

First subparagraph. Summarize the offeror's rationale for the proposed labor categories, hours and rates. Questions you can consider are: Are the proposed labor rates the result of a negotiated forward pricing rate agreement (FPRA)? Are they unaudited bidding rates that have been approved at a corporate level? Are they current actual rates for specific employees or a composite rate for personnel under each labor category? If the labor rates are developed on a specific base rate, what escalation factor (if any), has the offeror applied to the base rate? Is that a reasonable factor? Are the proposed labor categories and hours based upon the offeror's

previous experience? What evidence of historically incurred hours has the offeror provided? Or, is the proposal an engineering estimate of the projected labor and expertise to accomplish the requirements of the acquisition? Do the proposed hours correspond to the performance period?

Audit/Technical Recommendation

Second subparagraph. Summarize the basis of the audit or other recommendations. How have the recommended labor rates been developed? For instance, audit reports generally use the Data Resources Indices in developing labor rate recommendations. This has been proven to be a reliable *escalation predictor* for labor rates and material items. If you have an audit report, the information for this subparagraph will be within the audit report. In the event you have not obtained an audit, it is advisable to contact your state audit office and request current rate/escalation recommendations. The recommendations of the technical evaluation should also be addressed under this subparagraph. It is important that the evaluation includes complete and factual support for any exceptions taken to proposed direct labor categories and hours.

Prenegotiation Objective

Third subparagraph. Discuss the Grantee's negotiation objective. What is it based upon? Did you rely on the audit recommendations? Did you rely on the technical evaluation in development of your objective labor categories and hours? An excellent resource for additional considerations during analysis of a proposal is the Armed Services Pricing Manual, ASPM. Additionally, the evaluation considerations in evaluating manufacturing labor versus engineering labor differ greatly. In a manufacturing environment, other considerations may include application of learning curve theory, efficiency factors, recurring versus non-recurring labor, etc.

It is your responsibility to establish a reasonable objective after considering and analyzing all of the available data. Statements to the effect, " THE OFFEROR HAS PROPOSED THE SAME RATES ON OTHER CONTRACTS," are not adequate without discussion of how price reasonableness was determined under the other contracts.

(2) Labor Overhead, Material Overhead, and G&A

Compare, in detailed discussion, the offeror's proposal, the audit and/or other recommendations, and the Grantee's objective for labor overhead, material overhead, and G&A. For example:

Category	Offeror's Proposal		Audit/Technical Recommendation		Prenegotiation Objective	
	Rate	Amt.	Rate	Amt.	Rate	Amt.
Labor Overhead	x%	$	x%	$	x%	$
Material Overhead	x%	$	x%	$	x%	$
G&A	x%	$	x%	$	x%	$

Offeror's Proposal

First subparagraph. Describe how the offeror developed the proposed indirect rates. Does a forward pricing rate agreement exist? If so, what is the period covered by the agreement? This information should be provided by the offeror.

Audit/Other Recommendation

Second subparagraph. Explain what the audit's recommendations are based upon. This may include exception taken to some cost elements within the overhead pool, such as fringe benefits, unemployment taxes, rent, depreciation, etc. This information should be reflected in the audit report. If you do not obtain an audit report, you can request current rate recommendations and/or historical actual rates from your state audit office. Comparing the offeror's proposed rates to the actual rates can provide a good measure on how accurate the offeror's proposed rates have been.

Prenegotiation Objective

Third paragraph. Address how you developed the Grantee's prenegotiation objective, and upon what information you relied. Are your objective rates based upon recommendations? Occasionally, you may experience a situation where you haven't obtained an audit report, and your state audit office has no information on a specific offeror. In such cases, it may be to your advantage to request an audit of the offeror's rates. Absent this information, you will need to evaluate the offeror's proposed rates in detail (i.e., cost elements included in the indirect pools) for allowability and allocability. Comparing one offeror's rates with those of another offeror's is not an acceptable method in any case. Also, comparing this year's proposed rates to last year's rates is not a basis for establishing reasonableness of the currently proposed rate.

(3) Direct Material

Provide a detailed breakdown and compare, in detailed discussions, the offeror's material quantities and unit prices.

Material	Offeror's Proposal			Technical/Audit Recommendation			Prenegotiation Objective		
	Qty	UP	Amt	Qty	UP	Amt	Qty	UP	Amt
Pwr Sup	xx	$	$	xx	$	$	xx	$	$
CM Chips	xx	$	$	xx	$	$	xx	$	$
Wire	xx	$	$	xx	$	$	xx	$	$
Other	xx	$	$	xx	$	$	xx	$	$
Total			$			$			$

Offeror's Proposal

First subparagraph. Address the basis of the offeror's proposed direct material (engineering estimate? based upon history? etc.) and costs associated with the material (catalog prices? oral quotes? written quotes? historical prices escalated by $? competitive?, etc.) Will there be any scrap, attrition or variance factors to consider? If applicable, has the offeror included an analysis for large dollar items? Is the analysis meaningful?

Audit/Technical Recommendation

Second subparagraph. Address the audit/technical recommendations. Has the auditor/originator taken exception to any of the proposed material items, quantities or associated prices? Have exceptions been adequately supported?

Prenegotiation Objective

Third subparagraph. Support the Grantee's prenegotiation objective. If you have taken exception to any material items and/or quantities, what information have you relied upon to reach your conclusions? If you have taken exception to any pricing aspects of the offeror's proposal, explain fully how you arrived at your objective. In cases where you have no audit report, the importance of a thorough technical evaluation is increased. You must make a determination of price reasonableness for the direct material items. When challenging a cost, explain the basis for your position. "Appears too high," without rationale, is not sufficient.

(4) Other Direct Costs (ODC)

Compare, in detail discussions, the offeror's proposal, the audit and/or technical recommendation, and the prenegotiation objective for other direct costs. For example:

Cost Element	Offeror's Proposal	Audit/Technical Recommendation	Prenegotiation Objective
Computer Support	$	$	$
Freight	$	$	$
Air Travel	$	$	$
Per Diem	$	$	$
Consultant	$	$	$
Total ODC	$	$	$

Offeror's Proposal

First subparagraph. Summarize the offeror's rationale for proposing the various expenses. The elements above are examples of the types of costs generally included as other direct costs (ODC).

Technical/Audit Recommendation

Second subparagraph. Summarize the audit and/or technical recommendations. Address all the items included under this element. Any exceptions taken must be fully explained.

Prenegotiation Objective

Third paragraph. Provide an analysis of the items included under this cost element. For instance, are the number of trips scheduled considered reasonable by audit or your technical evaluation? Are the costs per trip reasonable?

You can check air travel rates with commercial airlines. How do the offeror's proposed costs compare with previous history? Did the contractor apply an escalation factor? Is it reasonable? In your analysis, you may need to show a lower level breakdown (i.e., a breakdown of the number and location of proposed trips).

(5) Profit/Fee Analysis

Provide a summary that compares the offeror's proposal and the Grantee's prenegotiation objective. For example:

Offeror's Proposal		Prenegotiation Objective	
Rate	Amt	Rate	Amt
xx%	$	xx%	$

Offeror's Proposal

First subparagraph. State the offeror's proposed profit/fee rate, that amount, and any other information provided by the offeror to support the proposed rate.

Prenegotiation Objective

Second subparagraph. Address the Grantee's prenegotiation objective profit/fee rate, which should be based upon application of your structured approach.

- Structured approaches for determining profit or fee prenegotiation objectives provide a discipline for ensuring that all relevant factors are considered.
  - Grantees should use a structured approach for determining the profit or fee objective in those acquisitions that require cost analysis; and
  - May prescribe specific exemptions for situations in which mandatory use of a structured approach would be clearly inappropriate.

- Profit or fee prenegotiation objectives do not necessarily represent net income to contractors. Rather, they represent that element of the potential total remuneration that contractors may receive for contract performance over and above allowable costs. This potential remuneration element and the Grantee's estimate of allowable costs to be incurred in contract performance together equal the Grantee's total prenegotiation objective. Just as actual costs may vary from estimated costs, the contractor's actual realized profit or fee may vary from negotiated profit or fee, because of such factors as efficiency of performance, incurrence of costs the Grantee does not recognize as allowable and contract type.

It is in the Grantee's interest to offer contractors opportunities for financial rewards sufficient to (1) stimulate efficient contract performance, and (2) attract the best capabilities of qualified large and small business concerns to Grantee contracts.

Both the Grantee and contractor should be concerned with profit as a motivator of efficient and effective contract performance. Negotiations aimed merely at reducing prices by reducing profit, without proper recognition of the function of the profit, are not in the Grantee's interest.

PART D TYPE OF CONTRACT CONTEMPLATED

Explain the type of contract contemplated and the rationale for selection.[12] If this prenegotiation memorandum is being written for a modification to an existing contract, you must also address the contract type.

PART E MAJOR DIFFERENCES

Identify any anticipated problem areas, exceptions taken by the offeror(s) to the solicitation terms and conditions, or major differences which may interfere with negotiations, and your intended negotiation strategy.

PART F NEGOTIATION APPROVAL SOUGHT

Give your specific recommendation similar to the following:

"Approval of this Pre-Negotiation Memorandum is recommended based upon the information set forth herein and authority to negotiate and enter into a contract is requested. It is considered the opinion of the negotiator that the Grantee's prenegotiation objectives are realistic and can be achieved."

[12] - FTA C4220.1E paragraph 7.i.(2).

Prepared by: Date:_____

_____
(Signature and Title)

Reviewed by: Date:_____

_____
(Signature and Title)

Approved by: Date:_____

_____

_____
(Name and Title)

My Approval is: (check one) ____ a. Unconditional
____ b. Conditional (See attached exceptions.)

5.3 AWARD PROCEDURES

DISCUSSION

Contract awards generally follow one of two procedures:

Offer and Acceptance - When you are fully in agreement with all of the terms and conditions of the offer and you desire to make an immediate contract award, you may wish to use a simple *offer and acceptance* form as the awarding document. All that is required is that you sign the "acceptance" block on the form and issue it to the contractor. The form may reference documents such as the Request For Proposal (RFP), which contain the terms and conditions upon which the offer is based. For an example of an *offer and acceptance* format see Appendix B.7. [13] 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, you may avoid confusion by drafting a *bilateral contract* document which defines the final terms agreed upon.

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 you 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

[13] - APTA, Standard Bus Procurement Guidelines, January 1997, p. 30.

work until a contract has been signed by both parties. Appendix B.8 contains the Federal contract award form.

5.3.1 Public Announcements of Contract Awards

REQUIREMENT
Paragraph 14 of FTA Circular 4220.1E, *Contract Award Announcement*, states: If a grantee announces contract awards with respect to any procurement for goods and services (including construction services) having an aggregate value of $500,000 or more, the grantee shall: a. Specify the amount of Federal funds that will be used to finance the acquisition in any announcement of the contract award for such goods and services; and b. Express the said amount as a percentage of the total costs of the planned acquisition.

DISCUSSION

Public Announcements - If your agency makes public announcements of its contract awards, and the award has an aggregate value of $500,000 or more, you are required to comply with the contract award announcement provision noted above. Public announcements may include press releases, announcements in public meetings, Internet postings and publicly released documents.

5.3.2 Debriefing of Offerors

DISCUSSION

Debriefing of unsuccessful offerors can be valuable to both the offerors and the procuring agency. A debriefing can be helpful for a number of reasons:

- **It communicates a sense of fairness and appreciation to offerors who have made sizeable investments of time and resources in preparing bids or proposals for your program.**
- **It may avoid a protest by convincing a disappointed offeror that your agency's decision was carefully made, factually well supported, and the best one for your agency.**

- **Of most importance, it can help offerors improve their future proposals, which is a definite advantage to them and to your agency.**

Best Practices

Time of Debriefing - Most agencies conduct their debriefings after contract award because they feel that evaluation information communicated to an offeror prior to award could encourage a protest or that it might result in an attempt by the unsuccessful offeror to resubmit an improved proposal and delay the selection process. Typically, one of the items addressed in a debriefing is the proposal's strengths and weaknesses in the context of what the transit agency was looking for; this information could be valuable to a competitor in negotiations. On the other hand, some Federal agencies, such as NASA, have had considerable success in avoiding protests by using pre-award debriefings. NASA feels that an in-depth, pre-award debriefing will work to convince an unsuccessful offeror that the Agency chose the best proposal, thus discouraging a protest. In addition, NASA would prefer to deal with a protest, if they are going to get one, before award and not after award, when they would face the risk of having to terminate the contract. Whatever policy your agency chooses to use needs to be carefully coordinated with your written protest procedures, which are discussed in Section 11.1, *Protests*, of the BPPM. [14]

Pre-award Debriefing – The timing of the debriefing relative to contract award will affect the nature of the information you can provide to the offeror. If an offeror has been notified that it has been excluded from the competitive range or otherwise excluded from the competition, and the offeror requests a debriefing prior to award, you will have to decide whether to grant the request or delay the debriefing until after contract award. If you decide to grant the request for a pre-award debriefing, you must limit the information disclosed to that offeror's proposal and not disclose any information about the other offerors. To reveal information about other offerors would compromise the integrity of the procurement. Information revealed to an offeror prior to award must be limited to the following:

- The agency's evaluation of the significant strengths and weaknesses of the offeror's proposal in accordance with the evaluation criteria;

- A summary of the reasons for eliminating the offeror from the competition;

- Reasonable responses to relevant questions about whether the evaluation procedures contained in the solicitation and other regulations were followed in eliminating the offeror from the competition.

Pre-award debriefings must not disclose the following:

- The number of offerors;

[14] - The Federal debriefing procedures may be found in the FAR at subpart 15.505 and 15.506.

- The identity of other offerors;
- The content or evaluation of other offerors' proposals.
- The ranking of other offerors;
- Confidential business information of other offerors. See below – *Disclosure of Confidential Information.*

Post-award Debriefing – Remember that the primary objective of the debriefing is to help the offeror improve its chances of success on future proposals, and not to defend the agency's selection decision. In light of this purpose, post-award debriefings may include, *at the agency's discretion*, the following information:

- The agency's evaluation of the significant strengths and weaknesses or deficiencies in the offeror's proposal in accordance with the evaluation criteria;
- Past performance information on the debriefed offeror but *not the names of individuals providing reference information about an offeror's past performance;* [15]
- The overall evaluated cost or price and technical ranking, if applicable, of the successful offeror and the debriefed offeror. Evaluated cost or price would include the agency's estimated cost of correcting defects or weaknesses in the items or services offered;
- A summary of the rationale for the selection decision;
- Reasonable responses to relevant questions about whether the evaluation procedures contained in the solicitation and other regulations were followed.

Post-award debriefings should not include:

- Point-by-point comparisons of the debriefed offeror's proposal with those of other offerors;
- *Specific numerical evaluation scores.* This inevitably leads to having to explain the basis for, and defend, the numbers. It will put the members of the agency's

[15] - As a rule, proposals should not be rejected on the basis of past performance information without allowing the proposer an opportunity to respond to unfavorable references (from inside or outside the agency). To do so would almost certainly be grounds for protest.

evaluation team "on trial" for their scores, and will make no positive contribution to the objectives of the debriefing. It may well contribute to a protest;

- Confidential business information. See below – *Disclosure of Confidential Information.*

Method of Debriefing - Debriefings may be done orally or in writing. If the debriefing is done orally, the contracting officer should conduct the debriefing and control what is being divulged. [16] If the reasons for rejection are highly technical, a subject matter expert may participate on a limited and controlled basis. The more people present, the more difficult to control the flow of information. Disclosure of the identity of evaluators can lead to personal friction and allegations of bias.

Disclosure of Confidential Information - Grantees should consult their individual state laws regarding the disclosure of proprietary information from competitors' proposals. Such information would include:

- Trade secrets;
- Confidential manufacturing processes and techniques;
- Financial or business information that is confidential, such as cost information, profit, overhead rates, etc.

It is suggested that a disclaimer be used in the solicitation to state that information will not be disclosed without prior notice to the offeror and an opportunity (e.g., 10 days) to obtain court protection from disclosure.

In conclusion, the information communicated to the offeror must be of *value* to the offeror. The information must enable the offeror to understand why its proposal was not selected. This type of discussion may require some *general comparison* of the offeror's proposal with the winning proposal in order to communicate the basis on which the selection decision was made, and to meaningfully communicate the weaknesses in the offeror's proposal.

5.4 DOCUMENTATION OF PROCUREMENT ACTIONS

REQUIREMENT
Paragraph 7.i. of FTA Circular 4220.1E requires a written record of the procurement history:

[16] - If an oral debriefing is conducted, it might be advisable to create a transcript to memorialize what was discussed in the debriefing in the event there is a protest.

Grantees shall maintain records detailing the history of a procurement. At a minimum, these records shall include:

(1) the rationale for the method of procurement,
(2) selection of contract type,
(3) reasons for contractor selection or rejection, and
(4) the basis for the contract price.

DISCUSSION

Section 2.4.1, *File Documentation,* contains a listing of the various types of contract file documentation which are typically required to document the history of a procurement. Section 9.1, *Documentation of Contract Administration*, contains guidance for documenting contract administration activity.

The purpose of this section is to discuss the documentation requirements which are closest to and relate most directly to the award of the contract. It might be helpful to note that documentation of contract decisions and actions is a perennial problem reported with regularity by review teams doing Procurement System Reviews for FTA's grantee community. These documentation problems are in the very areas of FTA's highest priority concerns, as expressed in Circular 4220.1E, and some are concerned with documentation related to contract awards. The most commonly noticed problems include:

- **No independent cost analysis 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,**
- **No documentation describing how the price was determined/negotiated**.

5.4.1 Sealed Bid Procurements

5.4.1.1 Abstract of Bids

Best Practices

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 Bids*. An example of an abstract is in Appendix B.4 which contains the GSA Forms 1409/1410, *Abstract of Offers,* used in Federal procurements for the recording of bids. Abstracts of bids should be available for public inspection.

5.4.1.2 Documentation of Award Decision

Best Practices

A written record of the award decision needs to be made. The elements of the award decision which need to be documented are:

- 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 4.4.4, *Responsive Bidder*. When there are lower bids than the bid being 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 5.1, *Responsibility of Contractor*.

- A determination of the reasonableness of the price. Section 5.2, *Cost and Price Analysis*, discusses the FTA Circular 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. Significant differences between the independent cost estimate and the low bid need to be discussed.

5.4.2 Negotiated Procurements

5.4.2.1 File Documentation of Selection Decision

Best Practices

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 grantee's program with price and other factors considered." [17] The contract file documentation should include the following:

- *Determination of Competitive Range* (See Section 4.5.3, *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.

[17] - FTA Circular 4220.1E Paragraph 9.d.(4).

- The *Technical Evaluation* (See Section 4.5.2, *Evaluation of Proposals* and *Appendix B.1*). 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* (See Section 5.2, *Cost and Price Analysis*). In all instances, the contract file must reflect evidence of a cost or price analysis. You 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, and where the costs are unrealistically low, an adjustment should be made to reflect what the agency believes the effort will actually cost given that 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 (See Section 5.1, *Responsibility of Contractor)*. Documentation regarding the selected contractor's responsibility should be included in the file.

5.4.2.2 Pre-Negotiation Plan

Best Practices

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 which is acceptable to all organizational elements of the agency. Second, it allows you to develop a *range of price objectives* which is acceptable to your agency management, so that negotiations can be concluded if the price can be negotiated within the range established in the Pre-Negotiation Plan. A 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.

An example of a grantee Pre-Negotiation Plan can be found in Appendix B.6. [18] Several features of this Plan are worth noting:

- The independent grantee cost estimate was used in the price analysis of the contractor's proposal.

- An advisory audit of the contractor's cost proposal was performed and the results were used to develop the prenegotiation position. Major subcontractors were also evaluated.

- The technical program office and the contracts office met to jointly develop a negotiation position that was acceptable to both. (Note: some organizations find it helpful to develop their negotiation objectives as a range of prices, to include both a target price objective and a maximum price which will not be exceeded in negotiations without further approvals by agency management. This approach allows the negotiation team a degree of flexibility which is usually needed because contractors often bring information to negotiations which agency personnel did not have when they prepared their negotiation plan.) [19]

- Agency management officials reviewed the pre-negotiation strategy and approved the position adopted, thus precluding any after-the-fact "second guessing" during the contract review process.

5.4.2.3 Memorandum of Negotiations

Best Practices

It is essential that every contract award be documented with a *Memorandum of Negotiations*. An example of a Memorandum of Negotiations is in Appendix B.9. [20] This memorandum must describe the most important aspects of the procurement history, which 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.

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18 - Metropolitan Transit Authority, Houston, TX. Procurement Manual, Exhibit 9, dated August 1, 1994.

19 - BART Procurement Manual, Rev. 4, dated July 20, 1994, p. 297, "Price Positions."

20 - MTA, Houston, TX, Procurement Manual, Exhibit 10, dated August 1, 1994.

- 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 a Plan was developed), the independent cost estimate (which should always be developed), and any advisory audits that may have been conducted. See Appendix B-12 (Negotiation Memorandum Sample Format) for an illustration.

- A discussion of important contract terms and conditions, such as insurance requirements, DBE participation, Buy America provisions, etc.

Chapter 6

6 - Procurement Object Types: Special Considerations

6.1 Construction (10/98)

6.1.1 The Traditional Construction Process - Design/Bid/Build (10/98)
6.1.2 Construction Management ("CM") (10/98)
6.1.3 "Fast Tracking"-- Phased Design, Award and Construction (10/98)
6.1.4 "Turnkey" -- Design/Build Contracting (10/98)
6.1.5 Value Engineering (6/03)
6.1.6 Facilities Maintenance -- Job Order Contracts (10/98)
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6.1.9 Incentives to Reduce Project Completion Time (10/98)
6.1.10 Special Contract Provisions (10/98)

6.2 Equipment and Supplies (2/00)

6.2.1 Lease/Maintain (2/00)

6.2.1.1 Lease/Maintenance of Vehicles (2/00)
6.2.1.2 Lease of Heavy Equipment with Operators (2/00)

6.3 Rolling Stock (10/98)

6.3.1 Buses (10/98)

6.3.1.1 Competitive Proposals vs. Sealed Bids (10/98)
6.3.1.2 APTA Standard Bus Procurement Guidelines (10/98)

6.3.2 Rail Cars (10/98)
6.3.3 Joint Procurements of Rolling Stock and “Piggybacking” (6/03)
6.3.4 Pre-Award and Post-Delivery Reviews for Buy America Act Compliance (10/00)
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6.5 Architect-Engineering Services (3/04)
6.6 Insurance (11/03)
6.7 Artwork (6/03)

6.1 CONSTRUCTION

Construction contracting presents a unique set of problems for the procurement specialist, and this section of the BPPM will attempt to identify some of these issues. A number of factors tend to make construction contracting an area where problems abound. The first is the uniqueness of the projects themselves; i.e., they are usually performed with drawings and specifications which are developed for the first, and only time, for that project. Because the documents are one of a kind, there has been no prior experience which would have identified errors and clarified ambiguities. Another factor is the highly competitive nature of the bidding process, producing prices which have no leeway for solving design problems which arise during performance of the contract or for accommodating changes. Add to these factors the legal complexities arising from Federal, State and local statutes, regulations and codes, and the process becomes one unlike any other in the procurement field.

There is a high degree of specialization in the construction industry among firms. The major areas being excavation and foundations, masonry, steel work, roofing, plumbing, electrical, and heating and air conditioning. Given this degree of specialization, the role of the general contractor is to manage other specialty contractors, scheduling and coordinating their work. In this role general contractors assume a high degree of risk when they bid firm- fixed prices, thus guaranteeing performance for the bid price. It should also be noted that a number of States require that the various trades be bid as separate primes, which adds to the complexity of project management and contracting; e.g., who controls the various contractors? If the general trades contractor is given this responsibility, how will it be compensated and what enforcement authority does it have against the other primes?

Another party in this process is the *surety*, who issues a bond assuring performance of the contract, including the payment of suppliers and mechanics in accordance with the terms of their contracts with the construction contractor.

A number of different construction contracting strategies are discussed below. Some of the material presented has been excerpted from the American Bar Association (ABA) *Model Procurement Code*, Chapter 5, which grantees are encouraged to read. Grantees are also encouraged to obtain the FTA construction management manual entitled *Project and Construction Management Guidelines 1996 Update*.[1] These *Guidelines* were developed by FTA "to assist local Transit agencies in developing management structures and work programs to effectively plan and implement the various phases of FTA-funded transit capital improvement projects." The *Guidelines* contain useful procurement information and guidance related to construction projects.

[1] - This document may be obtained from FTA, Office of Program Management, Engineering and Management Division, TPM-42, at (202) 366-2440.

6.1.1 The Traditional Construction Process - Design/Bid/Build

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

Advantages - A major advantage of the sequential design and construction approach is that complex or one- of- a- kind projects can be thoroughly planned and thought through before construction begins. The traditional approach thus produces, in the design phase of the project, the most accurate estimate of final project costs, and this is an advantage of the traditional technique. If problems are encountered with design aspects for the latter stages of the project, the earlier design features or phases can be modified before any construction work has been done, thus avoiding construction contractor claims and delays. Another advantage is that the Agency is given a fixed price for completion of the entire project before construction begins. There may also be advantages in obtaining the necessary financing and project approvals. Overall management of the project should also be simplified by this approach.

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

6.1.2 Construction Management

In recent years a construction technique known as *construction management* has come into practice. In this scheme the owner employs a *construction manager* who acts as the owner's agent during the design phase and as overseer during the construction phase. During the design phase the *construction manager* works closely with the *A/E*, monitoring the *A/E's* efforts to ensure that the design will be within the owner's budget, will accomplish the owner's purposes, etc. One of the critical tasks a CM can perform during the design phase is a *constructability review*, ensuring that the design can actually be built. [2] The specific role of construction managers in this phase will vary greatly from project to project. Their duties may include cost

[2] - See *Project and Construction Management Guidelines 1996 Update*, Section 3.2.2 *Configuration*, Constructability Reviews.

estimating, cost evaluating, project scheduling, review or preparation of contract documents, receiving bids, and advising the owner of bidder qualifications and the acceptability of bids.

Multiple prime contractors - During the construction phase, the construction management role can also take a variety of forms. Under one scheme the *construction manager* will coordinate the work of the various *specialty contractors*, who contract directly with the owner as *multiple prime contractors*. The *specialty contractors*, who would normally have been subcontractors to a *general contractor* in the traditional construction arrangement, now contract directly with the owner, and the coordination normally done by the *general contractor* is performed by the *construction manager*. The *construction manager* may also assist the A/E with inspections of the work. In this scheme the *construction manager* has no financial liability for successful completion of the work--there is no contract with the owner to complete the project for a contract price.

Advantages - The *construction manager* will bring construction expertise to the project team at an early design stage of the project, enabling design decisions to be made with an appreciation of their impact on construction. A *construction manager* may be indispensable if the Agency lacks the personnel resources to adequately and aggressively manage the project. *Phased design and construction* may be used much more easily because the *construction manager* can perform the vital functions of coordinating the work of the *A/E* contractor and the *specialty construction contractors.*

Disadvantages - The construction manager's fee will add to the overall cost of the project, and the cost of employing an independent construction manager may not be feasible on smaller construction projects.

Contract provisions - It is critical that the construction manager's contract clearly define the authority and the duties of the construction manager with respect to the other contractors on the project; e.g., how much authority does the construction manager have over the work of the A/E and the specialty construction contractors? If the construction manager fails to properly coordinate the work of the specialty construction contractors, will the construction contractor or the Agency be liable? It will also be necessary to define the CM's authority in the design and construction contracts, so that these contractors will know the degree to which they are to accept direction from the CM.

6.1.3 "Fast Tracking" -- Phased Design, Award and Construction

Fast tracking is a procedure designed to shorten the overall time for project completion by phasing the design and construction activities so that they can be performed together. In this scheme each phase of the project is placed under contract once the design for that phase is completed. Unlike the traditional approach, where the entire project is first designed and then contracted for with one construction contract, the fast track scheme will complete the design work in phases, and then award construction contracts for the various subsystems or phases once the design for that phase is finished. Thus there will be a number of specialty construction

contracts awarded by the owner, and a *construction manager* will normally, though not necessarily, be retained to assist in packaging the various specialty contracts and to manage the work of these specialty contractors. This work of defining and managing the specialty contracts can also be done by in-house project management or by the *A/E.*

Advantages - Phased design and construction can reduce the overall completion time of the project. It can also allow the Agency to reduce the scope of the later phases if the cost of the earlier phases exceed the budget. It also allows the Agency greater flexibility in the timing of the construction contract awards, thus taking advantage of market conditions, or managing the available funding.

Disadvantages - There is a risk inherent in phased design and construction because portions of the project are begun before the later portions are designed. If major changes occur in the later phases, they may cause costly changes in the earlier work and delays to the specialty contractors. These are risks which will be borne by the Agency.

6.1.4 Turnkey or Design/Build Contracting

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

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

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

Workshop on International Transit Turnkey and Joint Development - The Transportation Research Board has published a very informative Research Circular entitled *Proceedings of the*

Workshop on International Transit Turnkey and Joint Development. [3] This Workshop was held on October 15-19, 1996 and its purpose was " to explore current international experience in the development of turnkey transit projects, to discuss effective turnkey practices, and to identify those aspects that warrant further consideration." The Research Circular summarizes each of the presentations made at the workshop, and presents the "lessons learned" by those organizations using various turnkey approaches. The names of the presenters and their organizations are also given, which provides a reference tool for contacting others who are involved with turnkey projects. Grantees are encouraged to obtain this Transportation Research Circular--it is a valuable source of information. Some of the more important observations made at the Workshop include the following:

- The Federal government and most States, but not all, allow turnkey for some agencies and/or projects. In fact, the recently enacted Federal statute--Transportation Equity Act For The 21st Century (TEA-21)--permits grantees to use turnkey contracting to design and build a mass transportation system or an operable segment of a mass transportation system. Some States have recently expanded their regulations to permit design-build contracts, and this trend is likely to continue. Many of the current transit turnkey projects had to enact legislation or receive waivers to permit the turnkey process.

- A *negotiated procurement process is strongly recommended for selection of a turnkey contractor.* Discussions between the owner and offerors facilitates a true "meeting of the minds"; allows crafting of tailored solutions for contractor concerns; and achieves the optimum balance of risk and price. Negotiations can lead to optimum decisions. If a negotiated procurement cannot be done, then a two-step bidding process is recommended as the next best approach. Some States which allow design-build contracting require a bid process rather than a negotiated procurement.

- Industry input on documents should be sought prior to solicitation.

- Agencies should develop and follow a detailed selection procedure that includes a multi-disciplined and knowledgeable evaluation committee.

- Design-build requires a new generation of contract documents that incorporate the needs of three distinct elements: design, construction and operation. Melding the required pricing and procedures into one contract is a complex endeavor.

[3] - Transportation Research Circular Number 483, March 1998. Transportation Research Board, National Research Council, National Academy of Sciences, 2101 Constitution Avenue, N.W., Washington, D.C. 20418.

- Typical post-award concerns with design-build contracts include the interpretation of commercial terms and the pricing of changes (including the obtaining of adequate cost data to support change orders). Specific recommendations include: requirements for contractor job-cost systems; pricing change orders based on the job-cost system; and detailed audit provisions.

- The turnkey approach may result in lower capital costs and fewer change orders and contract difficulties.

- The turnkey approach may have an adverse impact on small and medium-sized firms, including DBE firms. Agencies may want to consider using incentive clauses in their solicitations to encourage DBE participation, as well as requiring offerors to identify small and minority owned businesses in their proposals during the prequalification/RFP stages of the procurement. It was reported that BART had been very successful with this prequalification requirement in the San Francisco Airport Extension turnkey demonstration project.[4]

- Environmental approvals, intergovernmental coordination, and finance should be in place prior to the turnkey procurement. It is critically important that project participants develop a teaming perspective. A formal *partnering* agreement with the contractor team and tangential agencies has been used with success. See Section 6.1.7 *Partnering*.

6.1.5 Value Engineering

REQUIREMENT
FTA Circular 4220.1E, Section 7(g) encourages the use of value engineering clauses in construction contracts: g. Use of Value Engineering in Construction Contracts. Grantees are encouraged to use value engineering clauses in contracts for construction projects. FTA cannot approve a New Starts grant application for final design funding or a full funding grant agreement until value engineering is complete (see Circular 5010).

DISCUSSION

FTA Circular 4220.1E does not require value engineering clauses but it does encourage them in construction contracts. Value engineering is a procedure designed to incentivize contractors to submit change proposals which reduce the cost of contract performance

[4] - Contact Department Manager-Procurement, BART at (510) 464-6380.

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 their contract specifications. They will be reluctant, however, to propose changes which will reduce their contract price and have the effect of reducing their profit on the contract. Value engineering is a technique designed to overcome this disincentive by offering them a share of the savings resulting from their change proposals.

It is important to note that some contractual arrangements (e.g., design-build contracts) may inherently include value engineering concepts and principles. Where this is the case, FTA does not require separate value engineering proposals, change orders, or other processes. From a procurement view, the concept of value engineering is more important than the form it takes.

The Federal Government uses value engineering clauses in contracts for supplies, services, construction and architect/engineer services. Part 48 of the FAR is dedicated to the subject of value engineering. The prescribed clause for Federal construction contracts may be found at FAR 52.248-3 *Value Engineering-Construction*. While this clause is not required for grantee third-party contracts, it may prove useful as a guide as to how to structure a value engineering clause.

FTA's Project and Construction Management Guidelines 1996 Update, Section 4.2.3 *Value Engineering and Peer Review*, presents a discussion of the value engineering process during the design phase of the project.[5]

Best Practices

Value engineering clauses in use by Transit Agencies tend to limit the type of savings which the Agency will share with the Contractor to those expected on the contract being performed. These are commonly known as "instant savings." The Contractor would not share in "collateral savings" or "future savings" resulting from his change proposal. "Collateral savings" are those savings anticipated by the Agency outside the contract, such as operations, maintenance, logistical support, etc. "Future savings" would be those resulting from the Contractor's value engineering proposals on future contracts for the same deliverable items. The typical share ratio is 50 percent for the Agency and 50 percent for the Contractor of any "net savings" resulting from the Contractor's change proposal. "Net savings" are defined as "gross savings" less the Contractor's costs for developing and implementing the proposal as well as any Agency costs resulting from the change, such as review, implementation, inspection, etc. Estimated "gross savings" would include the Contractor's labor, material, equipment, overhead, profit and bond. At the conclusion of negotiations for the change proposal, a contract modification is issued reducing the contract price by the Agency's share.

[5] - See note 1.

An important feature of all value engineering clauses is that the Agency's decision to accept or reject the contractor's proposal is final and conclusive, and not subject to appeal.

Another important feature of the usual Agency clauses is that the Contractor's value engineering change proposal (VECP) must not "impair any essential function or characteristic of the Work, such as safety, service life, reliability, economy of operation, ease of maintenance, and necessary standardization of features." [6] Another Agency's clause reads that the Contractor's VECP "shall not alter any item's characteristics such as functionality, service life, reliability, economy of operation, ease of maintenance, and necessary standardized features and appearance." [7]

6.1.6 Facilities Maintenance -- Job Order Contracts

The Metropolitan Atlanta Rapid Transit Authority (MARTA) has made use of a very cost-effective procurement approach known as Job Order Contracting (JOC) for its facilities maintenance requirements. These requirements would include the repair, alteration, modernization, maintenance and rehabilitation of buildings, structures, or other real property. The JOC is a competitively bid, firm fixed price indefinite quantity contract, against which MARTA issues Work Orders as specific needs arise.

The unusual feature of the JOC is that the Invitation For Bid (IFB) includes all of the conceivable line items of work, with specifications/definitions for each line item, and unit prices for each item. These specifications and line item prices were developed by MARTA with the assistance of a consulting engineering firm. The line item unit prices were furnished to prospective bidders in a "Unit Price Book," which was developed by the consultant. The Unit Price Book has over 90,000 items which detail specific repair and construction tasks and specifications. The Book covers a wide range of areas such as concrete, air distribution, plumbing, electrical, and hazardous and toxic waste. The Unit Price Book is work-segment based. Each job is detailed and broken down by task. The prices are based on the use of experienced labor and high quality materials. The Book also incorporates prevailing market area cost data and wages.

When bids are solicited, the objective is to obtain bids on "adjustment factors." *No specific projects are bid. Award is based on the lowest proposed adjustment factor.* The two price adjustment factors are for normal and overtime work. These two adjustment factors are applied to *all items in the Unit Price Book*. Adjustment factors are required to be bid to four decimal places. The best way for a bidder to develop its adjustment factor is to price out several types of

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[6] - Metropolitan Atlanta Rapid Transit Authority (MARTA), General Conditions-1988, Clause 49 *Value Engineering Proposals.* To discuss MARTA's approach, contact Mr. Wayner Crowder, Director of Contracts and Procurement, at (404) 848-5587.

[7] - San Francisco Bay Area Rapid Transit District (BART), General Conditions for Construction Contracts, February 1, 1998, Clause GC4.8.1 *Application of VECP*. To discuss BART's approach, contact Department Manager - Procurement, at (510) 464-6380.

projects and take an average. For example, if the price book states that the cost to replace a window is $100, and a prospective bidder develops an estimate of $75, then the bidder's adjustment factor is .7500. Likewise, if the bidder estimates a price of $110 to replace the window, then the bidder's adjustment factor would be 1.1000. On the most recent award, the winning low bid offered an "adjustment factor" of 0.7700.

Following award of the JOC, the process for issuing Work Orders would be as follows:

- A meeting is held with the contractor to discuss the scope of the work to be done.
- A Work Order Proposal is then requested from the Contractor. The Contractor's price is computed by:
    - Selecting various pre-priced construction tasks from the Unit Price Book.
    - Multiplying the pre-established prices from the Unit Price Book by quantities and then by the Contractor's adjustment factor.
- The Contractor's proposal is compared to an independent Authority estimate.
- If the price is reasonable, a Work Order is issued.
- If the price is not reasonable, the job is solicited under normal procurement procedures.

The JOC process offers the opportunity to save significant time and administrative effort because there is only one competitive bid process, and that is when the adjustment factors are solicited. Thereafter, individual jobs do not have to be competed, so there is no lengthy advertising or solicitation time, or complex solicitation documents to prepare, approve and issue. The JOC can be a multi-year contract, thereby reducing the number of times the program must be competed. MARTA's contract is for one base year plus two one-year options, and its value is approximately $9 million.

6.1.7 Partnering

Partnering is a concept/technique designed to foster a team building, or "partnering" frame of mind toward the accomplishment of the construction project. Partnering was originally developed by the Army Corp of Engineers for use on major construction projects with large project staffs on the work site and where effective communications are essential. The parties involved in the performance of the project, including the Agency, the A-E firm, the prime Contractor, and all subcontractors would meet together on a regular basis (at least monthly) to establish and maintain open lines of communication, with the goal of ensuring relationships of trust and cooperation.

The partnering process usually employs a professional Facilitator who conducts the sessions so as to promote trust and reach mutual agreements on how the project is to proceed. The

Facilitator's fee and associated costs are paid for by the Contractor who is in turn reimbursed by the owner (50%) from a line item in the contract Price Schedule. The partnering process does not change or alter the contract agreement. It is not just a one-time meeting at the start of the project, but is an on-going process. It is usually accomplished in five distinct phases:

- Phase I is a joint session of top executives designed to arrive at a clear agreement on the project's business goals and establish a clear issue resolution process. Issues generally focus on safety, budget, communications, quality, schedule, teamwork, impact on the community and a commitment to work together for a successful project. MARTA developed a *Partnering Charter* for its North Springs Station Project, signed by all the team members, which reads as follows:

  We, the team members of the North Springs Station (CF-520) Project Team, are committed to continuing the tradition of effective partnering among our organizations and to delivering a facility in which all team members take pride.
  We will measure our collective success through the following project objectives:

  - *Complete the project on schedule and meet all milestones*
  - *Provide a safe worksite to minimize lost time accidents*
  - *Complete the project within budget*
  - *Fair profit earned by contractor*
  - *Quickly resolve claims without litigation*
  - *Deliver a quality product within specified standards*
  - *Serve as responsible neighbors and provide a positive impact to the surrounding community*

  We will promote teamwork based on the following principles and attitudes:

  - *Timely inputs, responses and decisions*
  - *Open, effective communications*
  - *Honesty and trust*
  - *Solving problems at the lowest possible level*
  - *Working together against the job - not each other*
  - *Full team commitment and participation in partnering*

Note that the *Partnering Charter* identifies its goals as the best interests of *all the parties*. These interests include the earning of a fair profit by the Contractor. It is critical for the Agency's personnel to see the Contractor as a team member whose interest in earning a fair profit is equally important to the interests of the Agency.

- Phase II consists of a workshop where all stakeholders participate in developing a project charter defining team goals, conduct and risks. Washington Metropolitan Area Transit

Authority (WMATA) project members developed the following *Project Charter* for the Metro Georgia Avenue-Petworth Station:

Project Priorities:

- *Successful Partnering*
- *Early identification and resolution of problems*
- *Realizing one's own responsibilities and obligations*
- *Community relations*
- *Openness*
- *Timeliness (especially early submittals, early permits)*
- *Being able to live with changes*
- *Safety*
- *Quality*
- *Making a profit*
- *EEO, disadvantaged business program, employee salaries*
- *Maintaining professionalism*

Challenges We Face:

- *Getting approvals quickly*
- *Resolving issues by give and take*
- *Minimizing changes*
- *"Designing through changes"*
- *Slurry wall*
- *Architectural dome*
- *Being paid on time*
- *Closeout within 60 days*
- *No claims…if unavoidable, finalize promptly*
- *City construction*
- *Public safety*
- *Hazardous material*
- *Avoiding interference with other contractors*
- *Staying in harmony*

WMATA has used Partnering in its major construction contracts for over ten years and in its last two Railcar contracts. WMATA believes that partnering may also be useful in bus contracts where there is a need to enhance communications and working relationships between the owner and the bus manufacturer. For example, issues of delivery, payment and potential performance matters relative to testing, warranty, etc. could also be addressed.

- Phase III provides for monthly evaluations by those managing the job for both parties. The objective is to solve problems at the lowest level, and all members should be evaluating the team's progress, or lack thereof, in meeting the established goals. Monthly

meetings are held at the executive level to review and discuss areas of concern or interest. Problems are identified and solutions are agreed to. Organizational impediments to solutions are resolved. If necessary, unresolved issues are escalated to higher managers. Many issues are resolved before they become major problems and these successes are also discussed at the monthly meeting.

- Phase IV is an executive session, supplemented by key project personnel from both parties. This is normally a quarterly meeting. The purpose is to address the main issues that require resolution, and to ensure that the Partnering process remains on track.

- Phase V is a closure session to provide feedback on the value of the Partnering process. This session is not always held.

Additional information on *Partnering* is available from the Construction Industry Institute. [8]

6.1.8 Competitive Proposals vs. Sealed Bids

Projects Involving Technology - Generally such projects are either part of a larger construction project, in which case they may fall under competitive bidding requirements, or technology acquisition projects involving professional services and possibly an installation component, which takes them outside the construction field with its sealed bid requirements. Where the work to be performed under contract is to a dominant extent other than construction, some Transit Agencies have experienced situations where a competitive proposal has proven to be a better method of contracting for the project than the typical sealed bid approach. This has been true for projects which entailed technology, such as software and systems integration work. In these situations you may want to evaluate alternative technical approaches or alternative ways of construction. These conditions lend themselves to an RFP type of solicitation, where you will have the flexibility to hold discussions with the offerors and select the "best value" for your Agency, considering not only price but the value of the products being offered, including their expected reliability and maintainability. One such project involving technology was a contract for a Public Address/Customer Information Screen. This project is being constructed over a number of phases. The first phase contract was handled as a sealed bid. The problem with this approach was that the lowest responsible bidder was a construction contractor and not a systems integrator. There was a considerable amount of software involved and the solicitation documents did not mention who retained software rights. A project such as this should be solicited as an RFP so that negotiations can take place and prospective contractors can be evaluated on the basis of their suitability for the work. [9]

[8] http://construction-institute.org.

[9] New York City Transit. Contact Ms. Judi Gibson, Assistant Chief Procurement Officer -- Engineering, Construction & Capital Division of Materiel at (718) 694-4113.

Critical Projects Involving Schedule Incentives - If state law permits, it may be advantageous to consider a negotiated method of procurement instead of sealed bids when the project involves a critical completion schedule and where you have chosen to use incentive provisions in the contract or a bid/proposal evaluation method such as those described in section 6.1.9--*Incentives to Reduce Project Completion Times.* Where the methodology being used to evaluate bids is unconventional, and where it may be advantageous to have the flexibility to hold discussions with the prospective contractors, an RFP approach may be preferable to a sealed bid method because it will give you the ability to discuss the contractors' proposed approaches to schedule improvement and the realism of those proposals. It must be recognized, however, that a negotiated procurement will require more time to award, and this may be counter-productive when the project is a time-critical one.

6.1.9 Incentives to Reduce Project Completion Times

Transit agencies have had success in reducing project completion times by using a technique wherein bids are solicited and evaluated in terms of the prices offered and the best achievable completion schedule. [10] The contract award is determined by the *lowest evaluated bid*, using both the bid price and the proposed completion schedule. In this procurement scenario:

- The Agency specifies the maximum duration of the project in the bid documents.
- The Agency determines the value of a "day" during the contract period and specifies this value in the bid documents.
- Bidders must propose the project duration (best achievable schedule) in their bids.
- The bid documents would define the damages for failure to achieve the proposed completion schedule, and the bonuses for early completion, if the Agency should choose to use them with the damages provisions. The use of damages for failure to meet the proposed completion schedule is important in order to keep the bidders "honest" in their proposed completion schedules. The use of bonuses will provide an even stronger incentive for the bidders to successfully make their proposed schedules after contract award.

- Price + Duration (# of Days) = Evaluated Bid

Example:

	Bid	**Company X**	**Days**	**Company Y**	**Days**
Value of a day is $5,000	A - (Bid Price)	$5,000,000		$5,500,000	
	B - (Contract Duration)	----------	720 Days	----------	600 Days

[10] - See note 11.

Value of Duration (Days x $5,000)	$3,600,000	$3,000,000
Evaluated Total	**$8,600,000**	**$8,500,000**

The contract would be awarded to Company Y since its evaluated bid is lower than that of Company X by $100,000. Value of award would be $5.5 million.

Advantages to Price Plus Schedule Bidding - This technique is likely to encourage efficient contractors to bid, and it offers the likelihood of shorter construction project durations because of the strong financial incentives for achieving the best completion schedule.

Concerns with Price Plus Schedule Bidding - *It is extremely important that the construction contractor have control over the work site*, and that the Agency's responsibilities at the work site be minimal or, preferably, nonexistent. If the contractor is dependent upon the Agency to furnish support at the work site, or if the contractor's work is dependent upon the activities of other contractors, the Agency can expect claims regarding the issue of delays, which in turn affect the incentive provisions of the construction contract. In view of the probabilities of claims and litigation, Agencies should avoid incentive contracts such as this unless they can turn a work site over to a construction contractor and allow the contractor to control that site and the scheduling of all work required to complete the project. Where contractors lack the necessary control over the work site, Agencies may well have to pay higher prices, based on the contract bonuses and the contractor's successful claims for delays, and still have a project that is late in completion.

Completion incentives may work to discourage prime contractors from subcontracting with small or disadvantaged business firms. Primes will probably seek partners who are large businesses with proven track records, and which have substantial resources available to perform the work as expeditiously as possible.

The quality of construction work may suffer due to the schedule pressures, and Agencies will need to exert close surveillance over the contractor.

6.1.10 Special Contract Provisions

Construction contracts require certain provisions which are unique to that activity. These provisions are discussed in detail in other sections of the BPPM. Following is a summary of the special provisions and the BPPM sections where they are discussed.

Labor - The three wage and hour laws governing construction in the Federal realm are the Davis-Bacon Act, the Contract Work-Hours and Safety Standards Act, and the Copeland Anti-Kickback Act. The applicable contract clauses are discussed in Appendix A.1, clauses 16, 17 and 18. Section 8.1.2 *Davis Bacon Act* contains more detailed guidance with respect to administering the requirements of this Act.

Bonding - Construction contracts require contractors to furnish three types of bonds--bid bonds, payment bonds and performance bonds--which are discussed in Appendix A.1, clause 13, with more detailed guidance on each type of bond in Section 8.2.1 *Performance Bonds.*

Liquidated damages - Section 8.2.3 *Liquidated Damages* contains guidance on the use of liquidated damages clauses.

Differing Site Conditions – Section 9.2.3.1 contains guidance on administering the *Differing Site Conditions* clause.

Specifications for Construction - Section 3.4 *Specifications for Construction* discusses requirements within FTA Circular 4220.1E and the Master Agreement (MA) which may affect your construction specifications.

Insurance - Section 6.6 *Insurance* discusses an approach to insuring construction project contractors known as *Owner Controlled Insurance Programs (OCIP),* which has proven to be an effective method of insuring the contractor teams involved in construction projects.

Warranties - Obtaining acceptable warranty documents in a timely manner from contractors has been historically difficult. No contractual incentive has existed to motivate contractors to supply the required warranties. Grantees may wish to consider making the submission of an acceptable warranty form a condition of product or system acceptance in order to motivate contractors to furnish the required form. Grantees might also include the warranty forms as a fixed-price line item in the contract for payment purposes, thus giving the contractors a strong motivation to supply the required forms.

Contract Close-out - Close-out of construction contracts will require certain documentation unique to these contracts, such as lien waivers, as-built drawings, etc. These requirements are discussed in Chapter 10, *Close Out*.

6.2 EQUIPMENT AND SUPPLIES

6.2.1 Lease/Maintain

REQUIREMENT
Requirements related to the lease of equipment and facilities may be found in the following regulations: (a) **FTA Circular 4220.1E generally, and paragraph 7d which requires, where appropriate, an analysis of lease versus purchase alternatives to determine the most economical approach.** (b) FTA Master Agreement MA(12), Section 16, *Leases*. (c) *Capital Leases* (49 CFR, Part 639.)

DISCUSSION

Since equipment leases are considered "third party contracts' within the meaning of FTA Circular 4220.1E, the requirements of that Circular apply to such procurements. The Circular requires a lease versus purchase analysis to determine the most economical approach to any given procurement. The Master Agreement, Section 16, concerns capital leases, in accordance with 49 CFR, part 639.

<u>Lease vs. purchase alternatives</u> – Whenever an agency is considering the leasing of equipment, a lease vs. purchase analysis should be made. The analysis should be appropriate to the size and complexity of the procurement. It is usually more economical to purchase equipment than to lease it. This is not always true, however, especially when highly complex equipment is involved and there are issues of maintaining the equipment or having trained personnel who are competent to operate the equipment. In determining whether the lease of equipment is feasible, the following factors must be considered:

- **Estimated length of the period the equipment is to be used and the amount of time of actual equipment usage;**
- **When circumstances require the immediate use of equipment to meet program or system goals and the leasing would serve as an interim measure to meet these immediate needs.**
- **Financial and operating advantages of alternative types and makes of equipment;**
- **Total rental cost for the estimated period of use;**
- **Net purchase price if acquired by purchase;**
- **Transportation and installation costs;**
- **Maintenance and other service costs (e.g., the cost of permanent housing facilities for heavy cranes might preclude their purchase, and the lack of trained operators of heavy equipment may dictate that the agency lease the equipment with trained operators);**
- **Difference in warranty coverages between lease and purchase; e.g., some office equipment leases do not provide for warranty repairs whereas new purchases would be covered by warranties;**
- **Availability of a servicing capability, especially for highly complex equipment (can the Agency service the equipment if it is purchased?);**
- **Potential obsolescence of the equipment because of imminent technological improvements;**

- **Trade-in or salvage value;**
- **Imputed interest costs (net present value of lease payments); and**
- **Insurance costs.**

Best Practices

Leases with options to purchase – When a lease is justified, a lease with option to purchase may be appropriate.

Long term leases – Generally, a long-term lease should be avoided, but may be appropriate if an option to purchase or other favorable terms are included.

6.2.1.1 Lease and Maintenance of Vehicles

Lease vs. Buy Analysis **–** When comparing the costs of leasing vs. ownership, maintenance costs will usually be a major economic factor. Indeed the primary advantage of leasing is the avoidance of maintenance costs for items such as brakes, batteries, etc. Grantees must carefully estimate the maintenance costs over the anticipated life of the vehicle. The costs of ownership will be increased by these maintenance costs and decreased by the anticipated resale value (salvage value) of the vehicle when it is sold.

Using a Request for Proposal vs. Invitation for Bid – PACE Suburban Bus Service's experience with competitive procurements using an RFP has been positive**.** [11] There is much more flexibility for the grantee when an RFP is used instead of an IFB. The RFP approach gives the grantee an opportunity to establish evaluation criteria for important factors of performance, including such items as preventative maintenance, emergency roadside assistance, repairs, fuel card management services, and accident services. Proposals can be evaluated with the objective of selecting the best overall combination of service quality and price. Negotiations can be held with the offerors in order to secure the best possible proposal and contract terms. The PACE Suburban Bus RFP issued for leasing and maintaining their fleet vehicles may be found in Appendix B.15.

Joint Procurements with State DOT's – Grantees should inquire with their State Departments of Transportation as to whether it would be feasible to lease vehicles from contracts awarded by the State. These State contracts frequently represent the best possible terms available for vehicle leasing. When pursuing this "piggybacking" approach, grantee personnel must determine if the

State contract contains all the required Federal clauses and certifications required by Federal regulations. Grantees may wish to take the initiative with their State DOT's to plan ahead for

[11] - For information, contact the Purchasing Section Manager at (847) 228-3573.

joint procurements of vehicles in order to assure that their needs are addressed and that the Federal requirements are included when the procurements are initiated. For additional guidance, see Section 6.3.3 - *Joint Procurements of Rolling Stock and "Piggybacking."*

6.2.1.2 Lease of Heavy Equipment with Operators

Some agencies have found it beneficial to lease, rather than purchase, heavy equipment, such as cranes, with operators. [12] The more important considerations here tend to be operational rather than economic. Advantages to leasing would include such factors as:

- the availability of fully trained and licensed equipment operators;
- the convenience of having the lessor provide the very specialized maintenance services and housing structures for the equipment; and
- the lessor's assumption of liability in case of accidents.

Joint Agency Procurements - Heavy equipment may be very difficult to obtain on short notice, and longer-term leases, such as three years, may be advisable. In addition, competition may be virtually non-existent. Under these circumstances, agencies might be advised to seek out other agencies in their geographical region in order to conduct a joint procurement for their common needs so as to obtain a more favorable contract than either could procure by themselves.

Labor Laws – Agencies will need to be aware of local or State labor laws, as well as Federal laws if construction is involved (e.g., Davis-Bacon Act), when developing their solicitation document and contract.

Insurance – Insurance requirements will be an important part of the contract terms. Agency procurement personnel should carefully coordinate the insurance provisions with their insurance department or legal specialists. Requirements might include coverage for commercial general liability, auto vehicle insurance, workers compensation, and perhaps, a special railway protective policy. The agency's insurance specialists should determine specific coverage requirements and amounts.

6.3 ROLLING STOCK

REQUIREMENT
The FTA Master Agreement, MA(12), Section15 (l) defines several requirements for the acquisition of rolling stock:

[12] - For information about New York City's leasing of cranes with operators contact Stan Grill at (718) 694-4350.

l. Rolling Stock. In acquiring rolling stock, the Recipient agrees as follows:

(1) Method of Acquisition. The Recipient may award a third party contract for rolling stock based on initial costs, performance, standardization, life cycle costs, and other factors, or based on a competitive procurement process in accordance with 49 U.S.C. Section 5326(c).

(2) Multi-year Options. In accordance with 49 U.S.C. Section 5326(b)(1), a Recipient may procure rolling stock using financial assistance appropriated for 49 U.S.C. Chapter 53 using a contract with an option, not to exceed 5 years after the date of the original contract, to purchase additional rolling stock or replacement.

(3) Pre-Award and Post-Delivery Requirements. The Recipient agrees to comply with the requirements of 49 U.S.C. Section 5323 (m) and FTA regulations, "Pre-Award and Post-Delivery Audits of Rolling Stock Purchases," 49 C.F.R. Part 663, and any revision thereto.

(4) Bus Testing. To the extent applicable, the Recipient agrees to comply with the requirements of 49 U.S.C. Section 5323 (c) and FTA regulations, "Bus Testing," 49 C.F.R. Part 665, and any revision thereto.

6.3.1 Buses

6.3.1.1 Competitive Proposals vs. Sealed Bids

Grantee experiences with competitive *Requests for Proposals* (RFP's) for bus procurements indicates that this method may be preferable to the use of sealed bids. When RFP's are used, the grantee has the flexibility to hold discussions with the offerors and to evaluate the proposals and conduct negotiations for the best delivery schedules, warranties, quality/reliability, after market support in terms of parts availability, and the best prices. In other words, grantees can award their contracts on the basis of the best value, with all important factors considered. Some State laws, however, require the use of sealed bidding procedures for buses, in which case grantees would not be able to use competitive RFP's.

Prequalification of systems/components - The Metropolitan Transit Authority (MTA) of Harris County, Houston, TX, completed a large 243 bus procurement which used a two-step sealed bid process. This entailed a prequalification procedure -- "Request for Approved Equals"-- for major systems and components. In Step one, MTA issued a performance type specification identifying all the systems or components which had to be submitted for approval prior to bids. Examples would include: engines, transmissions, door systems, etc. MTA reviewed the submissions in terms of their characteristics, specifications, etc. and determined what systems and components they would accept. MTA then issued a notice to all bidders identifying what components were acceptable, so that all bidders knew beforehand what items were acceptable to bid on. Sealed

bids were then received, and when the low bidder was identified, MTA performed an audit for specification compliance and compliance with Buy America. [13]

6.3.1.2 APTA Standard Bus Procurement Guidelines

The American Public Transit Association (APTA) published the *Standard Bus Procurement Guidelines (SBPG)* in January 1997 as "a model for solicitation of offers and contracts for the supply of transit buses." [14] The SBPG contains suggested terms and conditions regarding the solicitation, the contract document, quality assurance and contractor warranties. A second volume containing technical specifications is under development. Grantees are cautioned, however, that the APTA *Guidelines* may contain terms and conditions which are not consistent with FTA's policies as set forth in FTA Circular 4220.1E. For example, the provisions regarding *advance payments* and *warranties* in the APTA *Guidelines* cannot be adopted without prior FTA waivers.

6.3.2 Rail Cars

There are certain realities in the rail car industry which impact the manner in which rail cars are procured. Transit Agencies buying rail cars tend to do so infrequently, with a number of years between procurements. The technology can be expected to change considerably during the intervening years between these procurements. This fact makes it critical that Agencies do considerable advance planning in order to determine the current state of the art before they formulate their specifications to procure rail cars.

Because there is virtually no standardization in the United States in the area of track gauges, station platform heights, tunnel designs, etc., and because new rail cars must be compatible with existing cars, it is not feasible for Transit Agencies to consolidate procurements of rail cars and use common buys or "piggybacking." While joint purchasing of rail cars is difficult, an agency designing a specification should consult with others who have either recently purchased cars or who are in the process of doing so, and attempt to achieve whatever commonality of components is possible. This will facilitate both joint purchases of parts in subsequent years and the ability to second-source. Another aspect of this problem with non-standardized rail cars is that it results in high one-time design costs for each Agency's procurement. This in turn provides an incentive to buy as many cars as feasible under each solicitation so that the design costs can be amortized over a greater number of vehicles, with a corresponding reduction in unit prices. On a recent MARTA procurement, for example, the unit price was reduced by $400,000 by increasing the quantity of cars to be procured from 30 (the initially planned number) to 100. This savings was due to amortizing the non-recurring design costs over a larger number of units. Agencies should

[13] - MTA, Houston, TX. Contact Don Murphy at (713) 739-4843 or Paul Como at (713) 739-4803.

[14] - American Public Transit Association, 1201 New York Avenue, N.W., Suite 400, Washington, D.C. 20005-6141. Copies may be ordered by phone at (202) 898-4089. Technical questions may be answered at (202) 898-4087.

carefully consider the multi-year contracting strategies discussed in Section 2.2 *Long Term Planning*.

Best Practices

MARTA's experience with a recent major rail car procurement offers a number of helpful insights. [15]

Competitive proposals - The procurement specifications were subjected to a *peer review* by other Transit Agencies and independent consultants prior to release in the RFP. This gave MARTA the benefit of other Transit Agencies' experiences with more recent rail car procurements. MARTA elected to use a competitive *Request for Proposal* (RFP) approach instead of a sealed bid method, which had been their earlier practice. They were pleased with this decision because it gave them the needed flexibility to discuss various technical approaches for complex items with each of the offerors, and to achieve the "best value," given the different technical approaches offered and the prices proposed for these approaches. "Best value" included expected reliability and maintainability features, such as on-board diagnostics.

MARTA's RFP included a *Proposal Data Requirements List* (PDRL) which defined the format and content of the required proposal information, thereby creating proposal uniformity, which in turn increased the quality and efficiency of proposal evaluation. The proposal evaluation plan, including the scoring mechanism, was carefully developed and tested using several mock proposals before the RFP was issued. Once proposals were received, the proposal evaluation plan and scoring mechanism were adhered to meticulously in order to avoid any appearance of bias. *This kind of rigid adherence to the proposal evaluation plan is a critical requirement for Agencies to observe if they use the RFP methodology*. MARTA's use of individuals outside the Agency to participate on the proposal evaluation committee added an element of objectivity and independence to the process, as well as enhancing the overall experience base of the evaluation team.

MARTA kept the technical and price proposal evaluations separate, so as not to influence the technical evaluators. They also established a "competitive range" following initial proposal evaluations, and held discussions with those companies in the competitive range (those that had a reasonable chance for contract award). Offerors eliminated from the competitive range were to be notified quickly after MARTA's decision so that they could release their teams to other opportunities.

The time required to complete the procurement process was longer using the RFP method than it would have been with sealed bids (IFB). Using an IFB was estimated to take between four and

[15] - MARTA Rail Car procurement, contact Mr. Robert June, Acting Director of Systems Engineering, at (404) 870-3203.

six months from advertising to award, whereas the RFP method took about 13 months from release of the RFP to contract award. Agencies planning to use the RFP method will have to allow for more time than if sealed bids are used, but the final results may be worth the added procurement time.

Future purchases of proprietary parts - Efforts should be made in the original acquisition of rail cars (and buses) to include an "advance agreement" with the supplier concerning the future acquisition of proprietary parts. This could be done as a percentage discount of the list price. The best approach might be to have a one-year contract for the proprietary parts, with a series of four one-year options (to be extended subject to FTA approval). This would enable the agency, at the end of each year, to determine whether the marketplace has changed in terms of the competitive availability of parts formerly only available from the vehicle manufacturer.

6.3.3 Joint Procurements of Rolling Stock and "Piggybacking"

REQUIREMENT
FTA Circular 4220.1E applies to all third party contract actions undertaken by grantees with Federal funds, including actions taken pursuant to the contracts of other entities, such as (1) the exercise of options which have been assigned to the grantee by another entity which awarded the contract initially, (2) the assignment of contracts themselves to a grantee by another entity (under which the grantee will spend Federal funds), and (3) joint procurements with other entities (under which the grantee will spend Federal funds). Of particular significance are the following provisions of FTA Circular 4220.1E: 7.e. Intergovernmental Procurement Agreements. 1. Grantees are encouraged to utilize available state and local intergovernmental agreements for procurement or use of common goods and services. When obtaining goods or services in this manner, grantees must ensure all federal requirements, required clauses, and certifications (including Buy America) are properly followed and included, whether in the master intergovernmental contract or in the grantee's purchase document. [16]

[16] - Sub-paragraph (1) looks primarily to State government contracts that allow subordinate government agencies to buy from established schedules akin to the GSA Schedules in Federal practice. FTA believes grantees may buy through these contracts provided all parties agree to append the required Federal clauses in the purchase order or other document that effects the grantee's procurement. When buying from these schedule contracts, grantees should obtain Buy America certification before entering into the purchase order. Where the product to be purchased is Buy America compliant, there is no problem. Where the product is not Buy America compliant, the grantee will still have to obtain a waiver from FTA before proceeding.

2. Grantees are also encouraged to jointly procure goods and services with other grantees. When obtaining goods or services in this manner, grantees must ensure all federal requirements, required clauses, and certifications are properly followed and included in the resulting joint solicitation and contract documents. [17]

3. Grantees may assign contractual rights to purchase goods and services to other grantees if the original contract contains appropriate assignability provisions. Grantees who obtain these contractual rights (commonly known as 'piggybacking') may exercise them after first determining the contract price remains fair and reasonable. [18]

8.a. Full and Open Competition. All procurement transactions will be conducted in a manner providing full and open competition.

9.i.(1) Evaluation of Options. The option quantities or periods contained in the contractor's bid or offer must be evaluated in order to determine contract award. When options have not been evaluated as part of the award, the exercise of such options will be considered a sole source procurement.

DISCUSSION

Recently, there has been a growing trend amongst transit systems to become creative in the acquisition of rolling stock. The most constructive of these techniques involve advance planning and joint procurement by several systems. FTA encourages this technique. In these joint procurements, the needs of the various transit systems are defined in the solicitation and the manufacturers are asked to bid upon the total known needs of the agencies involved. In other situations, transit agencies will identify an existing contract of another agency and "piggyback" that contract by means of an assignment of contract rights such as an assignment of options. Additionally, there is the occasion where an agency awards an Indefinite Delivery/Indefinite Quantity (ID/IQ) contract and allows other

[17] - Sub-paragraph (2) reflects FTA's belief that grantees should consider combining efforts in their procurements to obtain better pricing through larger purchases. Joint procurements offer the additional advantage of being able to obtain goods and services that exactly match each cooperating grantee's requirements. Joint procurements are considered superior to the practice of "piggybacking" since "piggybacking" does not combine buying power at the pricing stage and may limit a grantee's choices to those products excess to another grantee's needs.

[18] - Sub-paragraph (3) reflects grantees' continuing ability to assign contractual rights to others – "piggybacking." FTA believes it is extremely important that grantees ensure they contract only for their reasonably anticipated needs and do not add quantities or options to contracts solely to allow them to assign these quantities or options at a later date.

agencies to purchase from it. Regardless of the approach used, it is important that grantees be aware of the requirements of FTA Circular 4220.1E with respect to competition, evaluation of options in making the basic contract award, and the existence of a sole-source condition when optional quantities are ordered which were not priced and evaluated as part of the basic contract award process. ***It is FTA's policy that the estimated quantities must reflect the immediate or reasonably foreseeable needs of the parties to the solicitation and, in the case of indefinite delivery/indefinite quantity contracts, a minimum and maximum quantity must be stated.***

Best Practices

The streamlining of bus purchases can occur when two or more systems join forces using the same specification, solicitation process, terms and conditions, etc. leading to the purchase of vehicles from the same vendor. This can be accomplished using (1) the services of one lead governmental agency, (2) a consortium, or (3) "piggy-backing." *While all of these mechanisms require advance planning, the first two occur "pre-award," while the latter occurs "post-award."* The advantages of using a consolidated procurement approach include the following:

- Smaller transit systems lack the personnel and the expertise to conduct bus procurements expeditiously, especially in light of Federal requirements. Procurement lead times should be greatly reduced through a consolidated procurement procedure.

- Staff time at the various transit systems and the vehicle manufacturers will be saved by eliminating the redundancy in conducting multiple bidding processes for the same vehicles.

- Quality improvements could result from the buses being manufactured in a more standardized fashion.

- Savings in transit systems' operating costs will be realized from earlier delivery of new buses, as older vehicles with higher operating costs are retired earlier.

- It is to be hoped that larger quantity buying would result in better prices than a number of smaller individual solicitations.

- When common vehicles are purchased, it may result in better overall coordination/learning among transit systems in that they will be using the same vehicles.

Advance Planning--Joint Procurements

Consolidated Procurements - Various governmental agencies may act as a facilitator for the award of *multiple contracts*. This approach is particularly beneficial when dealing with a large

number of grantees. As an example, the New York State Department of Transportation (NYSDOT) has been using the services of its Office of General Services (OGS) for many years to purchase vehicles under FTA's Section 5310 Program. Here, six different types of light duty buses are purchased every year for the 5310 grantees using an OGS bid process based upon specifications developed, in part, by the grantees facilitated by NYSDOT. During the OGS bid process, NYSDOT estimates the number of vehicles to be purchased not only for the 5310 grantees, but also for other public transportation providers in the State. For the 5310 Program, New York State contracts directly with the successful manufacturer. The buses are built and delivered directly to the 5310 grantee along with the title. Other public transportation systems within the state (e.g. 5311 and 5307 grantees) may access these same contracts, contracting directly with the successful manufacturer. By using this contracting process, the efficiencies described previously are maximized.

Consortiums - Consortiums have been used where a number of systems come together to *jointly issue a solicitation and immediately award individual contracts* with the successful bidder. Given the different types of bus configurations (e.g. diesel/CNG; low floor/ high floor), it may be useful to identify a lead agency for developing a specification for each type of bus configuration. The specifications developed would then be reviewed by the other members of the procuring group, who would provide their comments on the specification to the lead system. The lead system might modify the specification based on the comments received, but if the changes were not in the best interest of the lead system, the changes would be included as options in the bid package. For example, if the lead system wanted roll curtain destination signs, and other systems wanted electronic destination signs, the specification would call for roll curtain destination signs, and electronic destination signs would be included under the options to be priced by bidders as part of the bid package.

The bid advertisement would specifically identify how many buses were being purchased for which transit systems. Differences or options in the specification for each unique system would be identified and prices obtained from the manufacturers for the various options outside of the base specification.

As an example, New York State has a successful history with a CNG consortium involving FTA grants. Six major systems formed a consortium, aided by NYSDOT as a facilitator, to purchase the first CNG buses placed into service in the State. A single solicitation was used, after which each transit system awarded its own contract in accordance with the terms of the solicitation and the winning bid. [19]

[19] - NY State DOT (518) 457-8343.

Piggybacking

Piggybacking and Tag-ons- FTA Circular 4220.1E sets forth FTA policy and guidance related to procurements commonly referred to as "piggybacking" and "tag-ons." These terms are defined in the Circular as follows:

> *"Piggybacking" is an assignment of existing contract rights purchase supplies, equipment or services.* [20]
>
> *"Tag-on" is defined as the addition of work (supplies, equipment or services) that is beyond the scope of the original contract that amounts to a cardinal change as generally interpreted in Federal practice by the various Boards of Contract Appeals. "In scope" changes are not tag-ons.* (See "Tag-on" paragraph below for further discussion). [21]

Circumstances When Piggybacking Is Permissible – There are a number of issues that should be addressed by a grantee before deciding to piggyback another agency's contract. Grantees must be able to affirmatively determine that the contract to be piggybacked meets Federal requirements. These Federal requirements include compliance with FTA Circular 4220.1E and the *Dear Colleague* Letter C-98-25. Grantees are advised to pay particular attention to the specific issues identified in the Piggybacking Worksheet paragraph below.

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[20] - FTA has introduced a limited definition of "piggybacking" and, to differentiate vastly different policies, has separated this practice of assigning contractual rights among grantees from joint procurements or other intergovernmental agreements. See Circular, paragraph 7.e.

[21] - FTA has similarly attempted to limit the definition of "tag-on" and align it with the concept of a "cardinal change" or "out-of-scope change." FTA believes that earlier attempts to categorize virtually any change in quantity, for example, as a forbidden "tag-on," failed to account for the realities of the marketplace and unnecessarily limited grantees from exercising reasonable freedom to make those minor adjustments "fairly and reasonably within the contemplation of the parties when the contract was entered into." *Freund v. United States*, 260 U.S. 60 (1922).

In applying the concept of "cardinal change" to third party contracts, FTA recognizes that this is a difficult concept, not easily reduced to a percentage, dollar value, number of changes, or other objective measure that would apply to all cases. FTA also recognizes that the various Boards of Contract Appeals, Federal courts, and Comptroller General have wrestled with these issues over many years and built an extensive array of case law differentiating in-scope from out-of-scope or cardinal changes. FTA does not imply that the Board of Contract Appeals cases are controlling, only that they will look to their collective wisdom in judging where changes in grantee contracts fall along the broad spectrum between clearly in-scope and clearly out-of-scope changes. It is FTA's intent to monitor its grantees and oversight contractors to ensure this concept is well understood and uniformly applied, and to issue additional guidance as necessary to assist grantees in exercising this authority.

Before attempting any change in quantity or major items (e.g., buses, rail cars), grantees should review their contract clauses to ensure they allow for such changes. For instance, in Federal practice, the "changes" clause from the Federal acquisition Regulation has been interpreted not to allow changes in quantity of major items. Federal contracting officers use additional clauses specific to this desired flexibility when they anticipate that there may be a need to add quantities of these major items.

Piggybacking Worksheet – A Piggybacking Worksheet may be found in Appendix B.16. The issues referred to in the worksheet that must be evaluated prior to a decision to piggyback another contract are as follows:

1. Have you obtained a copy of the contract and the solicitation document, including the specifications and any Buy America Pre-Award or Post-Delivery audits?

2. Does the contract contain an express *assignability clause* that provides for the assignment of all or part of the specified deliverables? FTA's policy is that the original solicitation must contain an *express notification* to all bidders that an assignment would be possible under the terms of the contract. Such a notification would put the bidders on notice that they would likely be called upon to deliver all of the deliverable items, both the base as well as the option quantities. The assignment clause would thus be an important factor in the original competitive bidding. If the contract does not contain an express assignability clause, piggybacking is not permitted.

3. Did the Contractor submit the "certifications" required by Federal regulations in accordance with the requirements of this solicitation? See the BPPM Section 4.3.3.2. - *Federally Required Submissions with Offers*. Piggybacking is not permitted when the Contractor has failed to submit the required Federal certifications with its bid.

4. Does the contract contain the clauses required by Federal regulations? See the BPPM Appendix A - *Federally Required and Other Model Contract Clauses*. Note that not all clauses in Appendix A will apply to all contracts – review each clause for applicability to the specific contract to be piggybacked. If a required Federal clause is not included in the contract, piggybacking is not permitted.

5. Were the piggybacking quantities included in the original solicitation; i.e., were they in the original bid and were they evaluated as part of the contract award decision? If not, a *Tag-on is not permitted.*

6. If the contract is an *indefinite quantity contract*, did the original solicitation and resultant contract contain both a minimum and a maximum quantity, which represent the reasonably foreseeable needs of the parties to the solicitation? See BPPM Section 2.2.5.3 – *Indefinite-quantity Contracts*, and the paragraph below *Indefinite Quantity Contracts, Unlimited Options and Piggybacking.*

7. If the piggybacking action represents the exercise of an option provision in the contract, is the option still valid? Options that have expired may not be exercised.

8. Does your State law allow for the procedures used by the original contracting agency; e.g., negotiations vs. sealed bids?

9. Was a cost or price analysis performed by the original procuring agency documenting the reasonableness of the contract price? Include a copy in your files.

10. Does the contract term comply with the five-year term limit established by FTA 4220.1E, paragraph 7.m?

11. Was there a proper evaluation of the bids or proposals? Include a copy of the analysis in your files.

12. What types of changes will you require to be made to the vehicles? For an assignment, only "within scope" (non-cardinal) changes are allowed (e.g., seating fabrics and colors, paint schemes, signage, floor coloring, etc.). For further guidance see BPPM Section 9.2.1-*Contract Scope and Cardinal Changes.*

Indefinite Quantity Contracts, Unlimited Options and Piggybacking – Serious problems arise when agencies issue solicitations with unlimited quantities, which result in open-ended contracts which other agencies then piggyback. This practice creates a number of serious problems; therefore, *unlimited quantities are not permitted*.

- Since the rolling stock manufacturers do not know what the potential orders may be under the contract, they cannot plan their operations nor can they quote prices which reflect the quantities that may be produced.

- Unspecified quantities result in higher unit prices for the procuring agency because manufacturers must use the minimum quantity specified to calculate prices for material, engineering, etc.

- For these reasons, *open-ended, indefinite quantity/indefinite delivery contracts, or contracts with unlimited options are not permitted.* They are not only disruptive to bus manufacturers and their suppliers, who cannot plan their production schedules given the degree of uncertainty that these contracts entail, but they are also counter-productive to the grantee community, which will invariable pay higher prices for items which were not really competed in a "full and open competition."

6.3.4 Pre-Award and Post-Delivery Reviews for Buy America Act Compliance

REQUIREMENT
The FTA Master Agreement, MA(12), Section 15 (l) (3) defines the following requirements: (3) Pre-Award and Post-Delivery Requirements. The Recipient agrees to comply with the requirements of 49 U.S.C. Section 5323 (m) and FTA regulations, "Pre-Award and Post-Delivery Audits of Rolling Stock Purchases," 49 CFR Part 663, and any revision thereto. The FTA *Dear Colleague Letter* C-97-03, dated March 18, 1997 provides further guidance to grantees on how to comply with the Buy America requirements of the Pre-Award and Post-

Delivery reviews for rolling stock procurements set forth in 49 CFR Part 663. The FTA Administrator's *Dear Colleague* Letter C-97-13, dated August 5, 1997, that amended the March 18, 1997 guidance by removing axles from the required final assembly activities, was subsequently withdrawn by the *Dear Colleague* Letter, C-97-18, dated September 25, 1997, which rescinded the August 5, 1997 guidance by redirecting grantees and manufacturers to follow the March 18, 1997 guidance on final assembly requirements for bus procurements.

DISCUSSION

The FTA Administrator's *Dear Colleague* Letter C-97-03, dated March 18, 1997, outlines the steps that a grantee must take in performing pre-award and post-delivery reviews of rolling stock procurements to ensure their compliance with Buy America Act requirements. This *Dear Colleague* Letter may be found in Appendix A.2 of the BPPM. This letter provides guidance to grantees concerning these reviews. It must be stressed that grantees are to document their reviews and include this documentation in their contract files as evidence that they have performed the required reviews. The file documentation must describe the data and information reviewed by the grantee's personnel and the basis for concluding that the manufacturer has complied with the Buy America Act requirements, including domestic content, final assembly location and final assembly activities. Also, where appropriate, copies of certifications of compliance with or inapplicability of Federal Motor Vehicle Safety Standards should be included in the file.

FTA has also published two manuals that provide detailed guidance to grantees concerning which Buy America certifications and documents are needed to support the procurement process -- from issuance of the solicitation to title transfer, as well as the procedures that the grantee may follow when conducting the pre-award and post delivery reviews. There are also examples of Buy America calculations and responses to frequently asked questions. [22]

6.3.5 Warranties

REQUIREMENT
FTA Circular 9030.1C, *Urbanized Area Formula Program: Grant Application Instructions* states the following:

[22] - *Conducting Pre-Award and Post-Delivery Reviews for Bus Procurements*. Document No: FTA DC -90-7713-93-1, Rev. B, dated May 1, 1995. *Conducting Pre-Award and Post-Delivery Reviews for Rail Vehicle Procurements*. Document No: FTA DC-90-7713-94-1, Rev. B, dated May 1, 1995. These documents may be obtained from FTA, Office of Program Management at 202-366-4020 or by e-mail at buyamerica@fta.dot.gov.

The FTA Office of Chief Counsel website address for Buy America matters is: http://www.fta.dot.gov/legal/buy_america/14328_ENG_HTML.htm.

Preventive Maintenance. Preventive maintenance, an expense that became eligible for FTA capital assistance for one year with the DOT 1998 Appropriations Act, was established as eligible for FTA capital assistance under TEA-21, so FY 1998 funds and subsequent fiscal year appropriations may be used for preventive maintenance. Preventive maintenance costs are defined as all maintenance costs…. [23]

Warranty. A warranty that is an industry standard is an eligible capital cost as part of the acquisition of a bus or any capital asset. [24]

FTA Circular 5010.1C, G*rant Management Guidelines* states the following:

Warranty standards, when part of equipment contracts, should provide for correction of defective or unacceptable materials or workmanship. These should specify coverage and duration and meet currently available industry standards. [25]

DISCUSSION

"Warranty" means a promise or affirmation given by a contractor to the purchaser regarding the nature, usefulness, or condition of the supplies, equipment or performance of services furnished under the contract. The principal purposes of a warranty are to delineate the rights and obligations of the contractor and the purchaser for defective items and services, and to foster quality performance. The benefits to be derived from a warranty must be commensurate with the cost of the warranty to the purchaser. [26]

Many transit agencies purchase or procure equipment with warranties. Depending upon the item and the contract language, a manufacturer will then repair or replace any piece of equipment that fails or is otherwise defective during the warranty period, the commitment to repair or replace being the "warranty." FTA's grantees that specify and purchase warranties should appropriately tailor the warranties, including but not limited to remedies, exclusions, limitations and durations.

In many instances an item is customarily warranted in the trade, and, as a result of that practice, the cost of an item to the purchaser will be the same whether or not a warranty is included. In those instances, it would be in the purchaser's interest to include such a

[23] - FTA C 9030.1C, Chapter III, paragraph 4.c.

[24] - FTA C 9030.1C, Chapter V, paragraph 9.b.3.

[25] - C5010.1C in Chapter II Management of Real Property, Equipment and Supplies, Subsection 3.e(6).

[26] - See generally Federal Acquisition regulations at 48 CFR Subpart 46.7 - Warranties.

warranty. [27] In some instances, industry associations such as the American Public Transit Association or the American Society for Testing and Materials have developed specifications including warranties that are recognized as "Industry Standard."

Grantees are encouraged to exercise sound business decisions in structuring broader and more comprehensive warranties than that offered as a matter of trade practice or as an industry standard (i.e., an "extended warranty") where such warranties are advantageous and cost effective. Such business decisions must be based upon market research and price/cost analysis.

For grant eligibility purposes, FTA had historically treated the customary warranty offered as a matter of trade practice as a *normal* warranty and *extended* warranties differently. This in turn affected their cost eligibility differently.

Prior to 1998, *normal* warranties were eligible *capital* expenses and therefore qualified for 80% Federal participation under capital assistance grants. The Office of Inspector General saw the "extended warranty" as a form of operating expense, impermissible at the time as a capital expense. Hence, e*xtended* warranties were classified as *maintenance* (*operating*) expense and as such were ineligible for funding under *capital assistance grants and were only* eligible for 50% Federal participation under *operating assistance grants*.

With the passage of TEA-21 in 1998, FTA revised its policies to reflect the provisions of the new statute. FTA's new policies are stated in FTA Circular 9030.1C, *Urbanized Area Formula Program: Grant Application Instructions,* dated October 1, 1998. [28] Under the new cost eligibility guidelines, *maintenance* is now an eligible *capital expense*, and there is no longer a distinction between *normal* warranties and *extended* warranties, as both are eligible costs. There are, however, procurement considerations and those are discussed below.

With respect to the procurement of warranties, prior to 1998 FTA grant application guidance identified specific warranty time frames as being "normal" for each of the major components of vehicles. In 1998, FTA changed this to allow the grantee--on the basis of its market research--to determine what is customary or "normal."

Normal warranty costs are eligible for reimbursement under FTA grants to the extent that the grantee determines that they are customary or an industry standard and FTA's other grant requirements are met such as that contained in FTA's C4220.1E.

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[27] - 48 CFR Subpart 46.7 - Warranties.

[28] - May be accessed at: http://www.fta.dot.gov/legal/guidance/circulars/9000/433_1152_ENG_HTML.htm.

Similarly, extended warranties are eligible costs to the extent that (1) the grantee determines what form of warranty would be advantageous and cost effective as part of the grantee's procurement planning effort, and (2) extended warranty costs are evaluated separately and determined to be "fair and reasonable."

Best Practices

An example of warranty terms is the list developed by APTA in its *Standard Bus Procurement Guidelines – Commercial Terms and Conditions* (October 10, 1997). [29] Among the issues addressed in APTA's suggested warranty provisions are:

- Complete Bus – Suggested Terms
- Body and Chassis Structure – Suggested Terms
- Propulsion System – Suggested Terms
- Major Subsystems – Suggested Terms for Brakes, Destination Signs, HVAC, Door Systems, Air Compressor and Dryer, Wheelchair Lift and Ramp System, etc.
- Exceptions to Warranty – For example, when Procuring Agency has not allowed an "equal" requested by the Contractor, and supplier won't offer the warranty required by the Procuring Agency;
- Detection of Defects – Schedule for notifying Contractor and Contractor's response;
- Fleet Defects – Contractor's duty to implement corrective work program;
- Repair Procedures – When repairs may be made by Procuring Agency and reimbursed by Contractor;
- Warranty after Repairs – Repair parts to have the unexpired warranty period of the original part.

6.4 PROFESSIONAL SERVICES

REQUIREMENT
Professional services other than architectural and engineering services may be obtained through sealed bids, competitive proposals, or (as the contract value warrants) small purchase or micropurchase procedures.

[29] - To order this book, call APTA at (202) 496-4800. Document is also available via Internet at: http://www.apta.com/info/online/index.htm.

Procurement of Architectural and Engineering Services (A&E). Grantees shall use competitive proposal procedures based on the Brooks Act when contracting for A&E services as defined in 40 U.S.C. Section 541. Other types of services considered A&E services include program management, construction management, feasibility studies, preliminary engineering, design, surveying, mapping and services which require performance by a registered or licensed architect or engineer. . . . This "qualifications based procurement method" can only be used for the procurement of A&E services. It cannot be used to obtain other types of services even though a firm that provides A&E services is also available to perform other types of services. These requirements apply except to the extent any state adopts or has adopted by statute a formal procedure for the procurement of architectural and engineering services. (FTA Circular 4220.1E, Section 9e).

DISCUSSION

Although you may use any of the applicable selection methods described in Chapter 4 and permitted by state law for professional services, the competitive proposal method is the most common for procuring professional services. Special Federal requirements apply to architectural and engineering services. Even though professional services such as legal advice, investment advice, auditing or engineering advice may have been rendered to your agency on a long-standing basis, or without a written contract, or by formal approval at the highest level, such practices do not exempt those services from the requirements for free and open competition, maximum five year terms, and written selection procedures.

Purpose

You have a requirement to contract for a laboratory to provide testing for your agency's drug and alcohol testing program. You cannot afford to take a chance on getting a contractor who has little experience, a poor history of quality control, and an unreliable performance history in terms of chain of custody. If you have to bid this contract, with low price being the deciding element, that is apt to be what you get. Unfortunately, in a few jurisdictions, that is what you may be faced with. However, in most jurisdictions, the state legislatures have wisely enacted a procurement policy that exempts professional and personal service contracts from the strict requirements of the competitive procurement laws. In those states, competitive sealed proposal statutes, mini-"Brooks Act" statutes for architect/engineering and related services, or exemptions from competitive requirements altogether (or a combination of all of the above) have been enacted. The critical point is that your state, either legislatively or through statutory interpretations by the state attorney general or the courts, will allow you some flexibility in buying professional services because it does not make sense "to buy the services of brain surgeon through a low bidder procurement process."

It is important to distinguish between two types of professional services:

- Statutory Professional Services - These are services that are clearly spelled out in a statute and procurement process is defined for obtaining these services. These are the mini - "Brooks Act" statutes and include architectural and engineering services. The statute may also include some related services or other services the legislature has determined should be bought in a multi-step procurement process.

In Texas, for instance, the Texas Professional Services Act defines "professional services" as services within the scope of the practice of accounting, architecture, land surveying, medicine, optometry or professional engineering, or are provided in connection with the professional employment or practice of a person who is licensed as a certified public accountant, an architect, a land surveyor, a physician (including a surgeon), an optometrist or a professional engineer. [30] Texas has said, as to these contracts or services, that competitive bidding shall not be used and that the selection and award shall be made on the basis of "demonstrated competence and qualifications to perform the service" and for a fair and reasonable price. [31] For architectural or engineering services, Texas mandates a "Brooks Act" process [32] and concludes this Act with the public policy statement that contracts entered into in violation of these provisions are void. [33] In all likelihood, your state will have adopted a public policy on the procurement of statutorily defined professional services that may be similar to the Texas statute and you should be very knowledgeable of that statute.

- Other Professional Services - Most states offer you other ways to avoid strict compliance with competitive bidding laws (and, in some states, competitive proposal laws as well) by exempting the procurement of professional or personal services from following competitive requirements. Thus, it is important to know what is considered a professional service for the purposes of this exemption under your state's law. This may vary from state to state. The service usually will involve labor and skills that are predominately mental or intellectual rather than physical or manual and the providers of the service are members of disciplines requiring special knowledge or the attainment of a high level of learning, skill and intelligence.

The exemptions are designed to permit the services of the most qualified, competent and experienced individuals to be obtained and a recognition that these services can seldom be measured with objective criteria. In the absence of a statutory definition, these services may include such professions as attorneys, construction management consultants, insurance brokers,

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30 - Texas Government Code, Section 2254.002.

31 - Texas Government Code, Section 2254.003(a).

32 - Texas Government Code, Section 2254.004.

33 - Texas Government Code, Section 2254.005.

physicians, auctioneers, medical laboratory testing, theologians, etc. You must consult your state law on these issues -- unlike the statutory professional services discussed above, most states do not prohibit you from using a competitive process to obtain the services of these other "professionals," they just provide an exemption if you choose to use it.

Best Practices

A&E Services - For the procurement of architectural and engineering services, the FTA and most state laws mandate a qualifications-based procurement process.

Other Professional Services - For the procurement of professional services other than A&E services, you generally have a great deal of flexibility in how you obtain those services. In some cases, you may be able to adequately and objectively define the services required and obtain those services through a competitive bidding process on the basis of low priced bids. In other cases, either because of an inability to adequately and/or objectively define your requirement or because of a limitation of your state's law, the competitive bidding method of procurement may not be possible to be used. In that case, a competitive proposal process may be the best method to use where more subjective requirements can be evaluated and weighed with the price offered to arrive at a properly balanced award decision. Depending upon the statement of work and the estimated dollar value of the procurement, you may be able to effectively and efficiently use the micro-purchase method of procurement (detailed in Section 4.1) or the small purchase method of procurement. As the stewards of public funds, it is always important to remember that you are spending tax dollars and to properly weigh the services you are obtaining against what you are paying for those services.

Finally, it is possible that the professional services you desire may be obtained from only one source and, thus, you will select your professional service provider on the basis of a sole source (noncompetitive) method of procurement. In this case, you must comply with the provisions of Section 9.e of FTA Circular 4220.1E as well as your state law. Again, even though you are negotiating with only one source for these services, your goal should be to obtain a price that is fair and reasonable.

6.5 ARCHITECT - ENGINEER SERVICES

REQUIREMENT
FTA Circular 4220.1E states: 8.b. Prohibition Against Geographic Preferences . . . However, geographic location may be a selection criterion in procurements for architectural and engineering (A-E) services provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract. 9.e. Procurement of Architectural and Engineering Services (A&E). Grantees shall use qualifications-based competitive proposal procedures (i.e., Brooks Act procedures)

when contracting for A&E services as defined in 40 U.S.C. § 1102 and 49 U.S.C. § 5325(b). Services subject to this requirement are program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services. [34]

Qualifications-based competitive proposal procedures require that:

(1) An offeror's qualifications be evaluated;

(2) Price be excluded as an evaluation factor;

(3) Negotiations be conducted with only the most qualified offeror; and

(4) Failing agreement on price, negotiations with the next most qualified offeror be conducted until a contract award can be made to the most qualified offeror whose price is fair and reasonable to the grantee.

These qualifications-based competitive proposal procedures can only be used for the procurement of the services listed above. This method of procurement cannot be used to obtain other types of services even though a firm that provides A&E services is also a potential source to perform other types of services.

These requirements apply except to the extent the grantee's State adopts or has adopted by statute a formal procedure for the procurement of these services. [35]

9.g Procurement of Design-Build: Grantees must procure design-build services through means of qualifications-based competitive proposal procedures based on the Brooks Act as set forth in Section 9.e when the preponderance of the work to be performed is considered to be for architectural and engineering (A&E) services as defined in Section 9.e.

[34] - FTA has expanded this section to better explain the breadth of this statutorily prescribed procurement method. FTA recognizes that most of the services listed (e.g., surveying) are not performed by architectural or engineering services companies. Qualifications-based competitive proposals (i.e., Brooks Act procedures) still must be applied to these procurements because of the statutory directive in 49 U.S.C. § 5325(b).

[35] - If a project is jointly funded with FTA and FHWA grant funds, grantees should seek the advice of counsel since the FHWA and FTA statutes differ in when and how the Federal requirements defer to state laws.

Qualifications-based competitive proposal procedures should not be used to procure design-build services when the preponderance of the work to be performed is not of an A&E nature as defined in Section 9.e, unless required by State law. [36]

The FTA Master Agreement, FTA MA(12), Section 15i – *Architectural, Engineering, Design or Related Services*, requires grantees, when awarding contracts for architectural, engineering, or related services, to accept undisputed audits conducted by other governmental agencies for the purpose of establishing indirect cost rates if such rates are not currently under dispute. This requirement to accept undisputed audits conducted by other governmental agencies originates in 49 U.S.C. § 5325(b). It should also be noted that this language has been interpreted by FTA's Chief Counsel's Office as precluding grantees from imposing (requiring) ceilings (or "caps") on overhead rates in contracts for architect-engineer services. [37]

DISCUSSION

Selection of Contractor - FTA Circular 4220.1E requires the procurement of A-E services in accordance with the "qualifications based procurement methods" of the Brooks Act. The "A&E services" that must be procured according to the Brooks Act procedures are defined in two statutes: 40 U.S.C. § 1102 and 49 U.S.C. § 5325(b). Both of these statutes must be taken into consideration when deciding what constitutes "A&E services."

The easiest way to conceptualize the requirements of these two statutes is to first apply the definition in 49 U.S.C. § 5325(b) and determine if the services are "program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services." If the services fall into one of these categories, they are services that must be procured pursuant to the Brooks Act. [38] If the services do not fall into one of these categories, then the three-part test from 40 USC 1102 must be applied. The three-part test from that statute states:

[36] - FTA added this paragraph to explain the requirements that apply to design-build procurements because they involve significant architectural, engineering, or other services that normally require qualifications-based competitive proposals but also include significant work that does not require this extraordinary procurement method. Grantees should determine which portion of the work is predominant and follow the method for that type of procurement. It would normally be expected that the construction portion of a design-build procurement would be predominant and, in that case, normal procurement methods can be used in lieu of qualifications-based competitive proposals (the Brooks Act method).

[37] - Letter from G. B. McBride to New York MTA, dated Feb 2, 2001. The issues addressed in this letter may be found on the FTA HelpLine (http://www.fta.dot.gov/ftahelpline) under the Frequently Asked Questions tab (see Architect & Engineering Contracts).

[38] 49 USC 5325(b) demands that Brooks act procedures be used for these services even though they are not routinely done by A&E firms (e.g., surveying) and do not require licensed architects or engineers.

"The term "architectural and engineering services" means-

(A) professional services of an architectural or engineering nature, as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services as described in this paragraph;

(B) professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and

(C) other professional services of an architectural or engineering nature, or incidental services, which members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operation and maintenance manuals, and other related services."

This is the portion of A&E services that relies on indicators such as licensing and whether A&E firms normally do the specific sort of task under consideration. If the function fits within this definition of A&E services, 'Brooks Act procedures' apply.

The Brooks Act (40 USC 1102) defines the competitive procedures to be used in the selection of A-E firms, and these procedures will apply to grantee procurements of A-E services unless the grantee's State has adopted formal procurement procedures for A-E services, in which case the State procedures will govern. A qualifications-based selection process must be followed for all A-E procurements regardless of dollar value.

The Brooks Act requires a *qualifications based procurement method* for the selection of A-E firms. Price is excluded as an evaluation factor, and negotiations are conducted with the most qualified firm only. If an agreement cannot be reached on price with the most qualified firm, *negotiations are formally terminated with that firm, thereby rejecting that firm's proposal, and the grantee cannot return to this firm at a later date to resume negotiations.* Negotiations are then conducted with the next most qualified firm. This process continues until a negotiated agreement is reached which the grantee considers to be fair and reasonable.

Negotiating Indirect Costs [39]

A) Grantees must (as a general rule) accept undisputed audits that have been conducted by any Federal or State agency of the consultant's indirect cost rate if the audit report has been developed in accordance with the cost principles contained in the FAR Part 31. However, if the audit is conducted by another State agency, and the grantee can fully document and justify to FTA why the other State agency's audit should not be accepted, then FTA may permit the grantee to conduct its own audit.

B) Undisputed audited rates must be used for the purpose of contract estimation, negotiation, administration, reporting and contract payment. This requirement applies to the undisputed audited rates of A&E subcontractors that are performing under cost-reimbursement subcontracts as well as prime contractors.

C) If there is more than one audit, the grantee may use whichever audit it wishes. However, as a practical matter, the audits should have virtually identical results if they are conducted in accordance with FAR Part 31. Also, if the audits resulted in different findings, it is likely that someone would be disputing one or more of the audit findings.

D) If a consultant has not been audited by any Federal or State government agency, the grantee or State government agency should conduct an audit and become the cognizant agency. However, in the case of a consultant contract involving a very small dollar amount, the grantee should be able to rely on its own cost and price analysis in order to negotiate the contract price.

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[39] - The Transportation Equity Act for the 21st Century (TEA-21) imposed regulations affecting the administration of contracts awarded by grantees for architectural and engineering services. The regulations affecting the Federal Highway Administration (FHWA) may be found in 23 U.S.C. § 112 and the corresponding regulations for FTA grantees may be found in 49 U.S.C. § 5325(b). FHWA implemented the TEA-21 requirements its final rule, "Administration of Engineering and Design Related Services Contracts," dated June 12, 2002 (http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2002_register&docid=02-14751-filed). This final rule had been preceded by a Notice of Proposed Rulemaking, "Administration of Engineering and Design Related Services Contracts" published in 65 FR 44486, July 18, 2000 (http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2000_register&docid=00-17774-filed). Because the language in FTA's section of the Code was substantially similar to that of FHWA, FTA's Office of Chief Counsel has interpreted the language of 49 U.S.C. § 5325(b) in a manner that is consistent with the provisions adopted by FHWA in its Notice of Proposed Rulemaking and its final rule. There are several important aspects of these contracting requirements that affect the grantee's administration of A&E contracts:

E) Many consultant firms have multiple indirect cost rates such as a national or corporate-wide rate, a regional or State rate, and a business segment rate. If a consultant proposes a particular rate such as a regional rate or a rate for a particular service (e.g., design services or construction management), that rate must have been audited by a cognizant Federal or State governmental agency before the grantee would be required to accept it. If another governmental agency's audited rate is not applicable to the contract in question, the grantee may perform its own audit applicable to the unaudited rate. For example, if the consultant has an audited rate for design services but not for construction management services, the grantee does not have to accept the rate proposed for construction management services.

F) Grantees may not require or impose a cap or ceiling on an A&E consultant's overhead rates even if the consultant agrees to such a cap by contract. The key words here are *require or impose*. In its final rule, Section 172.7(b) – *Audits for Indirect Cost Rate*, FHWA made the following concession in response to a Wisconsin DOT expressed concern that a State may not be able to accept a lower overhead rate freely offered by a consultant firm:

> ***The FHWA agrees there are many reasons why an overhead rate for a firm may be unusually high for a short period of time. In such cases, a firm may believe that it would be in its best interest to offer a lower rate. The FHWA agrees that a consultant should be free to offer a lower overhead rate than the one determined by a cognizant Federal or State government agency, and that the contracting agency should be free to accept it provided such rate is offered voluntarily by the consultant. Under no circumstances, however, shall a contracting agency require a lowering of the overhead rate.***

G) Grantees may not negotiate an overhead rate that is fixed for the entire contract, or for any particular fiscal year, and not subject to adjustment based on an audit of actual costs incurred. Grantees may, however, use *provisional billing rates* where a billing rate is established for a particular contract period and is subject to adjustment based on an audit of actual costs incurred for that period.

H) If the cognizant Federal or State agency for a consultant is behind schedule in finalizing audits and the latest accepted audit of indirect cost rates lags by three or four years, the grantee may use another agency's audit if it was conducted in accordance with the FAR and its findings were undisputed. If an audit has been performed by a private firm in accordance with FAR Part 31 and is undisputed, that audit could also be used. If there are no audits available under these assumed parameters where the cognizant agency is three or four years behind, the grantee may conduct its own audit in accordance with FAR principles to determine the actual overhead rates. Otherwise, the last audit performed by the "cognizant Federal or State" agency would be used.

I) Grantees may not use a negotiated overhead rate procedure in lieu of using the actual undisputed and accepted audit by a cognizant Federal or State governmental agency. The reason is that price negotiations on the indirect cost rate or any component thereof can be viewed as an administrative or de facto ceiling prohibited by 49 U.S.C. § 5325(b). Nevertheless, the State has the right and obligation to negotiate a fair and reasonable total price for the contract. Any component of the price, except the indirect cost rate, may be negotiated.

J) FTA has elected to follow the provisions of FHWA in its implementation of TEA-21 contracting requirements for architect-engineer services. FTA is not bound by the FHWA rule, however, and may permit exceptions in compelling and unusual circumstances.

Best Practices

The basic approach used to select A-E contractors using Brooks Act procedures makes use of *Statements of Qualifications*. This basic approach is outlined below.

Statements of Qualifications Process

Consultant Resource File - Grantees may wish to maintain a *consultant resource file* with the names of A-E firms and their respective disciplines, personnel resources, corporate experience, etc. This file would provide an initial mailing list for issuance of a request for *Contract-Specific Statements of Qualifications*. The initial list of potential offerors that a grantee might maintain would be supplemented by a public announcement of the project, calling for interested A-E firms to respond to a questionnaire from the grantee identifying the firm's basic experience and personnel resources. For an example of a questionnaire used by the Federal Government to identify potential A-E firms who would then be solicited to submit their contract-specific qualifications, see the Federal Standard Form 330 (SF 330), *Architect-Engineer Qualifications.* [40] The SF 330, Part 2, is the Federal equivalent of a *consultant resource file*. This questionnaire will provide the following types of information about each of the firm's branch offices:

- The location of the company's offices and a point of contact within each office.
- The number of personnel by discipline (e.g., architects, civil engineers, geologists, surveyors, soils engineers, etc.).
- Summary of professional services fees received for each of the last five years.

[40] - FAR 53.301-330.

- Profile of firm's project experience for last five years. The questionnaire lists over 100 different types of project codes (airports, tunnels, towers, gas systems, etc.)

- Summary of annual average professional services revenues for last three years showing totals for Federal and Non-Federal work.

Note that the SF 330, Part 2, does not ask the A-E firm to identify specific personnel or approaches that it would propose to use for the specific project that the grantee is advertising. Project specific information would come later in a statement of "Contract Specific Qualifications" (SF 330, Part1) discussed below.

Public Announcements - Agencies must publicize requirements for A&E services in accordance with State law. These notices could be placed in *local newspapers* and in publications such as *Passenger Transport, Engineering News Record, Dodge Report,* etc. These notices should describe the Agency's requirements and the criteria to be used in the evaluation of A-E qualification statements. The public announcements would advise interested A-E firms to submit expressions of interest to the procurement office. These expressions of interest may take the form of a questionnaire regarding the A-E firm's basic resources and corporate experience, along the lines of the SF 330, Part 2, used by the Federal Government. From these expressions of interest, and the list of firms identified in the consultant resource file, the grantee can then solicit *Project Specific Qualification Statements* from prospective A-E firms that the grantee judges to have the basic capabilities to perform the project.

Pre-proposal Conference – Pre-proposal conferences are generally used in more complex acquisitions as a means of briefing prospective offerors as to the project requirements as well as the agencies selection criteria. This allows the firms to better understand the agency's objectives and ask pertinent questions that will help them in preparing their proposals or project specific qualification statements (see below). For further guidance on pre-proposal conferences, see Section 4.3.2.4 - *Pre-Bid and Pre-Proposal Conferences*.

Request for Contract/Project Specific Qualification Statements - Interested A-E firms would be required to submit their *Project Specific Qualification Statements* to the procurement office. For an example of a questionnaire used to solicit project-specific qualifications, see the Federal Standard Form 330 (SF 330), Part 1, *Contract-Specific Qualifications*. [41] The SF 330, Part1, goes beyond the general information requested in the SF 330, Part 2. Part 1 asks the firm to identify (1) the proposed project team, showing all firms and their roles in the project, (2) an organizational chart of the proposed team, showing the names and roles of all key personnel and the firm they are associated with, (3) resumes of all key personnel being proposed for the project, and (4) relevant project experience of each of the proposed team's firms.

[41] - FAR 53.301-330.

From these Qualification Statements, the grantee's A-E evaluation committee would score and rank the firms on the basis of their technical qualifications. It would be advisable not to have a predetermined cut-off score to determine those firms that are the most qualified. Scoring should be a tool for the individual committee member to determine the relative strengths and weaknesses of the firms being evaluated. Also, it would be best not to determine the most qualified firms by averaging the individual committee member scores. The numerical scores should help each member rank the various firms in order to allow the procurement officer to determine a "short list" for conducting oral presentations and discussions. Once each committee member has ranked the firms (using the published evaluation criteria, the relative weights and scoring system), the committee should meet to discuss the findings of the individual members and reach a consensus on a ranking of the various firms.

Some agencies have found a qualitative (adjective) rating system to be more effective than a numerical scoring system. For example, firms are evaluated with respect to their qualifications statements in each of the evaluation criteria elements as being "excellent," "satisfactory," or "unsatisfactory." After rating each firm's qualifications for each criterion, the committee members then give each firm an overall evaluation rating. The overall ratings for the firms are then compared and the firms with the most "excellent" ratings are short-listed. Whether you use a numerical or qualitative (adjective) rating system, a written narrative by each evaluator justifying their decision should be prepared.

Request for Technical Proposals – If you determine to require detailed technical proposals after the short list has been determined, you will need to establish the evaluation criteria to be used in selecting the successful contractor and to advise the firms of the criteria in your RFP. Criteria will normally involve such matters as the following:

1. Past Performance – The solicitation should advise offerors of your 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 your 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 5.1.

2. 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 your solicitation. These factors must represent the key technical areas of importance that you intend 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.

3. 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 these key personnel relevant questions to determine the depth of their knowledge in critical areas.

4. Specialized Criteria - Grantees may also want to include specialized criteria such as experience in complying with the Americans with Disability Act requirements and previous work on landmark or historic structures.

Design Competition – The question is sometimes raised as to whether the A&E contractor can be selected on the basis of a conceptual design competition rather than qualifications statements. The Brooks Act would permit grantees to select an A&E firm on this basis. The FAR discusses this approach in Subpart 36.602-1 – *Selection Criteria*, paragraph (b). Of course the FAR is not binding on grantees but the Federal parameters for using design competitions may prove useful to grantees. Grantees will have to consider the payment of proposal stipends to those firms that are requested to submit design proposals. [42] The amount of the proposal stipend would be uniform for all competitors. It would almost assuredly attract greater competitive interest and should give the grantee title to the proposal design concepts since the proposal is being paid for by the grantee. Against the advantages is the cost to the grantee of paying for the proposals.

Architect-Engineer Selection Committee – When establishing their A-E Selection Committees, agencies will need to appoint members who have specific expertise in the disciplines needed for performing the contract. It would also be well to have a DBE advisor. It may be helpful to appoint some members to this Committee who are organizationally outside the engineering office that will be managing the A-E contract. The problem to be avoided when establishing this Selection Committee is one of "control;" i.e., care must be taken that one office does not control the selection process to the point where only a select group of "favorite" contractors are winning contract awards. This committee performs the initial review of A-E contractor qualifications and determines the rankings.

Developing the Short List – Determination of the *short list* or competitive range of qualified firms with whom oral discussions/presentations will take place should be the prerogative of the procurement officer. The short list should be a number appropriate for adequate competition and

[42] - Grantees should consider using a two-step procedure in order to narrow the number of firms allowed to submit design proposals (to those with a realistic chance of success) and thus to control the cost to the grantee. Step one might be based on qualifications statements such as are normally used to select A&E firms, from which a limited number of firms would be selected and requested to submit design proposals in step two.

should consist of those firms that have a reasonable chance of getting the award. These firms would then be invited to make presentations to the evaluation committee. Grantees should check their state laws to see if a minimum number of firms is required to be short-listed.

Oral presentations by A-E firms – Having evaluated the qualifications of the A-E firms who submitted detailed qualification statements (or technical proposals), and developed the short list of qualified firms, the A-E Selection Committee would establish a schedule for each firm to make oral presentations, although presentations are not always necessary or appropriate. If discussions are necessary, they can be written or by phone or videoconference. The Committee would advise the firms in advance of any questions the Committee had regarding the firm and its capabilities. These questions would be addressed by the A-E firm at the oral presentation. The Committee may also wish to specify those key personnel of the A-E firm that should present in order to answer the Committee's questions. It is important that the user organization be comfortable with the actual project managers being assigned to the project, and for this reason the presentations should be made by the firm's proposed key staff, not by a sales executive.

Final ranking of A-E firms - At the conclusion of the oral presentations, each of the Selection Committee members would perform a final scoring and ranking of the short- listed firms. These final scores would then be discussed, and the procurement officer chairing the panel should strive for consensus – finding a firm that is valued by most members and acceptable to the rest. This process should not be a mechanical "majority-rules" vote. Failure to obtain a consensus can result in internal fighting if the project gets into difficulty, and can even create these difficulties. Once an agreement is reached on the highest qualified firm, that firm is then requested to submit a cost proposal for negotiation of a contract.

Contract Negotiations - The Brooks Act requires a *qualifications based procurement method* for the selection of A-E firms. Price is excluded as an evaluation factor, and negotiations are conducted with the most qualified firm only. If an agreement cannot be reached on price with the most qualified firm, *negotiations are formally terminated with that firm.* Once negotiations are terminated, that firm is irrevocably out of contention for the contract and cannot be brought back in. Negotiations are then conducted with the next most qualified firm. This process continues until a negotiated agreement is reached which the grantee considers to be fair and reasonable.

In-house Cost Estimate - One of the biggest problems noted in FTA Procurement Systems Reviews is the failure of agencies to prepare detailed in-house cost estimates prior to receiving cost proposals. This is especially critical in A-E procurements where there are no competing proposals to provide a comparison. *In order to meaningfully evaluate and negotiate the A-E firm's cost proposal, it is critical that the grantee's technical staff prepare a detailed in-house cost estimate (work estimate) of the work required by the A-E firm before the solicitation is issue.* In order to be useful as a tool in evaluating the cost proposal, this in-house estimate needs to be prepared in the same level of detail that the grantee is requiring the A-E firm to submit its proposal. In other words, *the grantee's technical staff prepares its in-house estimate as if the grantee were the contractor proposing on the contract.* It is also important that grantees require A-E firms to submit their cost proposals in the same format in which the in-house estimate was

prepared. Grantees should consider issuing their Request for Proposal with a sample cost proposal format and a list of position descriptions for each of the direct labor categories used by grantee's in-house cost estimating team. This should allow for a one-for-one comparison of the cost proposal and the in-house estimate, thus facilitating the evaluation and negotiation process.

Terms and Conditions - The RFP should contain all of the agency's required *terms and conditions* (clauses, etc.). This will allow the contractor to address these terms and conditions in its proposal, which can then be discussed at negotiations. The A-E contractor should be advised before it submits its proposal what contract clauses are negotiable and what are not. This will save both the contractor and the grantee a lot of needless effort in discussing non-negotiable terms and conditions. For example, Federally required clauses would not be subject to negotiation and contractors should be so advised before they put their proposals together. Any exceptions taken by the contractor to terms and conditions should be included in the price proposal only. This will avoid influencing the technical evaluation, and it recognizes that contract terms involve risk allocation and therefore cost.

Controlling the Negotiations - An experienced contract specialist who can control the meeting should lead the negotiation team. Resource personnel (engineers, architects, lawyers, cost analysts, etc.) are a valuable resource to the contract specialist for advice, but these personnel should not be the ones making business decisions and committing the agency during the negotiations. Care must be taken that the contractor does not create a situation where the agency's contract specialist and resource personnel become divided in their positions. When the agency's team needs to discuss alternatives or possible concessions during negotiations, they should do so in private caucuses and not in the presence of the contractor. There should be one spokesperson for the agency—the contract specialist—who controls the meeting.

Contract Type – Grantees will need to choose the type of contract that is most appropriate for the scope of work anticipated. BPPM Section 2.4.3 contains a discussion of contract types, including fixed price, cost reimbursement, time and materials, and labor hour contracts. This section should be reviewed for general guidance as to the circumstances when each type of contract may be appropriate.

Indirect Cost Rates - The FTA Master Agreement requires grantees to accept undisputed audits of other Federal or State government agencies for purposes of establishing indirect cost rates that are used for pricing, negotiation, reporting and contract payments. See the paragraph above entitled "Negotiating Indirect Costs" in the DISCUSSION section.

Profit Analysis Factors –Suggested profit analysis factors include:

- Skill and expertise of the A-E personnel required for the work,

- Contract cost risk based on contract type and the degree of risk in completing the work within the negotiated price,

- Potential liability (e.g., third-party liability) of the A-E firm based on the nature of the project,

- Prior performance record of the firm,

- Degree of contractor investment, as it may contribute to more efficient and economical contract performance.

Profit on Change Orders – It is common practice in the construction industry for A-E firms to request increases in their contract fees/profit based on the percentage increase in the cost of the construction contract. Grantees should avoid this practice even though it is commonplace in the construction industry. A-E contractors' profits should be based on their work effort and should never be negotiated on a predetermined percentage basis of a cost increase in the contract whose cost the A-E firm is affecting by its designs. Grantees are prohibited from any type of cost-plus-percent-of-cost contracting. (See BPPM Section 2.4.3.5 - *Cost Plus Percentage of Cost Contracts (CPPC).*

A-E Role in Construction Change Orders, Claims and Litigation – The A-E firm can provide assistance to the agency in the evaluation of *changes* to the construction contract, whether the changes originate with the agency or with the construction contractor. When changes are suggested by the construction contractor, they must be evaluated, before they are adopted, as to their total system impact on the project, and the A-E is in the best position to do this. The A-E can also prepare a cost estimate of the changed work that the grantee can use to evaluate the construction contractor's price proposal for the change, and the A-E can assist the grantee in negotiations as a technical resource if the grantee so desires. The A-E also has a role to play in the evaluation of *claims* submitted by the construction contractor, although in this case the A-E's participation is somewhat defensive. For example, the A-E may be called in to defend its designs or specifications, or the time the A-E took to review and approve the construction contractor's documentation, and in this case the A-E's efforts may not be reimbursable under the terms of the A-E's contract with the agency. The same would hold true for issues that go to *litigation*—the A-E should be required to defend its designs and specifications without additional charge to the agency. Grantees would do well to make this a subject for an "advance understanding" in their A-E contracts, so that when claims and litigation occur, the parties will understand their respective obligations. If the claims or litigation are caused by the agency's actions, however, and are not due to the A-E's work products or actions, then the A-E can expect to be reimbursed by the agency for its efforts in defending the claim and assisting the agency in the litigation.

ABA Model Procurement Code (MPC) - The American Bar Association's *Model Procurement Code* Section 5-501, *Architect-Engineer and Land Surveying Services***,** contains a comprehensive and very worthwhile presentation of procurement procedures using *Statements of Qualifications* for the award of A-E contracts. The *MPC* covers the entire spectrum of events leading to a contract award, with detailed recommendations for the procuring Agency to follow.

Federal Procedures - The Federal Government procedures for procuring Architect-Engineer services may be found in FAR 36.6, *Architect-Engineer Services.*

A-E Contract Provisions

Design within funding limitations - You may wish to include a clause requiring the A-E firm to design the project so that the construction costs do not exceed your budget, an amount that would be stated in the A-E contract as a "design-to-cost" requirement. If the price offered by the low bidder in your construction IFB exceeds the stated limit in the A-E contract, the A-E firm should be responsible to redesign the project at no increase in the price of the A-E contract. If the higher than anticipated construction cost is due to reasons beyond the control of the A-E firm, such as an unexpected increase in the cost of certain materials, then the A-E firm should not be obligated to redesign the project at its own expense. Likewise, if the grantee has required features in the facility that contribute to the bids being in excess of the budget, then a change order to these requirements may be in order, and this too would be something beyond the A-E firm's ability to control, thus relieving the A-E from redesign responsibility. Grantees will need, therefore, to examine the elements of the construction contractor's bid to see why the bid price exceeds the "design-to-cost" amount that the A-E was attempting to achieve. An example of a contract clause used by one transit agency follows:

Design Within Funding Limitations [43]

A. The contractor shall accomplish the design services required under this contract so as to permit the award for the construction of the proposed facility at a price that does not exceed the estimated construction contract price as set forth in paragraph (C) below. When bids or proposals for the construction contract are received that exceed the estimated price, the Agency shall analyze the reasons for the excessive prices and, if appropriate, the Contractor shall perform such redesign and other services as are necessary to permit contract award within the funding limitation. These additional services shall be performed at no increase in the price of this contract. However, the Contractor shall not be required to perform such additional services at no cost to the Agency if the unfavorable bids, or proposals are the result of conditions beyond the its reasonable control.

B. The Contractor will promptly advise the Director of Purchasing if it finds that the project being designed will exceed or is likely to exceed the funding limitations and it is unable to design a usable facility within these limitations. Upon receipt of such information the Director of Purchasing will review the Contractor's revised estimate of construction cost. The Agency may, if it determines that the estimated

[43] - For additional information, contact Ms. Ann Geter, Central Ohio Transit Authority, at 614-275-5903.

construction cost contract price set forth in this contract is so low that award of a construction contract not in excess of such estimate is improbable, authorize a change in scope or materials as required to reduce the estimated construction cost to an amount within the estimated construction contract price set forth in paragraph (C) below.

C. The estimated construction contract price for the project described in this contract is $_____.

Design errors or deficiencies - If the A-E firm's designs, drawings or specifications contain errors or deficiencies, the A-E firm should be required to correct them at no increase in price to the grantee. When errors are discovered during construction, A-E's are generally liable for correction of the drawings at their own cost, and for the difference between what the "correct" construction will cost (as a change order issued to the construction contractor) and what it would have cost in the original contract had the drawings been correct. This includes any tear-out that needs to be done, etc.

State licensing laws also result in many multi-state A-E's that are set up as shell companies to hold licenses in different states. Agencies should obtain a performance guarantee from the parent company in these situations.

A-E Insurance – Agencies should require A-E's to have *General Liability* as well as *Errors and Omissions* insurance. When A-E's propose to be self-insured, agencies must look carefully at the adequacy of the firm's assets before accepting this self-insurance approach. See also BPPM Section 6.6 – *Insurance.*

6.6 INSURANCE

REQUIREMENT
49 CFR Part 19.31 prescribes insurance requirements *for grantees who are institutions of higher education, hospitals, and other non-profit organizations:* Section 19.31 Insurance Coverage. Recipients shall, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with Federal funds as provided to property owned by the recipient. Federally-owned property need not be insured unless required by the terms and conditions of the award. The Master Agreement, FTA MA(12), Section 20 prescribes insurance requirements *for all grantees:* a. Minimum Requirements. At a minimum, the Recipient agrees to comply with the insurance requirements normally imposed by its State and local governments.

b. Flood Hazards. To the extent applicable, the Recipient agrees to comply with the flood insurance purchase requirements of section 102(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. Section 4012a(a), with respect to any Project activity involving construction or acquisition having an insurable cost of $10,000 or more.

DISCUSSION

The Master Agreement prescribes a requirement that grantees determine what their individual States require in terms of insurance for construction projects, and that grantees ensure that their State insurance requirements, if any, are reflected *in third party contracts*. The customary approach for insuring against risks associated with work under third-party contracts is to require contractors to purchase and maintain insurance coverages that the grantee specifies within the terms and conditions of the third-party contract. These terms and conditions would specify the type of insurance required, such as *workers compensation, builder's risk, general liability, railroad protective insurance, automobile, errors and omissions,* etc., as well as the amount of the various coverages required. [44]

Under 49 CFR 19.31, institutions of higher education, hospitals, and other non-profit organizations are required to insure real property and equipment, which has been acquired with Federal funds, to the same degree, if any, they insure their own property and equipment. This CFR requirement pertains to property that has been procured and accepted by the grantee, and for which title has vested in the grantee. This type of insurance would be designed to insure against damage or loss to the property itself, and the grantee would procure this insurance directly from an insurance company or through an insurance broker, as part of its annual insurance program for the grantee's property and operations.

Best Practices

Wrap Up Policies

Construction projects - The traditional method of insuring the participants on large construction projects has been for each party (project owner, contractors and subcontractors) to purchase insurance independently to protect themselves from financial losses. In contrast with the traditional method, project owners can elect to purchase a *wrap-up* insurance policy that will cover all the parties involved in the project. Over the past decade, wrap-up insurance has become increasingly popular because of the potential for cost savings. In 1998, for example, wrap-up insurance covered about 300 construction projects nationwide.

[44] - For an example of a grantee's third-party contract *Insurance Specifications*, contact Mr. Harry Hower, Manager of Insurance, MARTA, at (404) 848-4504.

Grantees may want to consider some type of *wrap up* program for their larger construction projects (those over $10M). These programs are also known as *owner controlled insurance programs* (OCIP). A *wrap up* or *owner-controlled insurance program* is one in which the Transit Agency procures an insurance program covering all contractors and subcontractors who will be working on a large construction project or a family of related construction projects. Typical insurance coverage would provide for: *workers compensation*, *general liability*, and *"all risks course of construction*" (sometimes referred to as *builder's risk*). This policy is usually purchased through the services of an *insurance broker*, who may have been selected through a competitive RFP. As construction contracts are awarded over the term of the policy period, the names of the contractors and all subcontractors are added to the policy as named insureds.

This approach has been used with excellent results. [45] Among the advantages noted are:

- The Agency knows for sure that its contractors/subcontractors have adequate insurance coverage.

- For *Workers Compensation* insurance there will be premium discounts because of the size of the policy. When the insurance is bought as one, coordinated policy, rather than procured piecemeal through the individual contractors and subcontractors, there will be premium discounts. The bigger the policy, the bigger the discount. Other premium-saving plans may be available through a wrap-up program. Note that the construction contractors are informed in the Invitation For Bid (IFB) provisions what insurance the Agency is providing, thus permitting the contractors to request credits from their insurance companies for that project. The credits to their premiums can then be passed along to the agency in terms of lower bid prices.

- Newer and smaller construction contractors may have a difficult time getting insurance. This is especially true for small contractors and some Disadvantaged Business Enterprises (DBE's). A *wrap up program* can enhance the Agency's DBE participation, as well as the overall competitive environment for its construction projects, by enabling more contractors to compete for the work.

- In cases where there is a loss and it is not clear which construction contractor or subcontractor is at fault, the injured party does not have to prove which company caused the loss, only that a loss has occurred, and someone in the group was responsible. This greatly reduces the cost of settlement of claims, with obvious benefits to the injured parties.

- By having one insurance company, there will be one insurer's safety engineer with complete authority over the entire job, thus providing better coordination of safety issues.

[45] - See footnote above.

GAO Study of Wrap Up - In 1999 the U.S. General Accounting Office (GAO) completed a study of six major transit and highway projects using wrap-up insurance. [46] These projects included several design-build projects financed by FTA and FHWA. The purpose of the report was to identify the advantages and disadvantages of wrap-up insurance over traditional insurance and the factors that can affect the broader use of wrap-up insurance.

GAO found a number of advantages and disadvantages in using wrap-up insurance. Their research findings included the following:

> *Major advantages include savings from buying insurance "in bulk," eliminating duplication in coverage, handling claims more efficiently, reducing potential litigation, and enhancing workplace safety. According to insurance industry officials, wrap-up insurance can save project owners up to 50 percent on the cost of traditional insurance, or from 1 to 3 percent of a project's construction cost, depending on its size. The potential disadvantages of wrap-up insurance include requiring project owners to invest more time and resources in administration. Project owners must hire additional personnel or pay to contract out the management of wrap-up insurance. In addition, Project owners could also have to pay large premiums at the beginning of the project. However, transportation officials said these costs were reasonable.*
>
> *A number of factors can affect the broader use of wrap-up insurance. Perhaps the most significant barriers are state systems for workers' compensation that, in some states, effectively prevent wrap-up insurance by greatly reducing its potential cost savings. Another limitation is that a project must be sufficiently large, or contain at least a sufficient amount of labor costs, to make wrap-up insurance financially viable. Finally, some contractors dislike wrap-up insurance because it reduces a contractor's profits from insurance rebates.*

Types of Wrap-Up Insurance Plans - Two types of plans are available to project owners. One is to pay a flat premium (also known as a *guaranteed cost plan*). With this plan, premiums remain fixed for the term of the policy even if a high amount of claims is paid out. This type of plan is common for small and medium-sized businesses. The second type of plan is known as a *loss-sensitive plan*. Here the premiums depend on the policyholder's claims that are actually paid (called "losses"). A loss-sensitive plan returns a refund for low losses and charges additional premiums for high losses, thus giving the owner an incentive to maximize safe operations. Five of the six major projects studied by GAO used loss-sensitive plans, and all used deductible limits to lower their insurance costs. [47]

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[46] - *Transportation Infrastructure: Advantages and Disadvantages of Wrap-Up Insurance for Large Construction Projects*, B-281480, June 1, 1999. The GAO report may be accessed at http://www.gao.gov/archive/1999/rc99155.pdf. Orders may also be placed by calling (202) 512-6000.

[47] - Some project owners share the insurance rebates with their contractors. For example, the Boston Artery project will share 20 percent of any savings with contractors in the form of safety incentive awards.

Cost Savings - The six projects studied by GAO all claimed cost savings as a result of using wrap-up insurance. Savings claimed ranged from $2.9 million to $265 million. [48] Contributing to these savings were fewer injuries resulting from centralized safety programs, as well as using bulk buying power, avoiding duplicate insurance coverage, using more efficient ways to process claims, and reducing litigation. [49]

Centralized Safety Programs - Under traditional insurance, each contractor and its insurance company may be involved with safety but typically there is no coordinated safety program. Each contractor and subcontractor is concerned only for their segment of the work, and the degree of emphasis placed on safety will vary from contractor to contractor. Additionally, some of these contractors may be poorly monitored by their insurance companies at the job site. In contrast, on projects insured under wrap-up policies, the responsibility for safety will be centralized in one safety team (including one insurance company) that oversees all aspects of safety at a job site, with jurisdiction over all contractors and subcontractors. *It is improved safety, resulting in fewer injuries, that produces much of the potential savings from wrap-up insurance*. When l*oss-sensitive plans* are used, the participants have a compelling financial interest to keep injuries to a minimum so as to realize insurance rebates. All six projects studied by GAO claimed reduced injuries as the main basis for their insurance cost savings. [50]

State Insurance Regulations – Because three-fourths of the total insurance cost on a construction project can be for *workers' compensation*, removing it from the project owner's control effectively eliminates most of the cost savings derived from wrap-up insurance. [51] And this is what happens in some states that require contractors to use the state fund for workers' compensation as the primary insurance vehicle for construction projects. [52] Some states, such as Michigan and Ohio, require owners to obtain prior approval for wrap-up insurance from the state insurance regulator. Michigan also establishes a minimum project cost of $65 million to be

[48] - GAO also notes that in 1998 an FTA *Transit Construction Roundtable* study of 18 members indicated that savings of 28 percent were realized by purchasing wrap-up insurance for major projects.

[49] - GAO noted that large labor-intensive projects with construction costs between $50 million and $100 million would be in a better position (i.e., buying power) to obtain wrap-up insurance.

[50] - The *Boston Artery* project cited a loss ratio of 23 percent compared to a historic national average of about 65 percent for that type of project. The *Michigan Blue Water Bridge* project cited a loss ratio of 10 percent compared to a national average of 50 percent for that type of project.

[51] - Workers' compensation insurance pays claimants in case of injury, disability, or death of employees resulting from work on the job.

[52] - According to a 1997 GSA study of wrap-up insurance, North Dakota, Ohio, Washington, West Virginia, and Wyoming have a state fund into which all contractors must pay and a project owner cannot obtain separate workers' compensation insurance coverage.

eligible for wrap-up insurance. Oregon limits wrap-up to projects of $100 million and will not allow "rolling" different projects (combining several projects) under one insurance program.

Developing Insurance Cost Information – In the six projects studied by GAO, owners developed cost information for traditional vs. wrap-up insurance by one of three methods: (1) obtaining two bids – one with insurance included (traditional method) and one with insurance excluded (wrap-up method), (2) removing insurance costs from existing contracts, or (3) relying on brokers' estimates of traditional insurance.

Helping Small and Disadvantaged Businesses – By providing insurance coverage to all contractors, including small and disadvantaged businesses, owners can often improve the degree of participation by these businesses when they use wrap-up insurance. For example, according to GAO, the Chicago Transit Authority (CTA) achieved about 30 percent participation by DBEs in their 1994 Green Line Rehabilitation Project.

Potential Problems With Wrap Up - Grantees must be cautious about contractors with poor safety records and high insurance costs. They can present a problem when the grantee is using an owner controlled insurance program. Grantees using an OCIP should specify in their solicitation documents (IFB's, RFP's) that the bidder's past performance with respect to safety matters will be considered as part of the grantee's determination of contractor "responsibility." See Section 5.1 *Responsibility of Contractor*.

Mega-projects - On mega-projects, grantees should consult with individuals who have had working experience with such projects because there may be opportunities for innovative techniques. Such projects lend themselves to creative negotiations with the insurance companies. FTA regional personnel with such experience may be consulted. [53]

Equipment and Supplies - Equipment contractors would typically furnish their own insurance coverage for the products they furnish, except that for *installation* of heavy equipment, the *wrap up* policy could apply to the installation work. It would be prudent to do some market research before establishing the insurance limits that you require the suppliers to have in order to bid on your requirement. If the limits are too large, it may restrict competition. By calling the potential bidders in advance, you can determine what insurance limits are reasonable to stipulate in your IFB or RFP.

Hazardous materials - When your project requires the contractor to work with pollutants or any type of hazardous materials (such as asbestos, waste oil products, parts cleaners, etc.,) *be sure to have your insurance specialist and your environmental safety officer review all of the contractor's policies very carefully to determine if there are any exclusions in any of the policies*

[53] - For FTA Region 1 experience with the Central Artery Project in Boston ($11B), contact Mr. Richard Cole at (617) 494-2395.

for the type of material involved. If there is any question in any of the policies, be sure to have the contractor obtain a rider from his insurance company removing the exclusion.

Architect -Engineer Services - It is the customary practice of Architect-Engineer firms to buy *errors and omissions* insurance to protect against design errors which they may make in the course of their design work. However, there may be situations where the cost of insurance for a particular project is very high. This could occur, for example, when the A-E firm is designing elements of a system, such as a rapid rail system, which will carry large numbers of passengers. This situation carries with it the potential for very high liability in the event of an accident caused by a faulty design of a system element. In some cases, like these, Agencies have decided to indemnify their A-E firm against liability arising from design errors or omissions. When this approach is followed, the A-E firm does not incur the very high cost of *errors and omissions* insurance, which would have been passed along to the Agency as a direct cost on their contract. The money thus saved by the Agency in not having to pay for insurance could then be deposited in a special self-insurance fund from which future claims, if any, would be paid. If there are no accidents and claims, the Agency will realize some extraordinary savings. MARTA elected to use this indemnification approach with its primary engineering consulting contractor, and the resulting savings were about $300,000 annually. Any decision to adopt this approach is a major one, and obviously entails an element of risk to the Agency. It should be pointed out that in many states it is against public policy for one party to indemnify another against that party's own negligence. Under these circumstances, the type of indemnity described would be illegal.

6.7 ARTWORK

REQUIREMENT
Requirements related to the procurement of artwork in transit projects may be found in the following documents: a. FTA Circular 9400.1A – *Design and Art in Transit Projects*, dated June 1995. b. 49 CFR Section 18.34 "Copyrights."

DISCUSSION

FTA Circular 9400.1A provides FTA policy and guidance for the incorporation of design and art into transit projects funded by FTA. [54] Some of the more important issues in this Circular concern:

1. **The eligibility of design and art as eligible costs and guidance for the incorporation of quality design and art into transit projects funded by the FTA.**

[54] - Grantees may access this Circular at: http://www.fta.dot.gov/legal/guidance/circulars/9000/433_1313_ENG_HTML.htm

2. **Flexible guidelines for the amount to be spent on artwork; e.g., costs should be at least one half of 1% of construction costs, but should not exceed 5% of construction costs, depending on the scale of the project. Funds spent on the artwork should be adequate to have an impact.**

3. **The encouragement of artists to interact with the community (residents and businesses) on a project.**

4. **The Circular has certain specific recommendations for the procurement of art:**

   a. **The selection process should consider use of a variety of artists that are capable of working on the project,**

   b. **Selection of artists should be by a panel of art and design professionals, such as art administrators, artists, curators, and architects,**

   c. **The community surrounding the future facility should participate in the selection process – this may include all levels of participation, including generating ideas for the project, supplying information, attending panel meetings, and being voting members of the panel.**

5. **Criteria for evaluating specific works of art for commissioning. These would include:**

   a. **quality of art or design,**

   b. **impact on mass-transit customers,**

   c. **connection to site and/or adjacent community; art that relates, in form or substance to the cultures, people, natural or built surroundings, or history of the area in which the project is located,**

   d. **appropriateness for site, including safety and scale,**

   e. **durability of materials,**

   f. **resistance to vandalism, and**

   g. **minimum maintenance.**

Best Practices

The size and nature of the project may affect the choice of procedures to be followed. The guidance here may be most relevant for the procurement of major art-in-transit projects, and is in

fact taken from the experiences of several transit agencies that have procured or are in the process of procuring significant artwork for their transit projects.

Grantees should also be familiar with the ten case studies that FTA has published on its website detailing the "lessons learned" from agencies that faced a diversity of problems and challenges in bringing their art-in-transit projects to a successful conclusion. [55]

A. Maintaining an Artists Registry

Many States and the U.S. General Services Administration (GSA) maintain an Artists Registry. The GSA has developed the "GSA National Artists Registry," which is a database of several thousand contemporary American artists of all career levels, media, and styles. This registry is used to solicit expressions of interest from artists whose prior work is of the type that GSA is interested in considering for their current project.

The Los Angeles County Metropolitan Transportation Authority (MTA) maintains a mailing list database of professional artists who are interested in working on MTA programs. Inclusion on the mailing list is open to all professional artists on an on-going basis. Artists are solicited from this mailing database for expressions of interest via open 'Call for Artists.'

It must be pointed out that some Artists Registries require the submission of slides and statements of qualifications by artists. They require considerable time and resources to maintain, and unless acceptance into the registry is juried, the number of unqualified or inappropriate artists may expand to the point of rendering the registry of little or no value. Artists will want to update their slides periodically, and the handling, storage, database entry and return mailing may be prohibitive for all but the largest programs.

A more practical approach for most grantee organizations will be to contact their State's Arts Council and other organizations that maintain mailing lists of public artists. Examples of these other organizations would include other transit agencies that have been active in public artwork programs [56] and organizations such as Forecast Public Artworks at www.forecastart.org and Public Art Network (PAN) at www.americansforthearts.org. This approach will provide the grantee with an extensive list of artists at minimal expense to the grantee, and is a much more practical approach for those grantees that have "one-time" artwork projects and limited staffing to maintain an expensive Artists Registry or mailing database.

[55] - These case studies may be found at: http://www.fta.dot.gov/transit_data_info/reports_publications/reports/art_in_transit/2260_ENG_HTML.htm.

[56] - LAMTA, NYMTA, SEPTA, Metropolitan Council of Minneapolis, MN.

B. The "Call For Artists"

The "call for artists" can be published for national coverage in publications such as *Public Art Review, Sculpture Magazine, Art In America, ArtNews, and ArtForum*, and regional periodicals such as, *New Art Examiner, ArtPapers, and ArtWeek* as well as local newspapers. However, the experiences of several agencies in advertising have not been completely satisfactory as far as reaching prospective artists. A far more successful approach has been to develop the names and addresses of the artists to be solicited and send them a notice of the commission opportunities and "Request for Expression of Interest" (RFI) letter. For example, Southeastern Pennsylvania Transportation Authority (SEPTA) hired an art consultant who culled a list of candidate artists from various art foundations. Other agencies have used their State Arts Council as a resource for listings of artists' names and addresses. As already discussed, some have gone to the expense of maintaining Artists Registries and mailing databases to identify candidates who are contacted directly by mail.

Applicants are normally asked to provide resumes, slides of past work, copies of published reviews/articles about their work, and perhaps a videotape of several minutes length. Artists may also be required to state in their cover letters why they are interested in creating artwork for the project being advertised and why their work is applicable to an outdoor transit environment.

C. Publicizing the Project's Art Budget

It has been the practice of almost all agencies, including the U.S. GSA, to publish the agency's budget for the art project at the time the "call for artists" is released and/or the notices are sent to candidate artists soliciting their interest in the project. The reasoning behind the practice is to inform the artists of the relative magnitude of the project and to establish an evaluation and selection process that will be based on a "best-value-for-the- money" type of decision, instead of the more traditional procurement approach of determining the lowest price proposal that will produce an artwork that meets a predetermined specification. In other words, agencies want the very best product that can be obtained with the funds available for art, and there is generally no motivation to reduce the artwork monetary investment by selecting art concepts that are less costly but also may be artistically and aesthetically less rewarding to the agency and the community.

An example of a budget that was published with a "Call to Artists" by the Metropolitan Council, Minneapolis, MN is shown in Appendix B.18 – *Hiawatha Line Public Art & Design Budget.* The Call to Artists listed sixteen commission opportunities, four of which were "Design Only" commissions, while twelve others were listed as "Design, Fabrication, and Installation" commissions. The work involved in the various phases of these commissions was described in the Call to Artists, and the amount of the commission allocated for each phase was as shown in Appendix B.18. Note that every commission included the completion of designs and the preparation of construction drawings within the scope of the initial contract award. The initial contracts did not, however, include the Fabrication and Installation Phases. The agency's decision to involve any particular artist in the Fabrication and/or Installation Phase was to be

made at the completion of the Design Phase, and was to be related to such considerations as the artwork design, the artist's interest in involvement in the Fabrication and Installation Phase, and the agency's interest in retaining the artist's involvement in those follow-on phases. The involvement of any particular artist in the Fabrication and Installation phase could vary from the complete fabrication and installation of the artwork, fabrication and installation of certain elements of the artwork coordinated with the installation of other elements by the project's Design/Builder, oversight of fabrication and installation by the project's Design/Builder, or in an unusual situation, no involvement at all. Because the involvement of the artist might vary in the Fabrication and Installation Phase, the commission amount associated with this Fabrication and Installation Phase was estimated as a maximum amount in the published budget. The actual amount of any fabrication and installation commission was to be determined by negotiations between the agency and the artist at the conclusion of the Design Phase depending on the artist's degree of involvement. [57]

D. The Selection Process

Timing - One of the most important lessons learned from those who procure artwork is that the artist should be selected and on-board at a very early date in the design process, preferably at the inception of the design process as members of the design team. Starting the artist early with the Architect-Engineer firm that will do the design work enables the artist to have maximum opportunities for the artwork. If you wait until the facility is designed already, or virtually designed, you limit what the artist can do. This is a major consideration. In order to afford the artist the opportunity to collaborate with the A/E firm during the design concept phase, the artist selection process should begin well before the A/E contract is awarded.

Methods of Selecting Artists - There are two basic approaches that have been used to select artists. One involves the selection of a "short list" of candidates from whom competitive proposals are solicited and evaluated. These proposals would typically call for the submission of design concepts, models and/or renderings, cost proposals, etc. The other approach is one in which the evaluation is designed to select the artist instead of selecting the best artwork concept as in the competitive proposal method. This method would produce a "short list" of the most qualified candidates based on artists' resumes, slides of previous artwork products, videotapes, the artist's expected hourly remuneration, etc. Interviews are conducted with the short-list candidates. Selection then follows the interviews. The latter approach does not involve the submission of design concepts for the project being advertised – the preparation of designs comes after artist selection. Nor does this approach call for artists to submit the estimated prices of their artwork because the art has not yet been designed. It does, however, call for the artists to submit their proposed hourly rates of remuneration, which fulfills the requirement of FTA Circular 4220.1E that cost be a factor in the selection process. Note that cost may in fact be the

[57] - For further information about this public art program contact Mr. David Allen, Metropolitan Council Hiawatha Public Art and Design Manager at (612) 215-8221.

least important factor if the grantee so chooses, but it must be considered in the selection process. A discussion of these two approaches follows.

Review of Qualifications to Determine a "Short List" of Candidates – Having issued the "call for artists" and received letters of interest from candidate artists, most agencies (with participation of an artist selection panel) use a qualifications-based process to narrow down the candidates to a "short list" of four to seven candidates. This process of developing the short list would typically be based on the artist's past work. Resumes and slides of the artist's previous work would normally be reviewed (by a selection panel) at this stage of the evaluation process. Artists would not normally be required to submit a "technical proposal" of their conceptual designs for the project at this stage.

Selection after Interviews – Having determined a "short list" of candidate artists, agencies' approaches to determine the actual winning artist may vary. When the project is just beginning and the artists will be working with the A/E firm to develop design concepts, the typical approach has been to furnish the short-listed artists with the community profile and invite them to be interviewed by the selection panel. The winning artist is then selected on the basis of their past work and the interview process. An example of the artist selection criteria which might be used in this type of scenario would be as follows:

- Aesthetic quality of previously completed art projects and commissions.
- Applicability and suitability of past work to the specific commission opportunities being advertised by the grantee.
- Appropriateness of previously completed artworks to their sites, including safety and scale.
- Durability and suitability of materials, resistance to vandalism and a minimum of maintenance requirements.
- Experience working with the public and neighborhood communities.

Soliciting Competitive Proposals – When the project for which the art is being procured has already been designed and/or built, some agencies invite all of the short listed artists to submit proposals for the project. However, some agencies have required proposals even when the artist selection process is occurring early in the program, before the A/E firm has done any design. When proposals are solicited, and following the submission and evaluation of these proposals, interviews are then scheduled with all of the candidates where the artists may present their proposals and the agency's selection panel may ask questions of the artists. Artists may be called upon to present a rendering of their proposed artwork (a model or drawings or written descriptions), a cost proposal, and samples of the actual proposed material to be used. The cost proposal (budget) would include costs for design, fabrication, site preparation and installation, insurance, etc. Since the conceptual designs are probably the most valuable contribution that the

artists will make, agencies have often felt it equitable to compensate the artists for this conceptual design work, and they will establish a uniform amount of money to be paid to each artist for his/her work in developing the proposal. For example, SEPTA's procurement of artwork for the Frankford Transportation Center included a "design stipend" of $2,500 to each of the semi-finalist artists that were asked to provide detailed proposals as part of the final competition. This design stipend of $2,500 for the semi-finalists was adequate to generate significant interest from nationally acclaimed artists. [58]

This approach of requiring competitive proposals is not without its problems. The first significant problem will be how to involve the community during the process of proposal (conceptual design) development. Community involvement is one of the most important aspects of the design process and FTA Circular 9400.1A notes it as such. It may be difficult for community representatives to deal objectively and interact with the competing artists' designs if competitive proposals are required. Experience has shown that involvement of community representatives at this stage produces problems in having to deal with a number of competing artists and designs, and to reconcile differences of preference with grantee personnel responsible for artist selection. It may be easier and perhaps more constructive for community representatives to work with one artist who has been selected by the grantee prior to conceptual design development, and then serve as a major contributor to the process of design development. This affords the community a design development role during conceptual design work rather an after-the-fact- role with several artists whose design concepts have already been formulated. Another consideration is the adequacy of the design stipend. Will the stipend your agency can afford to pay a number of artists be adequate to compensate them for research, travel, community discussions, conceptual design work, models, renderings, etc.? Consider also whether the rather small stipend and limited time given to the competing artists will produce the best possible design concepts for your project, or whether your agency would be better served with selecting an artist based on the quality and suitability of his/her past work for your application, and giving this artist more resources and time to produce the best design concept after collaboration with community representatives.

E. Contracting with the Selected Artist for Design and Fabrication of the Art

Direct Contract vs. Subcontract with the A/E Firm – Most agencies will normally award a prime contract to the artist, although some have assigned the responsibility of contracting with the artist to the A/E firm that is doing the facility design.

Type of Contract – Because of potential problems with unsuitable accounting systems for cost reimbursement contracts, grantees would be advised to consider contract types for artwork that

[58] - For further information, contact Elizabeth Mintz, Manager of SEPTA's Art-In-Transit program, at (215) 580-3633.

do not require the auditing of incurred costs. Using a fixed price contract with the artist would usually be preferable to a cost type contract.

Determining a Fair and Reasonable Contract Price – When negotiating a contract price with the selected artist, a cost proposal should be solicited, evaluated and negotiated as with any procurement for professional services; e.g., a contract with an architect to design a facility. It is recommended that the grantee consider whether it is advisable to contract initially for the design phase of the work and postpone negotiations of the cost/price for fabrication and installation until the design is completed and approved. This phased approach would then allow the artist to solicit bids or proposals from fabricators and installers based on a final design and specifications for fabrication and installation. The phased approach will avoid the problem of trying to prematurely guess what the fabrication and installation costs will be prior to completion of the design. A phased approach will also allow the grantee and artist to negotiate fixed price contracts for the design phase and then for the fabrication/installation phase. This in turn will avoid the pitfalls inherent in cost reimbursement contracting with an artist that probably does not have a cost accounting system in place that is suitable for a cost type contract. See the paragraph, Fabrication Costs, below.

Experience with artwork projects would indicate that the design phase of the project could be anywhere between 10% and 20% of the total project budget. For larger projects the design phase costs should represent the lower end of the range (about 10% of the project budget). Smaller projects may have a larger percentage (up to 20%) of the project cost devoted to design activities. The primary reason for this is that the costs of doing community research, including the travel expenses associated with this research and discussions with community representatives, will represent a larger fraction of the total budget for smaller projects than larger ones. This is not to suggest that the design phase contract be negotiated as a percent of the total project budget, only that grantees may wish to apply these historical percents as a "sanity check" when evaluating the artist's cost proposal for the design phase. Design budget percentages may also be impacted by the artist's national/international prominence and recognition. Historical experience with architectural fees for a variety of construction projects may prove to illustrate the point being made here. Typical fees for the most artistic type of building projects have been tabulated by the
R.S. Means Company, and the fee percentages range from a high of 16% of total project costs for the smaller projects ($100K) to a low of 8.3% for the highest dollar value projects (over $50M).[59]

Determining an Hourly Rate of Compensation - The hourly rate of compensation for the artist should be proposed by the artist in his/her cost proposal (along with the other necessary cost elements), and evaluated by the grantee for reasonableness. The grantee would be advised to

[59] - R.S. Means Company, *Square Foot Costs*, 23rd Edition, p. 438. However, artists may not necessarily base their compensation rates on providing the same types of professional design services as practiced in an architectural office, but by the track record of unique, one-of-a-kind commissions that respond to curatorial forces operating in the curatorial world of the gallery, the museum and the broader art market.

evaluate the artist's compensation on other projects, as well as what artists working on similar size public art projects have recently and historically been paid by other owners. The objective is to determine a fair and reasonable rate of compensation for the expertise offered by that particular artist, which will be an important part of the overall contract price for the design phase.

Determining a fair and reasonable hourly rate of compensation for the artist may also be extremely helpful if for any reason the grantee decides to terminate the artist's contract for the convenience of the grantee. In the event of a termination, the grantee and the artist will have to negotiate the amount to be paid the artist for his/her efforts up to the point of termination. Having already negotiated an hourly rate of compensation as part of the contract negotiations to determine a price for the design phase contract, the parties will then have an equitable basis to determine the amount to be paid for the artist's efforts prior to the termination.

Payment Provisions – Design Phase – Experience has shown that there may be problems with using standard "progress payment" clauses where payments are made at regular intervals based upon the artist's "progress" towards completion of the artwork design. Measuring progress on an artwork contract may prove to be a very subjective exercise and one that causes problems for the agency and the artist. A preferable approach would be to use a "milestone" payments approach where contractually specified dollar payments are to be made for achievement of specified milestones.

Fabrication Costs - When the artist is to be contractually responsible for fabricating the artwork, the typical scenario will involve a subcontractor that will do the actual fabrication work. It is very important that the artist be required to furnish credible cost and price information regarding fabrication of the artwork so that a realistic contract price can be negotiated with the artist. Grantees should not rely on "guestimates" from the artist when the contract price is being negotiated. There has been a tendency to use the artist's own cost estimates for fabrication instead of requiring the artist to obtain realistic cost/price proposals from fabricators. This in turn has led to some significant cost overruns when the real fabrication cost becomes known as a result of bids obtained later by the artist. This tends to happen when the agency's contract with the artist is a cost-reimbursement or Time and Material type of contract. Owing to the uncertainties in fabrication costs, agencies may want to contract in "phases" for the artwork project, where the first phase is for work up to submission and agency approval of the artist's design, and a second phase for fabrication and installation support by the artist. This second phase would be priced using competitive bids from fabricators following agency approval of the artist's detailed designs.

Intellectual Property Rights – Ownership of data and copyrights may be negotiated by the grantee and the artist under an arts in transit procurement provided that the Federal interests are protected. 49 CFR 18.34 – Copyrights, requires the grantee to include a clause in the artwork contract that provides FTA a royalty-free, non-exclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes, the copyright developed under the grant.

Grantees will want to involve their Legal Counsel in drafting and negotiating the specific provisions related to rights in the Artwork and artwork design concept developed under the contract due to stipulations found in Federal and State laws governing artists' rights. Some of the more important issues that have been addressed (but not necessarily resolved as stated) by those procuring artwork have included the following:

RIGHTS IN ARTWORK DESIGN AND ARTIST'S SUBMITTALS

1. Copyright: Artist's rights in all drawings, documents, studies developed by artist as well as the artwork itself.

2. License for FTA: To reproduce, publish or authorize others to use for Federal Government purposes, in accordance with 49 CFR Section 18.34 – Copyrights.

3. Right of grantee to reproduce (such as photographs and prints): For noncommercial purposes (educational, public relations, arts promotional, etc.) the Artwork submittals and Artwork Design.

4. Right of grantee to distribute reproductions: To the public by gift, sale or other transfer of ownership.

5. Right of grantee to incorporate the Artwork Design into any trademarks or service marks.

6. Grantee rights for commercial uses: To be negotiated with the artist and the terms to be established in a separate written agreement.

7. Artwork Design not to be duplicated by artist without grantee's written consent.

8. Termination of Artist's Rights: Artist's rights terminate with death of Artist and do not extend to Artist's heirs, successors or assigns.

RIGHTS IN THE ARTWORK

1. Ownership: Title to pass to the grantee upon installation and final acceptance of Artwork. Grantee to have right to donate, transfer, or sell the Artwork, or any portion thereof.

2. Display: Grantee to have exclusive right to publicly display the Artwork and to loan the Artwork to others for purpose of public display.

3. Reproductions and Adaptations: Grantee to have license to reproduce (e.g., photographs and prints) and three-dimensional reproductions for noncommercial purposes (educational, public relations, arts promotional, etc.) Examples of such

reproductions for noncommercial purposes might include: books, slides, postcards, posters, tee-shirts, mugs and calendars; reproductions in art magazines, art books, newspapers, videos, film and other visual media of whatever kind; reproductions in or on world wide web sites, internet sites and other electronic media; and reproductions for advertising purposes. Reproductions to contain a credit to the Artist and a copyright notice.

4. Commercial Uses by Grantee: Reproductions for commercial uses are only to be made with the mutual consent of the parties; e.g., use of the Artwork as background for advertisements, publications, movies, television, video and other types of productions or entertainment media.

5. Artist Credit: All references and all reproductions or adaptations of the Artwork will credit the Artwork to the Artist unless Artists requests to the contrary.

6. Artist's Commitments: Artwork Design not to be duplicated by artist without grantee's written consent.

7. Future Removal, Relocation or Modification: Grantee to have right to remove the Artwork from the site and relocate to another site.

8. Repairs and Restoration: Grantee, after consultation with Artist, shall have the right to determine when and if repairs and restorations are needed. If grantee makes repairs or restoration not approved by Artist, Artist shall have the right to sever its association with the Artwork.

9. Termination of Artist's Rights: Artist's rights terminate with death of Artist and do not extend to Artist's heirs, successors or assigns.

10. Notice of Claims: Artist to give grantee written notice prior to asserting any claim pertaining to the Artwork, and the grantee shall have not less than 90 days from the date of receipt of claim to cure any such claim.

11. The right of grantee to incorporate the Artwork into any trademark or service marks to be utilized by the grantee and to register the same in accordance with state or local law.

F. Contracting for Installation of the Artwork

Many times the installation work will be outside the artist's realm of expertise, especially for work involving construction services. Much artwork installation will be regulated by the Davis-Bacon Act wage requirements. For example, modifications to real property, such as the installation of murals on building walls, will require Davis-Bacon wage determinations. Agencies may wish to contact their regional Department of Labor (DOL) office for assistance in

determining the applicability of the Davis-Bacon Act to their artwork projects. It has been the usual practice to install the artwork under a construction contract competitively bid. For example, the artwork installation may be part of the main construction contract for the project. When this is done, the artist's services are usually obtained to serve in the role of a consultant to the agency or the A/E firm that has responsibility for construction oversight.

Chapter 7

7 - Disadvantaged Business Enterprise

7.1 Comparison of Old vs. New DBE Rules (6/99)

7.1.1 Applicability of DBE Rules to Grantee Programs (2/00)
7.1.2 Definition of Terms (2/00)

7.2 Administrative Requirements (6/99)

7.2.1 Who Must Have a DBE Program? (6/99)
7.2.2 DBE Liaison Officer (6/99)
7.2.3 Required Efforts on Behalf of DBE Financial Institutions (6/99)
7.2.4 Prompt Payment Mechanisms (6/99)
7.2.5 DBE Directory (6/99)
7.2.6 Bidders List (6/99)
7.2.7 Monitoring Contractors' Performance (2/00)

7.3 Goals for DBE Participation (6/99)

7.3.1 DOT National Goal of 10% (6/99)
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7.5 Exemptions and Waivers (6/99)

7.1 COMPARISON OF OLD VS. NEW DBE RULES

REQUIREMENT
The Federal Department of Transportation's policies concerning Disadvantaged Business Enterprise (DBE) participation in programs of the Federal Transit Administration are set forth in 49 CFR Part 26. 49 CFR Part 26 supercedes the old DBE regulation found at 49 CFR Part 23, subparts A and C through E. [1] This Part 26 also supercedes FTA Circular 4716.1A, dated July 26, 1988.

DISCUSSION

Grantees are encouraged to visit the Web sites of the Department of Transportation, Office of Small and Disadvantaged Business Utilization (OSDBU) [2] and the FTA Office of Civil Rights[3] for current information and guidance on DBE regulations and issues. Following is a summary of the old vs. the new DBE rules as found at the Web site of the Office of Small and Disadvantaged Business Utilization (OSDBU).

Setting and Meeting DBE Goals

Old Rule – Part 23	New Rule – Part 26
1. Did not use, but also did not prohibit, quotas. It explicitly authorized set-asides under some circumstances. DOT never penalized recipients for failing to meet goals under the old rule, but the text of the rule did not make the point explicitly.	**1. The new rule explicitly prohibits the use of quotas. The rule also explicitly prohibits the use of set-asides, except in extreme cases to remedy egregious problems. The rule explicitly provides that recipients will not be penalized for failing to meet their DBE goals.**
2. Under the old rule, recipients who had less than a ten percent goal had to make a special justification to the Department.	**2. The new rule views the statutory 10 percent goal as a nationwide aspirational goal, which does not require that recipients set their goals at 10 percent or any other particular level.**

[1] As of January 29, 1999.

[2] http://osdbu.dot.gov/

[3] http://www.fta.dot.gov/office/civil

3. Under the old rule, overall goals were set to achieve the object of "maximum practicable" use of DBEs. The recipient's goal could be based directly on the 10 percent national goal or on the recipient's past achievements.	**3. Recipients must set overall goals to represent a "level playing field"- the amount of DBE participation they could realistically expect in the absence of discrimination. This goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs to participate on your DOT-assisted contracts. The rule gives recipients substantial flexibility in the methods they choose to set overall goals.**
4. The old rule did not mandate the use of race-neutral measures or give them priority. There was no prompt payment requirement.	**4. Recipients must obtain as much as possible of the DBE participation needed to meet their overall goals through race-neutral measures. Race-neutral measures include such activities as training, technical assistance, bonding assistance, business development or mentor-protégé programs, breaking contracts up into pieces that small businesses can readily perform, and awards of prime contracts to DBEs through the regular competitive process. One type of race-neutral measure, a prompt payment provision, will be required for all subcontractors, DBEs and non-DBEs alike.**
5. Under the old rule, contract goals were required on all contracts with subcontracting possibilities, regardless of whether the contract goals were needed to meet overall goals.	**5. Contract goals, or other race-conscious measures, must be used only to obtain DBE participation needed to meet overall goals that cannot be obtained through use of race-neutral measures. Contract goals are not required on every contract. If recipients are over-achieving or under-achieving their overall goals, they have to adjust their use of contract goals.**

6. The old rule employed the same good faith efforts mechanism, but did not emphasize as strongly the mandate that recipients seriously consider good faith efforts showings. There was no reconsideration provision.	**6. When there is a contract goal, a bidder must make good faith efforts to meet it. The bidder can do so either through obtaining enough DBE participation to meet the goal or documenting the good faith efforts it made to do so. The rule explicitly provides that recipients must not disregard showings of good faith efforts, and it gives bidders the right to have the recipient reconsider a decision that their good faith efforts were insufficient.**
7. The old rule did not have an over-concentration provision.	**7. If a recipient determines that DBE firms are so over-concentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, it must devise appropriate measures to address this over-concentration.**

Certification and Eligibility

Old Rule – Part 23	New Rule – Part 26
1. The old rule did not state a specific standard of proof.	**1. Applicants must show that they meet size, group membership, ownership and control standards by a preponderance of the evidence.**
2. The old rule did not have either a personal net worth cap for participation or a requirement to submit information concerning personal net worth.	**2. Each disadvantaged individual seeking certification for his or her firm must submit a notarized certification of disadvantage and a statement of personal net worth. If an individual's personal net worth (excluding his or her principal residence and his of her interest in the applicant firm) exceeds $750,000, the person is not an eligible DBE owner.**

3. The less specific standards of the old regulation were interpreted in many varying ways by recipients and DOT offices, leading to inconsistent and confusing results.	**3. Ownership and control requirements provide detailed, specific, clarified standards for determining whether to certify firms. The standards are intended to resolve many difficult issues that have arisen in the implementation of the program.**
4. Formerly, a firm that wanted to work for the State highway agency, two airports, and three transit agencies in the same State had to fill out six application forms and endure six certification processes. This created significant burdens on applicants and used recipient resources inefficiently.	**4. By February 2002, all the transit, airport, and highway recipients in each State are required to agree on a unified certification program (UCP). This program must be fully operational no later than August 2003. The UCP must provide for "one-stop shopping" for DBE firms applying for certification in each State. The applicant fills out one form, goes through one application process and, if certified, can work as a DBE for any DOT recipient in the State. There will be a single DBE directory for the State. The rule allows recipients substantial discretion about the form the UCP will take in each State.**
5. The old rule suggested, but did not require, administrative due process. Recipients' practices varied, and some recipients' processes were so lacking in due process that substantively valid decisions were overturned by the courts on procedural grounds. Many recipients erroneously believed that the Department required annual recertifications, which burdened DBEs and used recipient resources inefficiently.	**5. In certifying or decertifying firms, recipients must provide administrative due process to ensure that procedures are fair. When a firm is certified, it normally stays certified for three years, but must inform the recipient in writing of any changes that would affect its eligibility and must submit an annual affidavit that such changes have not taken place.**

6. The old rule lacked specific standards and procedures for certification appeals, resulting in informal and sometimes inconsistent handling of certification issues.	**6. All certification actions begin with a proceeding by a recipient. A party dissatisfied with the result can appeal to the DOT Office of Civil Rights. This appeal proceeding is an administrative review of the record of the recipient's action, and does not involve a new hearing before DOT. Recipients must promptly implement the Department's decision.**

Program Administration

Old Rule – Part 23	New Rule – Part 26
1. There was no program waiver provision in the old rule.	**1. A recipient can apply to the Department for a program waiver if it wants to implement the program in a way not provided for in the rule. If the Secretary believes that the recipient's idea will meet the program's objectives, he or she will approve the application. Waivers can apply to such matters as overall and contract goals, but program waivers do not apply to DBE eligibility standards and procedures, which must remain uniform nationwide.** **2. Recipients must submit revised DBE program documents to DOT, reflecting the new rule's changed requirements, by September 1999.**
3. The inconsistency of DOT guidance concerning the old rule led to substantial confusion and was criticized by a General Accounting Office report. Greater coordination is appropriate in an era of "One DOT."	**3. To avoid confusion and promote consistency and certainty, written guidance about the new rule is valid and binding – and represents the official position of the Department – only if it has been approved by the DOT General Counsel. Guidance issued under the old rule is no longer binding.**

	4. Recipients must begin to collect data about the bidders on their contracts and subcontracts, for later use in calculating overall goals.
5. The old rule did not have similar provisions.	**5. In the near future, DOT will develop new, uniform program data reporting and certification application forms.**

2.1.1 Applicability of DBE Rules to Grantee Programs

REQUIREMENT

49 CFR § 26.3, *To Whom Does This Part Apply*, defines the applicability of the new DBE regulations in terms of the types of funds being expended by the recipient. The types of *Federal transit funds* to which the DBE regulations apply are defined as those authorized by:

a) Titles I, III, V and VI of ISTEA, Pub. L. 102-240, or

b) Federal transit laws in Title 49, U.S. Code, or

c) Federal transit laws in Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178.

Stated simply, any third party contract which is awarded by a FTA grantee and which is funded in whole or in part with Federal DOT funds, is subject to the DBE regulations in 49 CFR Part 26. It does not matter whether the Federal funds are for planning, capital or operating assistance, the DBE rules apply. A contract that is funded entirely with local funds – without any Federal funds – is not subject to the DBE requirements under this rule.

DISCUSSION

The DBE rules set forth in 49 CFR Part 26 apply to all third party contracts funded in whole or in part with Federal DOT funds. This does not mean, however, that every procurement or contract must be reviewed for DBE participation. The rules give grantees flexibility in when and how they establish individual contract goals. Certain types of procurements (e.g., off-the-shelf commodities) may not have subcontracting opportunities or be appropriate for DBE goal setting. In other words, the DBE rules that apply to all contracts also include guidance and flexibility throughout Part 26 as to how grantees can comply with this part without subjecting every procurement to an individual review for DBE participation. If, for example, the grantee can meet its overall goal through race-neutral means, then contract goal setting will not be necessary. And where goal setting is

necessary, the rules do not require goals for every contract nor that every procurement be reviewed for goal setting purposes.

2.1.2 Definition of Terms

REQUIREMENT
49 CFR §26.5, *What Do The Terms Used In This Part Mean*, contains definitions of the terms used in the new DBE regulation. The definitions of the designated groups included in the definition of "socially and economically disadvantaged individual" are derived from the Small Business Administration's (SBA) new small disadvantaged business program regulation (13 CFR § 124.3).

DEFINITIONS

a) *Disadvantaged business enterprise* or *DBE* means a for-profit small business concern: (1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged, or, in the case of a corporation, 51 percent of the stock of which is owned by one or more such individuals; and (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

b) *Small business concern* means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in 49 CFR §26.65(b). The cap is currently set at $16.6 million in average annual gross receipts over the firm's previous three fiscal years. [4] This amount is adjusted for inflation by the Secretary of DOT from time to time. It should be noted that a not-for-profit firm may not be certified as a DBE. However, a firm owned by an Indian tribe or Alaska Native Corporation as an entity may be certified as a DBE.

c) *Race-conscious* measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs. The use of contract goals is the primary example of a *race-conscious* measure in the DBE program, but set-asides and price credits for DBEs would also be considered *race-conscious* measures.

d) *Race-neutral* measure or program is one that is, or can be, used to assist all small businesses. While benefiting DBEs, such programs are not solely focused on DBE

[4] As of April 1, 1999.

firms. Examples of *race-neutral* measures would include outreach programs, technical assistance programs, and prompt payment clauses, all of which can assist a wide variety of small businesses, not just DBEs. As used in this regulation, *race-neutral includes gender neutrality*.

e) *Set-aside* means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

f) *Personal net worth* means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's *personal net worth* does not include: The individual's ownership interest in an applicant or participating DBE firm or the individual's equity in his or her primary place of residence. An individual's *personal net worth* includes only his or her own share of assets held jointly or as community property with the individual's spouse.

g) *Socially and economically disadvantaged individuals* means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is –

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands, Macao, Fiji, Tonga, Kirbati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any individual groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

h) *Contract* means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of this part, a *lease* is considered to be a *contract.*

i) *Bidders List* – For the meaning of this term, see Section 7.2.6 – *Bidders List.*

7.2.2 ADMINISTRATIVE REQUIREMENTS

7.2.1 Who Must Have a DBE Program?

REQUIREMENT
49 CFR § 26.21 *Who Must Have a DBE Program?* requires all FTA recipients who receive $250,000 or more in FTA planning, capital, and/or operating assistance in a *Federal fiscal year*, exclusive of transit vehicle purchases, and transit vehicle manufacturers who must submit an overall goal under Sec. 26.49, to have a DBE program meeting the requirements of 49 CFR part 26.

7.2.2 DBE Liaison Officer

REQUIREMENT
49 CFR §26.25 *What Is the Requirement for a Liaison Officer?* requires grantees to have a DBE Liaison Officer who has direct, independent access to the Chief Executive Officer concerning DBE program matters. The Liaison Officer must be responsible for implementing all aspects of the grantee's DBE program. Grantees must also have adequate staff to administer the DBE program.

DISCUSSION

The DBE Liaison Officer will be responsible for overseeing all aspects of the grantee's DBE program. One area of the Liaison Officer's responsibility would include acting as an advocate for DBE contractors, subcontractors and suppliers of any tier on the grantee's contracts. The DBE Liaison Officer would be available to any DBE who is experiencing difficulties in the payment process or in any other aspect of the contract work. The Liaison Officer would be available to investigate complaints, mediate disputes and recommend remedies to the appropriate grantee management officials.

Some grantees require their contractors to post notices on the job site, (these notices are provided by the grantee), identifying the DBE Liaison Officer, and the contractors must require all subcontractors of any tier to include an appropriate notification in their subcontracts with DBE firms.[5]

7.2.3 Required Efforts On Behalf of DBE Financial Institutions

REQUIREMENT
49 CFR §26.27--*What Efforts Must Recipients Make Concerning DBE Financial Institutions?*-- requires grantees to thoroughly investigate the full extent of services offered by DBE financial institutions in the community, and to make reasonable efforts to use these institutions. Grantees must also encourage prime contractors to use such institutions.

7.2.4 Prompt Payment Mechanisms

REQUIREMENT
49 CFR §26.29--*What Prompt Payment Mechanisms Must Recipients Have?*-- requires grantees to establish a contract clause which requires prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment that the grantee makes to the prime contractor. This clause must also require the prompt return of retainage payments from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. This part also discusses other aspects of a prompt payment program that grantees may wish to consider, including: (1) Appropriate penalties for failure to comply, (2) Prior written consent of grantee for delays in payment of subcontractors, (3) Requirement for primes and subcontractors to use alternative dispute resolution mechanisms to resolve payment disputes, and (4) Requirement that primes will not be paid for work performed by a subcontractor until the prime ensures that the subcontractor is paid.

[5] - For an example of a clause, see BART Clause SC7.1.10 "Ombudsperson." Contact BART at (510) 464-6380.

DISCUSSION

Prompt payment provisions are an important race-neutral mechanism that can benefit DBEs and all other small businesses. Under part 26, all grantees must include a provision in their DOT-assisted contracts requiring prime contractors to make prompt payments to their subcontractors, DBE and non-DBE alike. DBE contractors are significantly affected by late payments from prime contractors, and lack of prompt payment constitutes a very real barrier to the ability of DBEs to compete in the marketplace. Non-DBE contractors are also affected by late payment problems. A prompt payment requirement applying to all subcontractors is an excellent example of a race-neutral measure that will assist all subcontractors.

The required contract clause would obligate the prime contractor to pay subcontractors no later than 30 days from the receipt of each payment the grantee makes to the prime contractor. Payment is required only for satisfactory completion of the subcontractor's work. Retainage would have to be returned within 30 days from the time the subcontractor's work had been satisfactorily completed, even if the prime contractor's work had not yet been completed. The number of days specified in the prompt payment clause for the payment of subcontractors may be less than 30 days, at the grantee's discretion. Grantees who already operate under prompt payment statutes may use their existing authority in implementing this requirement. It may be necessary, however, to add to existing contract clauses in some cases (e.g., if existing prompt payment requirements do not cover retainage).

Paragraph (e) of § 26.29 lists a series of additional measures that the regulation authorizes, but does not require, grantees to use. In addition to the mechanisms suggested by §26.29, another possible mechanism that grantees should consider would be declaring a prime contractor to be not responsible for future awards where the contractor has exhibited a pattern of withholding or making late payments to subcontractors.

Best Practices

Following are examples of *prompt payment* and *reporting requirements* (of payments to subcontractors*)* contract clauses used by the Chicago Transit Authority (CTA). [6] We would note that the time periods specified in the CTA clause for payment of subcontractors may be too aggressive and may not be feasible for all grantees. In any event, FTA gives grantees discretion in stipulating the payment timelines in their prompt payment contract clauses.

[6] For further information contact Mr. Donald Mayes, Manager, DBE Contract Compliance at 312-664-7200, ext. 3519.

PROMPT PAYMENT TO SUBCONTRACTORS

A. The Contractor is required to pay all Subcontractors for all work that the Subcontractor has satisfactorily completed, no later than five (5) business days after the Contractor has received payment from the Authority. [7]

B. In addition, all Retainage amounts must be paid by the Contractor to the Subcontractor no later than fourteen (14) business days after the Subcontractor has, in the opinion of the VP Construction, satisfactorily completed its portion of the Work. [8]

C. A delay in or postponement of payment to the Subcontractor requires good cause and prior written approval of the General Manager, Purchasing.

D. The Contractor is required to include, in each subcontract, a clause requiring the use of appropriate arbitration mechanisms to resolve all payment disputes.

E. The Authority will not pay the Contractor for work performed unless and until the Contractor ensures that the Subcontractors have been promptly paid for the work they have performed under all previous payment requests, as evidenced by the filing with the Authority of lien waivers, canceled checks (if requested), and the Contractor's sworn statement that it has complied with the prompt payment requirements. Prime Contractors must submit a prompt payment affidavit, (form to be provided by the Authority) which identifies each subcontractor (both DBE and non-DBE) and the date and amount of the last payment to such subcontractor, with every payment request filed with the Authority, except for the first payment request, on every contract with the Authority. (See below for *Prompt Payment Affidavit* developed by CTA).

F. Failure to comply with these prompt payment requirements is a breach of the Contract, which may lead to any remedies permitted under law, including, but not limited to, Contractor debarment. In addition, Contractor's failure to promptly pay its Subcontractors is subject to the provisions of 50 ILCS 505/9.

REPORTING REQUIREMENTS DURING THE TERM OF THE CONTRACT

A. The bidder shall, within five (5) business days of contract award, or prior to any work being performed, execute formal subcontracts or purchase orders with the DBE firms included in the bid. [9] These written agreements shall be made available to the General

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[7] We would note that five business days to pay subcontractors may not be realistic in all cases and could lead to complaints from subcontractors that the grantee enforce this timeframe.

[8] Other transit agencies have imposed a 30-day requirement for payment of retainage.

[9] The five-day requirement may not be realistic. Some agencies require subcontracts with DBEs within 60 days of contract award if the contract term is less than one year, or within 30 days of commencement of work for a contract that is for one year or more. The commencement of work rather than initial contract award is more realistic in the case of multiyear contracts where work may not start for another year or so.

Manager, DBE Program, upon request. All contracts between the bidder and its subcontractors must contain a prompt payment clause as set forth in Section VIII herein.

B. During the term of annual contracts, the bidder shall submit regular "Status Reports of DBE Subcontract Payments" in a form acceptable to the Authority. The frequency with which these reports are to be submitted will be determined by the General Manager, DBE Program, but in no event will reports be required less frequently than quarterly. **In the absence of written notice from the General Manager, DBE Program, the bidder's first "Status Report of DBE Subcontract Payments" will be due ninety (90) days after the date of contract award, with additional reports due quarterly thereafter.**

C. In the case of a one-time procurement with either a single or multiple deliveries, a "Status Report of DBE Subcontract Payments," in a form acceptable to the Authority, indicating final DBE payments shall be submitted directly to the General Manager, DBE Program. The information must be submitted prior to or at the same time as the bidder's final invoice to the Authority user department identified in the solicitation. (NOTICE: The original invoices must be submitted directly to the Authority's department identified in the contract documents and the Status Report of DBE Subcontract Payments must be submitted directly to the General Manager, DBE Program.) **Failure to follow these directions may delay final payment.**

D. The address for the General Manager, DBE Program, is: CTA General Manager, Chicago Transit Authority, DBE/EEO Programs/Contract Compliance Department, 567 West Lake Street, Chicago, IL 60661-1498).

PROMPT PAYMENT AFFIDAVIT

Contractor will place a check in the appropriate box below that applies to this payment request.

Re: Payment Request No. _____

I, _____, the _____
Name Title (e.g., President, Vice President, etc.)

of _____ ("Company"), do state the following with regard to payments made under Contract No. _____ ("Contract"):

1. ☐ Subcontractors, at the first tier, both DBE and non-DBE, who completed work and were listed for payment on the prior Payment Request No. _____, were paid no later than five (5) business days after Company received payment from CTA.

2. ☐ Copies of invoices and cancelled checks for subcontractors at the first tier who were paid under the prior payment request have been delivered or mailed to the DBE Department. In addition, Company has attached to the current Payment Request all lien waivers for prior subcontractor payments and any other documentation required by CTA.

(Failure to attach all required documentation to the Payment Request or forward cancelled checks and invoices to the CTA DBE Department may cause the Payment Request to be rejected by CTA.)

3. ☐ All retainage amounts withheld from any subcontractor who satisfactorily completed its portion of the contract work, including punch list items, were paid to the subcontractor(s) no later than fourteen (14) business days after it satisfactorily completed its work, whether or not CTA has paid said retainage amounts to Company. Attach a copy of the cancelled check evidencing payment of each retainage amount.

4. ☐ There was no delay in or postponement of any payment owed to a subcontractor, whether periodic payment or retainage amount, except for good cause and after receipt of prior written approval from the CTA Purchasing Agent.

Attach a copy of the written approval from the CTA Purchasing Agent.

Subscribed and sworn to before me this _____ day of _____ 20___ _____ Notary Public	_____ Company Name _____ Signature _____ Print Name Date: _____

7.2.5 DBE Directory

REQUIREMENT
49 CFR §26.31 *What Requirements Pertain to the DBE Directory?* requires grantees to compile and update at least annually a directory or source list of all firms eligible to participate as DBEs in the grantee's programs. The listing for each firm must include its address, phone number, and the types of work the firm has been certified to perform as a DBE. This directory is to be made available to interested persons, including contractors and the public on request.

DISCUSSION

Grantees must maintain directories of DBE firms that have been certified to do work as DBEs. The information required for the Directory includes the name, address, phone number, and the types of work the firm has been certified to perform as DBE. The primary purpose of the Directory is to show the results of the certification process. Since certification under the DBE rule pertains to the various kinds of work a firm's disadvantaged owners can control, it is important to list those kinds of work in the

Directory. For example, if a firm seeks to work in fields A, B, and C, but the grantee has determined that its disadvantaged owners can control its operations only with respect to A and B, then the Directory would recite that the firm is certified to perform work as a DBE in fields A and B.

The focus of the Directory is intended to be eligibility. A Directory is intended to permit interested firms to contact the DBEs. The Directory is not intended to be a comprehensive business resource manual. For example, information about firms' qualifications, geographical preferences for work, performance track record, capitalization, etc. are not required to be part of the Directory.

7.2.6 Bidders List

REQUIREMENT
49 CFR §26.11 *What Records Do Recipients Keep and Report?* requires grantees to create and maintain a *bidders list*, consisting of all firms bidding on prime contracts and bidding or quoting subcontracts on DOT-assisted projects. For every firm, the following information must be included: (1) Firm name, (2) Firm address, (3) Firm's status as a DBE or non-DBE, (4) The age of the firm, (5) The annual gross receipts of the firm.

DISCUSSION

The *bidders list* is intended to be a count of all firms that are participating, or attempting to participate, on DOT-assisted contracts. The list must include all firms that bid on prime contracts or bid or quote subcontracts on DOT-assisted projects, including both DBEs and non-DBEs. DOT believes that *bidders lists* are a promising method for accurately determining the availability of DBE and non-DBE firms, and DOT believes that developing bidders data will be useful for grantees. Creating and maintaining a bidders list will give grantees another valuable way to measure the relative availability of ready, willing and able DBEs when setting their overall goals. (See section 7.3.3--*Establishing Overall Goals*.) The DOT regulations do not impose any procedural requirement as to how the data is collected. Grantees are free to choose how they collect the required data. DOT suggests that grantees consider using a widely publicized public notice or a widely disseminated survey to encourage all firms that have bid on the grantees' contracts to make themselves known to the grantee. Once the list of bidders has been created, grantees will need to supplement this information with the age of each firm (since establishment) and the annual gross receipts of the firm (or an average of its annual gross receipts). Grantees can gather this additional information by sending a questionnaire to the firms on the list, or by any

other means that the grantee believes will produce reliable information. The grantee's plan for how to create and maintain the list and gather the required information must be included in its DBE program.

7.2.7 Monitoring Contractors' Performance

REQUIREMENT
49 CFR §26.37 *What Are a Recipient's Responsibilities for Monitoring the Performance of Other Program Participants?* requires grantees to establish a monitoring and enforcement mechanism to verify that the work committed to DBEs at contract award is actually performed by the DBEs.

DISCUSSION

DOT has avoided prescribing monitoring and enforcement mechanisms for grantees. The Department is looking for grantees themselves to define a strong and effective set of monitoring and compliance provisions in their DBE programs. These mechanisms could be almost anything available to the grantee under Federal, State or local law (e.g., liquidated damages provisions, responsibility determinations, suspension and debarment rules, etc.). The results that grantees must measure consist of payments actually made to DBEs, not just promises at the award stage. Credit toward goals can be awarded only when payments (including, for example, the return of retainage payments) are actually made to DBEs. Grantees must keep a running tally of the extent to which, on each contract, performance had matched promises. Prime contractors whose performance fell short of original commitments would be subject to the compliance mechanisms the grantee had made available.

Best Practices

Suggestions for monitoring contractor's performance would include:

a) Requiring adequate justification when a prime contractor proposes to substitute a non-DBE subcontractor.

b) Conducting status reviews of contractor's compliance at regularly scheduled project meetings.

c) Requiring written monthly or quarterly reviews of the contractor's performance in meeting goals.

d) Requiring the contractor to propose plans to cure and then implement those plans when the contractor is failing to meet the contract goals.

7.3 GOALS FOR DBE PARTICIPATION

7.3.1 DOT National Goal of 10%

DISCUSSION

There is a statutory goal that not less than 10 percent of the transit funds authorized are to be expended with DBEs. Under the former part 23, the 10 percent goal derived from the statute played a role in the setting of overall goals by grantees. For example, if grantees had a goal of less than 10 percent, the rule required them to make a special justification to FTA. *The new rule makes clear that the 10 percent goal is an aspirational goal that applies to the Department of Transportation on a national level, not to individual grantees or their contractors.* The national goal of 10 percent is not tied to grantees' goal-setting decisions. Grantees set goals based on what will achieve a level playing field for DBEs in their own programs, without regard to the national DOT goal. Grantees are not required to set their overall or contract goals at 10 percent or any other particular level. Nor are grantees required to make a special justification if their overall goals are less then 10 percent.

7.3.2 Use of Quotas and Set-Asides

REQUIREMENT
49 CFR § 26.43--*Can Recipients Use Quotas or Set-Asides as Part of This Program?*-- prohibits the use of quotas for DBEs on DOT-assisted contracts under any circumstances. Set-asides are not permitted except in limited and extreme circumstances to redress egregious instances of discrimination.

DISCUSSION

The DBE program does not set aside a certain percentage of contracts or dollars for a specific set of contractors. The DBE program is a goals program, which encourages participation without imposing rigid requirements of any type.

***Quotas* are not permitted under any circumstances. A *quota* is a simple numerical requirement that a contractor must meet, without consideration of other factors. For example, if a grantee sets a 12 percent goal on a particular contract and refuses to award the contract to any bidder who does not have a 12 percent DBE participation, either refusing to look at showings of good faith efforts or arbitrarily disregarding them, then the grantee has used a quota. Bidders must make good faith efforts to meet contract goals where such goals are stated, but grantees may not deny a contract to a bidder simply because it did not obtain enough DBE participation to meet the goal. Grantees must seriously consider bidders' documentation of good faith efforts. If bidders make good faith efforts to meet contract goals, they have complied with the intent of the DBE regulations, even if their good faith efforts fail to meet the actual contract goal.**

Set-asides **are not permitted except in extreme circumstances to redress extreme instances of discrimination. A contracting agency sets a contract aside for DBEs if it permits no one but DBEs to compete for the contract. Firms other than DBEs are not eligible to bid. A grantee may use a set-aside under part 26 if other methods of meeting overall goals are demonstrated to be unavailing and the grantee has legal authority independent of part 26. DOT believes that set-asides should not be used in the DBE program unless they are absolutely necessary to address a specific problem when no other means would suffice.** ***Set-asides are a last resort.***

7.3.3 Establishing Overall Goals

REQUIREMENT
49 CFR §26.45--*How Do Recipients Set Overall Goals?*-- requires grantees to set an overall goal for DBE participation in their DOT-assisted contracts. The overall goal must be based upon demonstrable evidence of the relative availability of DBEs in the grantee's own market. Section 26.45 also furnishes examples of methods that grantees may use to develop a base figure for the *relative availability of DBEs* in their particular market. The methods suggested include the use of DBE Directories, Census Bureau Data, Bidders Lists, etc. Goals must be submitted to FTA by August 1 of each year. Public participation is also required in establishing an overall goal; i.e., consultation with minority, women's and general contractor groups, and other organizations that could have information concerning the availability of DBEs, as well as public notices announcing the proposed overall goal and its rationale.

DISCUSSION

"Establishing Overall Goals" is not normally a procurement office function DBE. Program administrators should seek guidance from the US DOT Office of Small and Disadvantaged Business Utilization (http://osdbu.dot.gov/).

7.3.4 Establishing Overall Goals for Transit Vehicle Manufacturers

REQUIREMENT
49 CFR §26.49--*How Are Overall Goals Established for Transit Vehicle Manufacturers?*-- requires grantees to obtain a certification from each transit vehicle manufacture that desires to bid or propose upon a DOT-assisted transit vehicle procurement that it has complied with the requirements of 49 CFR §26.49. Grantees may, however, with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying through the overall goal-setting procedures.

DISCUSSION

49 CFR §26.49 requires transit vehicle manufacturers (TVMs) to establish and submit for FTA approval an annual overall percentage goal for DBEs. Part 26 continues the older rule that was in part 23 for TVMs. TVMs must set their goals based on the principles in §26.45. Grantees are required to obtain a certification from TVMs that wish to bid or propose on DOT-assisted transit vehicle procurements, or alternately, grantees may, with FTA approval, establish a project-specific goal for DBE participation. [10] **The APTA *Standard Bus Procurement Guidelines* provide a sample *solicitation provision* and a *certification* to be signed by the TVM's authorized official.**[11]

7.3.5 Means of Meeting Overall Goals

7.3.5.1 Race-Neutral Means

REQUIREMENT
49 CFR §26.51--*What Means Do Recipients Use to Meet Overall Goals?--*requires grantees to meet the maximum feasible portion of their overall goal by using *race-neutral* means of facilitating DBE participation. This Section includes examples of *race-neutral* steps that grantees can take to facilitate DBE participation. In any year in which the grantee expects to meet part of its goal through race-neutral means and the remainder through contract goals, the grantee must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. This data must be reported to FTA.

DISCUSSION

One of the key points of the new DBE rule is that, in meeting overall goals, grantees have to give priority to *race-neutral* means. By *race-neutral* means (a term that includes gender neutrality for purposes of this rule), DOT means outreach, technical assistance, procurement process modification, etc.—measures that can be used to increase opportunities for all small businesses, not just DBEs, and *do not involve setting specific goals for the use of DBEs on individual contracts.* Whenever a DBE receives a prime contract because it is the lowest responsible bidder, the resulting DBE participation was achieved through race-neutral measures. Similarly, when a DBE receives a subcontract on a project that does not have a contract goal, its participation was also achieved through race-neutral measures.

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10 - The TVM must certify that it has complied with the DBE goal requirements of § 26.49.

11 - See the APTA *Guidelines* sections 1.1.3.5 for the *solicitation provision* and 1.1.5.7 for the DBE *certification.*

Race-neutral **means include, but are not limited to, the following:**

(1) Arranging solicitations, times for the submission of bids or proposals, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs, and other small businesses. Examples might include the unbundling of large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces, etc.;

(2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing the bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing;

(3) Providing technical assistance and other services;

(4) Carrying out information and communications programs on contracting procedures and specific contract opportunities (e.g., ensuring the inclusion of DBEs and other small businesses on grantee mailing lists for bidders; ensuring that prime contractors receive lists of potential subcontractors; provision of information in languages other than English, where appropriate);

(5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;

(6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

(7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;

(8) Ensuring distribution of the DBE Directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and

(9) Assisting DBEs and other small businesses to develop their capability to utilize emerging technology and conduct business through electronic media.

7.3.5.2 Using Contract Goals

REQUIREMENT
49 CFR §26.51(d)--*What Means Do Recipients Use to Meet Overall Goals?--r*equires grantees to establish contract goals to meet any portion of their overall goal that they do not project being able to meet using *race-neutral* means. Grantees may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities. Further, grantees are not required to set goals on every DOT-assisted contract, nor must they set a particular contract goal at the level of the overall goal. The particular contract goal will depend on the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by the overall goal, grantees must set contract goals so that they will cumulatively result in meeting any portion of the overall goal that they do not project being able to meet through the use of race-neutral means. If the grantee's approved projection indicates that it can meet its entire overall goal through race-neutral measures, the grantee must implement its program without setting contract goals during that year.

DISCUSSION

The expressed priority for race-neutral means does not preclude the use of race-conscious measures, such as contract goals, by grantees. The rule simply requires grantees to get the maximum feasible DBE participation through race-neutral measures. The first step is to establish an overall goal and estimate, in advance, what part of the goal can be met through the use of race-neutral measures. This projection is furnished to FTA at the time the overall goal is submitted, and is subject to FTA approval. The grantee uses race-conscious measures (e.g., sets contract goals) to get the remainder of the DBE participation it needs to meet the overall goal. If the grantee expects to meet its entire overall goal through race-neutral means, it could, with FTA approval, implement its program without any use of contract goals.

Grantees will most likely use a combination of race-neutral and race-conscious measures. It is important that grantees keep accurate records of contract awards to DBEs through race-neutral vs. race-conscious methods. The grantee's actual experience with the methods will enable the grantee to adjust the methodology it uses to achieve its future overall goal. For example, a grantee that was consistently able to meet its overall goal using only race-neutral measures would never need to use contract goals.

The new DBE rule makes clear that contract goals are not required on all contracts. The rule also states that the contract goal need not be set at the same level as the overall goal. For example, if a grantee has an overall goal of 11 percent, it does not have to set a contract goal on each contract. Nor does it have to establish an 11 percent goal on each contract where it does set a contract goal. The idea is for the grantee to set contract goals that, cumulatively for the year, bring in enough DBE participation, which when added to the participation expected from race-neutral measures, will result in achieving the overall goal.

Best Practices

When grantees must use contract goals to meet their overall goal, grantees need to review candidate procurements to determine if they afford subcontracting opportunities for DBE participation. DBE subcontracting goals are to be established based on the known availability of qualified DBEs**.** Grantees can obtain information about certified DBE firms from their State or local government offices as well as the Federal *Small Business Administration*, which publishes a listing of certified small businesses and small disadvantaged businesses on their *Pro-Net* Internet site. *Pro-Net* is an Internet-based database of information on more than 171,000 small, disadvantaged, 8(a) and women-owned businesses. This data is free to the general public as a resource for those seeking contractors and subcontractors and/or partnership opportunities. Businesses profiled on the *Pro-Net* can be searched by SIC codes; key words; location; quality certifications; business type, ownership race and gender; E.I. capability, etc.[12] Of course, grantees are required to maintain a current *Directory* of DBE sources in order to facilitate the establishment of specific contract goals and to assist prime contractors in identifying potential DBE subcontractors. See Section 7.2.5, *DBE Directory*, above.

Grantee initiatives to promote DBE participation in their third-party contracts would include such steps as:

- Reviewing all purchase requisitions above a certain dollar threshold or for certain types of work (e.g. construction and professional services), to determine if DBE goals should be required.

- Encouraging bidders to divide their total requisitions, where appropriate, into economically feasible units, tasks or quantities so as to permit maximum DBE participation.

- Stressing the importance of DBE participation at pre-bid/proposal conferences, with guidance to bidders and proposers as to the resources available to them in locating potential DBE subcontractors and suppliers (such as the Small Business Administration's *Pro-Net* database).

- Targeting advertisement notices in minority-owned newspapers in addition to other newspapers of general circulation.

- Extending the bidding time to allow contractors to identify DBE firms and permit their certification where necessary. This technique was used by the Metro-Dade Transit Agency on a procurement for technical, computer-related end items where DBE firms with the technical expertise to perform the work were not certified.

12 - The Internet address for Pro-Net is: http://pro-net.sba.gov/.

Allowing an extended proposal period permitted the prime contractors to locate DBE subcontractors and have them certified.[13]

- Including a prominent notification in all "Notice of Award Letters" similar to that used by NYC Transit:

  Your contract contains a Disadvantaged Business Goal of _____%. The Contract requires that you submit work schedules and copies of executed subcontract agreements for your proposed DBE subcontractors within 30 days of the date of this award letter. You are further required to submit monthly reports of your progress toward meeting these goals, on the forms provided in the contract documents.[14]

- Inviting your DBE program office to participate on all selection committees for procurements that require DBE subcontracting goals.

7.3.5.3 Evaluation of Contractor Proposals For DBE Participation

DISCUSSION

There are two practices for submission of DBE information by offerors

- **Offerors may be required to complete their DBE submissions, including either the list of proposed DBE subcontractors and amounts, or the proof of good faith efforts, with their offers. This approach is typical of professional service contracts; or**

- **Offerors may be required only to promise compliance with the program in their offers, postponing submission of the list of subcontractors (or proof of good faith efforts) until determination of the apparent low bidder.**

When determining compliance with DBE requirements, two scenarios are possible:

- **The proposer/bidder submits information indicating that the DBE goals will be met; or**

- **The proposer/bidder submits information indicating that the DBE goals will not be met.**

The following are best practices to follow for the two scenarios:

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13 - Contact King Elliott, Metro-Dade Transit Agency, 111 N.W. First St., Suite 910, Miami, FL 33128 at (305) 375-3634.

14 New York City Transit. Contact Stan Grill at (718) 694-4350.

Scenario 1: Proposer/bidder submits information that the DBE goals will be met

Required Information - The information submitted by the offeror must include

- **Names of DBE subcontractors/suppliers participating in the contract. DBEs must be eligible (those that are currently certified or that can be certified prior to award);**

- **A description of the work each DBE is to perform or the products to be provided by the DBE, with an indication of the percentage of the work to be done by the DBE's own work forces, as compared with that which will be subcontracted by the DBE to other DBEs or non-DBEs; and**

- **The dollar value of each proposed DBE subcontract, including the dollar values of subcontracts to be awarded by the DBE subcontractor.**

Counting DBE Participation - Having received the above information, verify the counting of DBE participation towards the goal using the criteria set forth above in section 7.3.5.5, *Counting DBE Participation Toward the Goal*.

If the goal has been met satisfactorily, the award process can continue. If the goal has not been met even though the offeror stated that it will, you should assess the cause for differing conclusions; notify the offeror and seek additional information, or consider documentation of good faith efforts as provided by your DBE program and procedures.

- **If you have required evidence of compliance from all offerors with their offers, giving the offeror an additional opportunity may, depending on your program and procedures, appear to give the offeror an unfair chance to re-evaluate its offer after submission. You apparently have either a mistake or an offer that does not comply with the terms of your solicitation. In the former case, you should follow the guidance on mistakes in Section 4.4.5, "Bid Mistakes." In the latter case, you may work with the offeror to reconcile the difference if your DBE program provides for that opportunity; if your program provides it, all offerors could have expected the opportunity and it would not give the offeror a gratuitous or unfair second chance to evaluate its offer.**

- **However, if you requested evidence be submitted only after selecting the apparent awardee, you may work freely with the offeror to reconcile the discrepancy, as all offerors should expect the opportunity to provide information regarding responsibility and similar determinations made prior to award.**

If these steps conclude with the offeror meeting the goal or demonstrating good faith efforts to meet the goal, you can proceed with the award. If these steps conclude without the offeror meeting the goal or demonstrating good faith efforts to meet the goal, you can eliminate the offer and proceed to the next ranked offer.

Scenario 2: Offeror submits information that the DBE goals will not be met.

Required Information - Documentation of good faith efforts by the proposer/bidder is required in all cases where the proposer/bidder fails to meet the stated goal for DBEs. As discussed above, the solicitation may require that good faith efforts be accomplished prior to bid opening or that good faith efforts be accomplished prior to the receipt of best and final offers. Where the shopping period is permitted after final submission of offers, good faith effort requirements are established accordingly.

Your agency's DBE program should include guidelines for determining and evaluating good faith efforts by proposers/bidders. Criteria for determining whether a good faith effort was made can include those factors discussed in section 7.3.5.4--*Good Faith Efforts to Meet Contract Goals*.

If the proposer/bidder has satisfactorily demonstrated good faith efforts, the award process must continue. If not, the offer should not be accepted, and you may proceed to the next best offer (next lowest bid, or next highest score proposal, depending on your agency's DBE program components). In either case, the proposer/bidder's good faith effort documentation, as well as your written evaluation of that material, are important entries in the contract file. This is a potential protest area and should be well-documented.

7.3.5.4 Good Faith Efforts to Meet Contract Goals

REQUIREMENT

49 CFR §26.53--*What Are the Good Faith Efforts Procedures Recipients Follow?*-- requires grantees to award a contract that requires a DBE goal to a bidder/offeror who has made *good faith efforts* to meet the goal. A *good faith effort* is defined as one where the bidder:

(1) Documents that it has obtained enough DBE participation to meet the goal; or

(2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so.

Appendix A to Part 26 – *Guidance Concerning Good Faith Efforts*, provides grantees with suggested types of actions that they should consider when making judgments as to whether bidders/offerors have used good faith efforts. Grantees are specifically prohibited from ignoring bona fide good faith efforts.

It follows from the above that grantees, in a negotiated procurement, may not give extra credit (higher evaluation scores) to an offeror's proposal if it exceeds the grantee's subcontracting goal, nor less credit (lower scores) to a proposal that cannot achieve the full DBE goal. The DOT requirement is that the offeror make good faith efforts to meet the goal, and if this is demonstrated by the offeror the grantee cannot penalize the offeror in the proposal evaluation and contract award process.

If a grantee determines that an otherwise successful bidder/proposer has failed to meet the good faith efforts requirement of this Part, the grantee must provide the bidder/proposer an opportunity for *administrative reconsideration*. The requirements that grantees must follow in the administrative reconsideration process are outlined in 49 CFR § 26.53(d).

DISCUSSION

The types of actions that grantees should consider as part of the bidder's good faith efforts would include, but not be limited to, the following:

(1) Adequate solicitation of DBEs (through all reasonable and available means), with sufficient time for DBEs to respond to the solicitation;

(2) Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved;

(3) Providing interested DBEs with adequate information about the plans, specifications and requirements of the contract in a timely manner;

(4) Negotiating in good faith with interested DBEs. The fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract goal, as long as the costs are reasonable. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

(5) Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities.

(6) Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the grantee or contractor.

(7) Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

(8) Effectively using the services of available minority/women community organizations and other organizations to provide assistance in the recruitment and placement of DBEs.

In determining whether a bidder has made good faith efforts, grantees may take into account the performance of other bidders in meeting the contract goal. For example, if the apparent successful bidder failed to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, grantees may view this as evidence of the bidder having made good faith efforts.

The CFR allows discretion to grantees in when they require bidders/proposers to submit their good faith efforts documentation. This may be required: (a) as a matter of responsiveness with initial bids under sealed bid procedures; (b) as a matter of responsiveness with initial proposals under contract negotiation procedures; or (c) as a matter of responsibility at any time before the grantee commits itself to the performance of the contract by the bidder/proposer. [15]

In those procurements where bidders/proposers are required to submit their DBE participation information and good faith efforts with the initial bid/proposal as a matter of responsiveness, they are to be evaluated on the basis of that information, and may be rejected if the information presented is not satisfactory. (See however, the requirement for administrative reconsideration noted above in the Requirements block.) During the course of the negotiation process, changes may be made to the contract scope that affect either the need for some DBE subcontractors or the level of their participation. In that event, the agency should request that the proposer adjust its subcontract plan to maintain or enhance the DBE participation, and should require each proposer to submit a final DBE participation plan as part of its Final Proposal Revision (Best and Final Offer).

Best Practices

Following is a solicitation provision used by the Chicago Transit Authority (CTA) describing the types of actions that CTA would consider as demonstrating *good faith efforts* on the part of a bidder. [16]

> **GOOD FAITH EFFORTS**
>
> In order to be responsive, a bidder must make good faith efforts to meet the DBE participation goal set forth in the contract. The bidder must document the good faith efforts it made in that regard. Thus, the Bid submitted to the Authority must be accompanied by written documentation prepared by the bidder evidencing all of its sufficient and reasonable good faith efforts toward fulfilling the goal. These efforts must be active steps, and ones, which could reasonably be expected to lead to sufficient DBE participation to meet the contract DBE participation goal. Mere *pro forma* efforts are not acceptable and will be rejected by the General Manager, DBE Program.
>
> Good Faith Efforts require that the bidder consider all qualified DBEs, who express an interest in performing work under the contract. This means that the bidder cannot reject a DBE as unqualified unless the bidder has sound reasons based on a thorough investigation of the DBE's capabilities. Further, the DBE's standing within its industry, membership in specific groups, organizations or associations and political or social

[15] 49 CFR § 26.53(b)(3).

[16] For further information contact Mr. Donald Mayes, Manager, DBE Contract Compliance at 312-664-7200, ext. 3519.

affiliation (for example, union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the Contractor's efforts to meet the contract DBE participation goal.

The following list, which is not exclusive or exhaustive, sets forth the types of actions, which indicate good faith efforts on the part of a bidder to meet the DBE goal. The extent and type of actions required will vary depending on such things as industry practice; the time available for submitting a bid and the type of contract involved.

A. Attendance at a pre-bid meeting, if any, scheduled by the Authority to inform DBEs of subcontracting opportunities under a given solicitation.

B. Advertisement in general circulation media, trade association publications, and minority-focus media for at least twenty (20) days before bids are due. If 20 days are not available, publication for a shorter reasonable time is acceptable.

C. Written notification to capable DBEs that their interest in the contract is solicited.

D. Documentation of efforts to negotiate with DBEs for specific sub-contracts including at a minimum:

    1. The names, addresses, and telephone numbers of DBEs that were contacted and the date(s) of contact.

    2. A description of the information provided to DBEs regarding the plans and specifications for portions of the work to be performed.

    3. A statement explaining why additional agreements with DBEs were not reached.

E. For each DBE the bidder contacted but rejected as unqualified, the reason for the bidder's conclusion.

F. Documentation of efforts made to assist the DBEs contacted that needed assistance in obtaining bonding or insurance required by the bidder or the Authority.

G. Documentation of efforts to utilize the services of small business organizations, community and contractor groups to locate qualified DBEs.

H. Documentation that the bidder has broken out contract work items into economically feasible units in fields where there are available DBE firms to perform the work.

I. Evidence that adequate information was provided to interested DBEs about the plans, specifications and requirements of the contract, and that such information was communicated in a timely manner.

J. Documentation of any efforts made to assist interested DBEs in obtaining necessary equipment, supplies, materials or related assistance or services.

GOOD FAITH EFFORTS RECONSIDERATION

If it is determined that the apparent successful low bidders have failed to meet the requirements of the contract goal/good faith efforts, the Authority will provide them with ONE opportunity for administrative reconsideration, before the Authority awards the contract. This reconsideration will include the following:

A. The bidder will be permitted to either provide written evidence or to present oral argument at a pre-scheduled time that the documentation it submitted with its bid met the DBE goal and/or showed good faith efforts to do so. No new evidence of good faith efforts may be presented after the bid submission deadline.

B. The Authority's Reconsideration Officer will review the evidence presented by the bidder and issue a written determination that the bidder has: 1) met the DBE goal; 2) not met the DBE goal but has made adequate good faith efforts to do so; or 3) has not met the DBE goal and the good faith efforts made were not adequate.

C. The decision of the Authority's Reconsideration Officer is final and may not be appealed to the Authority, its funding agencies or the USDOT.

D. The Authority will not award a contract to any bidder who does not meet the contract DBE participation goal or show good faith efforts to meet that goal. Thus, it is essential that all bidders submit ALL relevant documentation concerning the DBE goal and/or good faith efforts in the envelope or package containing their sealed bid.

7.3.5.5 Counting DBE Participation toward Goals

REQUIREMENT
49 CFR § 26.55--*How is DBE Participation Counted Toward Goals?*-- sets forth the criteria to be used in counting DBE participation toward DBE contract goals. Grantees should refer to this section and not rely solely on the discussion below since the section may contain relevant additional details not included here.

DISCUSSION

49 CFR § 26.55 defines the methodology for counting DBE participation toward contract goals. *Grantees must be familiar with the details of this section, not all of which are discussed here.* The basic principles of this section are summarized below:

1. **When a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward DBE goals.**

   (a) For construction contracts, count the entire amount of that portion of the contract that is performed by the DBEs own forces, including the cost of supplies purchased and equipment leased by the DBE for the work.

   (b) For professional, technical, consultant or managerial services contracts, count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

   (c) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

2. **When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work that the DBE performs with its own forces toward DBE goals.**

3. **Count expenditures to a DBE contractor only if the DBE is performing a *commercially useful function* on that contract. This section sets forth a number of criteria for determining when a DBE is performing a *commercially useful function*. Included among these criteria for determining when a DBE is performing a commercially useful function is a requirement that the DBE perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or that the DBE does not subcontract a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved. Grantee decisions on commercially useful functions matters are subject to review by FTA, but are not administratively appealable to DOT. This section also contains detailed guidance for: (i) determining whether a DBE *trucking company* is performing a *commercially useful function,* and (ii) how to count DBE participation under**

several scenarios, including DBE ownership of the trucks and circumstances when the trucks are leased from a non-DBE owner. [17]

4. **For expenditures with DBEs who supply materials or supplies, this section establishes rules for counting DBE participation based upon whether the DBE is a manufacturer or a regular dealer. For expenditures with DBE manufacturers, count 100 percent of the cost of the materials or supplies. For expenditures with DBEs who are regular dealers, count 60 of the cost of the materials or supplies.**

5. **For purchases of materials and supplies from a DBE, which is neither a manufacturer nor a regular dealer, do not count any portion of the cost of the materials and supplies toward DBE goals. However, fees or commissions charged by a DBE for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, may be counted toward DBE goals, provided they are reasonable and not excessive as compared with industry practices.**

6. **Do not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or your overall goal until the amount being counted toward the goal has been paid to the DBE.**

Best Practices

Following is a solicitation provision developed by the Chicago Transit Authority (CTA) that defines how the Authority will evaluate and count DBE participation. [18]

COUNTING DBE PARTICIPATION TOWARD THE CONTRACT GOAL

The inclusion of any DBE by the bidder in its bid documents shall not conclusively establish the bidder's eligibility for full DBE credit for the firm's participation in the contract. The amount of DBE participation credit shall be based upon an analysis by the General Manager, DBE Program, of the specific duties which will be performed by the DBE.

The bidder may count toward its DBE goal only expenditures to firms which are currently certified by the IL UCP (or with the Authority prior to the implementation of the IL UCP) and which perform a commercially useful function. A firm is considered to perform a commercially useful function when it is responsible for the performance of a distinct element of the work and carries out its responsibilities by actually performing, managing and supervising the work involved.

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[17] - Paragraph (d).

[18] - For further information contact Mr. Donald Mayes, Manager, DBE Contract Compliance at 312-664-7200, ext. 3519.

To determine whether a firm is performing a commercially useful function, the General Manager, DBE Program, will evaluate the amount of work subcontracted, industry practices and other relevant factors. The General Manager, DBE Program, reserves the right to deny or limit DBE credit to the bidder where any DBE is found to be engaged in substantial pass-through activities with others.

DBE participation shall be counted toward the DBE goal in the contract as follows:

A. Once a DBE is determined to be eligible in accordance with these rules, the total dollar value of the contract awarded to the DBE may be counted toward the DBE goal except as indicated below.

B. A bidder may count toward its DBE goal that portion of the total dollar value of a contract with an eligible joint venture equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces.

C. Consistent with normal industry practices, a DBE may enter into subcontracts. If a DBE subcontracts more than thirty percent (30%) or a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the DBE shall be presumed not to be performing a commercially useful function. Evidence may be presented by the bidder involved to rebut this presumption.[19]

D. When a DBE subcontracts a part of the work under the contract to another firm, the value of the subcontracted work may only be counted towards the DBE goal if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count towards the DBE goal.

E. The bidder may count one-hundred percent (100%) of its expenditures for materials and supplies required under the contract and which are obtained from a DBE manufacturer towards the DBE goal. The bidder may count sixty percent (60%) of its expenditures for material and supplies under the contract obtained from a DBE regular dealer towards its DBE goal. The terms "manufacturer" and "regular dealer" are defined in 49 C.F.R. Part 26.55(e)(1)(ii) and (2)(ii).

F. The bidder may count towards its DBE goal expenditures to DBEs which are not manufacturers or regular dealers, such as fees or commissions charged for services and assistance in the procurement of essential personnel, facilities, equipment, materials or supplies and transportation charges as set forth in 49 C.F.R. Part 26. However, the General Manager, DBE Program, must determine the fee or charge to be reasonable and not excessive as compared with fees or charges customarily allowed for similar services.

[19] The CTA requirement is more restrictive than the CFR.

G. The bidder must use good business judgment when negotiating with subcontractors and take a DBE's price and capabilities into consideration. The fact that there may be some additional costs involved in finding and using DBE firms is not sufficient reason to fail to meet the DBE goal set forth in the contract, as long as such costs are reasonable.

7.4 CERTIFICATION: STANDARDS AND PROCEDURES

REQUIREMENT
49 CFR Part 26, Subparts D and E, prescribe standards to be applied and procedures to be followed when certifying businesses as DBEs. *Grantees must use the new certification standards for all decisions issued after March 4, 1999.* Grantees must also determine whether all disadvantaged *owners of current certified firms meet the personal net worth standard by September 1, 1999.* APPENDIX E to Part 26 contains guidance as to how grantees are to make individual determinations of *social and economic disadvantage*.

DISCUSSION

"Certification: Standards and Procedures" is not normally a procurement office function, and detailed guidance may be found at the Web site of FTA's Office of Civil Rights (http://www.fta.dot.gov/office/civil) – See "Final Rule" published in the Federal Register.

7.5 EXEMPTIONS AND WAIVERS

REQUIREMENT
49 CFR §26.15 *How Can Recipients Apply for Exemptions or Waivers?* describes the provisions made by DOT for the granting of exemptions and waivers to the requirements of the DBE regulations.

DISCUSSION

There is a distinction made in this section between *exemptions* and *waivers.* The procedures to be followed when applying for *exemptions* and *waivers* are described in §26.15.

***Exemptions* are for unique situations that are most likely not to be either generally applicable to all recipients or to have been contemplated in the rulemaking process. If such a situation occurs and it makes it impractical for a particular grantee to comply with a provision of part 26, the grantee should apply for an exemption from that provision. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part, that make the grantee's compliance with a specific provision of this part impractical.**

***Waivers*, by contrast, are not designed for extraordinary circumstances where a grantee may not be able to comply with part 26. *Waivers* are for situations where a grantee believes that it can better accomplish the objectives of the DBE program through means other than the specific provisions of part 26. The waiver provision is designed to ensure that DOT and a grantee can work together to respond to any unique local circumstances. Grantees are encouraged to carefully review the circumstances in their own jurisdictions to determine what mechanisms are best suited to achieving compliance with the overall objectives of the DBE program. If a grantee believes it is appropriate to operate its program differently from the way that a provision of Subpart B or C provides, including, but not limited to, any provisions regarding administrative requirements, overall or contract goals, good faith efforts or counting provisions, it can apply for a waiver. For example, waiver requests could pertain to such subjects as the use of a race-conscious measure other than a contract goal, different ways of counting DBE participation in certain industries, use of separate overall or contract goals to address demonstrated discrimination against specific categories of socially and economically disadvantaged individuals, the use or wording of assurances, differences in information collection requirements and methods, etc.**

Chapter 8

8 - Contract Clauses

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8.1 FEDERAL REQUIREMENTS

8.1.1 Sources of Model Federal Clauses and Applicability

REQUIREMENT
§ 16 of FTA Circular 4220.1E requires that grantees evaluate Federal statutory and regulatory requirements for relevance and applicability to a particular procurement. Appendix A.1 of this Manual contains a discussion of each of the most generally applicable requirements, including the types of contracts to which each applies, any specific wording that must be incorporated in your contracts, suggested wording where specific wording is not mandatory, and the applicability to subcontracts.

DISCUSSION

FTA grantees recognize that the most significant of the strings attached to the receipt of federal funds is the requirement to comply with federal statutes and regulations applicable to their project or particular contract.

You will want to be able to determine exactly which clauses are required for a specific procurement because the incorporation of unnecessary or loosely drafted clauses can:

- **discourage competitors,**
- **cause confusion for anyone involved with the contract, and**
- **ultimately result in additional costs for your agency.**

Appendix A.1 of this manual discusses each of the most generally applicable clauses. Knowing that a particular law must be complied with and that appropriate language must be included in a third party contract, still leaves the Grantee trying to draft or incorporate a clause that meets those requirements. The clause-by-clause discussions in Appendix A.1 have been developed by FTA to assist you.

Best Practices

Appendix A.1 of this Manual contains thirty model contract clauses that are either federally required or are suggested model clauses that you may include in contracts. The clauses contained in this Appendix include the following common elements which will be helpful to grantees in deciding if a specific clause is required in a particular procurement:

Applicability to Contracts - discusses the types of contracts for which the clause is applicable.

Flow Down - discusses to which prime contractors and which level of subcontractors the clauses apply.

Mandatory Clause/Language - includes the model clause, identified by FTA as either a required (specified) clause or a suggested-language clause.

The narratives provided with the individual clauses in the Appendix indicate the source of the clause, if required. Many of the required clauses come directly from requirements in various sections of the Code of Federal Regulations (CFR) which is published by various executive departments of the federal government. The most common requirements for FTA grantees come from various parts of Title 49 of the CFR, published by the Department of Transportation. Requirements of the Department of Labor (such as Davis-Bacon Act clauses) originate as specific language in Title 29 of the CFR. 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 grantee procurements, one advantage of using FAR clauses in the absence of a specific requirement imposed upon your Agency is that a body of federal law has been developed which interprets those clauses. [1]

Your State, local jurisdiction, or transit Agency may have enacted a procurement code or body of regulations that actually establishes specific clauses which you must use. In that case, you will be obligated to use what has been established for you. Many of the recent enactments of those codes or regulations are adaptations of the American Bar Association's *Model Procurement Code for State and Local Governments*. [2]

You may have the ability to incorporate clauses by reference (such as, title, date and where it can be found) in your contracts. To the extent clauses you want to incorporate are published in a Federal, State, or local statute, code, or ordinance, or in an official regulation such as the CFR, you should be able to incorporate those provisions directly into your contractual document by reference only. You can check with your supporting legal counsel on what clauses you can and cannot incorporate by reference and the manner in which they may be incorporated. It is doubtful you would ever be able to incorporate by reference a clause that was only published in an FTA Circular, because of the way FTA Circulars are published (i.e. they are not officially published in the *Federal Register*).

8.1.2 Davis-Bacon Act

REQUIREMENT
§ 24 of the Master Agreement delineates the Grantee's obligations to comply with the employee protection requirements of the Davis-Bacon Act. For construction activities exceeding $2,000 performed in connection with an FTA-funded Project, the Recipient of those funds agrees to comply with, and assure compliance with, the requirements of 49 U.S.C. § 5333(a), the Davis-Bacon Act, [3] and the implementing regulations of the Department of Labor at 29 CFR Part 5. In addition to the requirements of the statute and regulations, the Recipient also agrees to report to the FTA every suspected or reported violation of the Davis-Bacon Act or its Federal implementing Regulations.

[1] - Although the relevance of that law will vary from state to state, most individual states will not have interpreted federal statutes and clauses and will frequently look to the federal common law, as interpreted by the Comptroller General of the United States and the various boards and courts, for guidance in interpreting that law and those clauses.

[2] - The Model Procurement Code and recommended Regulations may be available in your local public library or may be purchased from the American Bar Association. It is recommended that you contact the following for further information: Member Services, P.O. Box 10892, Chicago, Illinois 60612-0892.

[3] - Act of March 3, 1931, 46 Stat. 1491, as amended; codified at 40 U.S.C. § 276a et seq.

DISCUSSION

The Davis-Bacon Act (the Act) provides that contracts in excess of $2,000 to which the United States is a party (i.e., federal funds are involved) for construction, alteration, or repair (including painting and decorating) of public buildings or public works within the United States shall contain a clause that no laborer or mechanic employed directly upon the site of the work shall receive less than the prevailing wage rates as determined by the Secretary of Labor. [4] The clause mandated by the Act and its implementing federal regulations is found in Appendix A.1 of the Manual. The purpose of this section in the Manual is to discuss the practical issues surrounding the requirements of the Act and the regulations implementing it.

Best Practices

Federal Wage Determinations - When a construction project is being performed with federal funds, laborers and mechanics employed directly upon the site of the work shall be paid a minimum wage which is determined by the Secretary of Labor. That rate of pay is referred to as the "Davis-Bacon wage rate" and is specifically identified in the contract between the Recipient and the Contractor.

Types of Wage Determinations - Federal wage determinations are of two types: (a) General Wage Determinations and (b) Project Wage Determinations. *General wage determinations* contain prevailing wage rates for the types of construction designated in the determination, and they are used in contracts performed within a specified geographical area. They contain no expiration date and remain valid until modified, superseded, or canceled by a notice in the Federal Register by the Department of Labor. These determinations should be used whenever possible.

Project wage determinations are issued at the specific request of the grantee. They are used only when no general wage determination applies and they are effective for 180 days from the date of the determination.

It is the obligation of the contracting officer to ensure that a copy of the most current wage determination of the Department of Labor (DOL) is actually included in the solicitation and ensuing contract. The Wage and Hour Division of the DOL is responsible for the publication of wage determinations. Such determinations are numbered, dated, and issued as different rate schedules, depending upon the type of construction involved (building, residential, highway, or heavy construction). [5]

[4] - For a thorough discussion of the labor standards for contracts involving construction, *see* FAR Subpart 22.4.

[5] - See generally, FAR § 22.404-2(c) for discussion of the different types of construction.

State Wage Determinations on Federally Funded Projects - Your state may also prescribe minimum wages and benefits for public works projects. *If your state has established prevailing wages that are higher than Davis-Bacon Act rates, you should get advice of counsel to determine whether or not the state law or Davis-Bacon Act rate prevails, however in no event can rates be lower than Davis-Bacon Act rates.*

Where to Obtain Wage Determinations - General wage determinations may be found in the Government Printing Office document entitled *General Wage Determinations Issued Under The Davis-Bacon and Related Acts.*

Subscriptions to this information are available electronically [6] and by hard-copy. [7] The decisions are included in six different volumes, arranged by state. If ordering a hard-copy subscription, only get the volume that includes your state. An annual edition is published in January or February of each year and then updated weekly throughout the year as part of the loose-leaf service.

This publication is available at each of the 50 Regional Government Depository Libraries and many of the Government Depository Libraries across the country. In large metropolitan areas, this document may also be available in a central public library as well as through local offices of your state's department of transportation. In addition, The Davis-Bacon Act wage rates can be accessed on the Internet at http://159.185.2:80/wagerate. This site is maintained by the General Services Administration (GSA).

If you are involved in a project that will involve the issuance of multiple construction-related solicitations over an extended period of time, you may want your own copy of this document. This is not only for convenience but also ensures that your solicitations and contracts contain the most up-to-date determinations. [8]

Requesting a Wage Determination - As you start a project involving construction, one of the best personal contacts you can make is with the local DOL representative who will be monitoring your contract for compliance with the Davis-Bacon minimum wage requirements. If a general wage determination is available for your area, you may use it without notifying the Department of Labor. If a general determination is not available for your area, you can work with your local

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6 - In a *Federal Register* Notice of June 14, 1996, the Chief, Branch of Construction Wage Determinations advised that wage determinations issued under the Davis-Bacon and related Acts are available electronically by subscription to the FedWorld Bulletin Board System of the National Technical Information Service (NTIS) of the U.S. Department of Commerce. A telephone contact is (703) 487-4630.

7 - The same Notice advised that hard-copy subscriptions may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 with a telephone contact at (202) 512-1800.

8 - The cost of the hard-copy subscription (between $440 and $830 per volume) is a minuscule investment for your project library when considering the contractual impacts of the wage determinations which will be discussed below.

DOL representative in requesting either a general wage determination or a project determination.[9] Do not hesitate to utilize the services of a project's design services professional to assist in obtaining information about the latest wage determinations. In all likelihood, that firm will know precisely what the requirements are and who to contact at the DOL.

Because the process to make a determination takes at least 45 days, it is important to know early in the project whether or not a determination is available for your area. The request to have a determination made needs to be submitted to the DOL 45 to 60 days before the solicitation is to be issued.

Wage Determinations and Your Solicitation/Contract - The clause and regulations require that the wage determination be physically attached to the solicitation. The wage determination cannot be incorporated by reference. If the solicitation is issued without a wage determination included, bids may not be opened until a reasonable time after the wage determination has been furnished to all bidders and incorporated into the solicitation by amendment.

What if the wage determination expires before award? It should be noted that *general wage determinations* never expire and remain valid until modified, superseded or canceled by DOL. But *project wage determinations* do expire. In the event that your project wage determination expires or your general wage determination is superseded by a new determination *before bids are received*, you must request a new project determination (if using a project wage determination) and incorporate the new rates in a solicitation amendment in sufficient time for bidders to amend their bids. If the new determination does not change the wage rates and would not cause bidders to change their bid prices, you should amend the solicitation to include the number and date of the new determination.

If the wage determination expires after bid receipt but prior to award, you should request an extension of the determination from DOL's Wage and Hour Division. If necessary, award of the contract should be delayed until the request for extension has been granted or a new wage determination has been issued. If the request for extension is denied and a new wage determination issued that changes the wage rates for classifications to be used in the contract, the contracting officer may either cancel the solicitation and re-advertise with the appropriate determination or award the contract and incorporate the new determination effective on the date of contract award. [10] If the new wage determination did not change any wage rate, the

[9] - The procedures to be followed in requesting these determinations are found in 29 CFR Part 1 and in FAR § 22.404-3.

[10] - In this case, the grantee has the discretion, depending upon the terms of their solicitation documents, to either award to the low bidder at the price bid, or to equitably adjust the contract price for any increased or decreased cost of performance resulting from any changed wage rates.

contracting officer should award the contract and modify it to include the number and date of the new determination. [11]

What if the wage determination is modified before award? *If the wage determination is modified (as opposed to expires) before bids are received*, whether or not it must be included in the solicitation is determined by the time of receipt of the modification by the contracting agency or the time of its publication in the *Federal Register*. The modification is effective and must be included in the solicitation if (a) it is received by the contracting agency, or notice of the modification is published in the *Federal Register*, 10 or more calendar days before the date of bid opening or (b) it is received by the contracting agency or notice of the modification is published in the *Federal Register*, less than 10 days before bids are due to be opened unless the contracting officer finds that there is not reasonable time to notify bidders of the modification.

If the modification is received (or notification of the modification published in the Federal Register) after bid opening, it is not effective and shall not be included in the solicitation.[12] You may have a situation where an "effective modification" (i.e., received by the contracting agency or published in the *Federal Register* 10 days prior to the bid opening date) is received by the contracting officer at some time later than it was received by the contracting agency. In this case, if the "effective modification" is received by the contracting officer prior to bid opening, the bid opening date shall be postponed to allow a reasonable time to amend the solicitation to incorporate the modification and permit bidders to consider the impact of the modification on their bids. If the modification is received after bid opening, but prior to award, the same procedures apply as in our earlier discussion about new wage determinations received after bid opening, but prior to award. If the effective modification is not received by the contracting officer until after award, the contracting officer must modify the contract to incorporate the wage modification retroactively to the date of contract award and equitably adjust the contract for any increased or decreased cost of performance resulting from any changed wage modifications.[13]

What if the Wage Determination is modified after award? It is recommended that grantees incorporate language such that contractors are obligated to pay prevailing wages throughout the life of the project and are not entitled to change orders for increased costs associated with any change in the prevailing wage made after award.

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[11] - Rules relating to expiration of wage determinations are discussed in detail at FAR § 22.404-5.

[12] - If award of the contract is not made within 90 days after bid opening, the modification becomes effective unless the Wage and Hour Division Administrator extends the 90 day period. If an extension is not granted, the modification is treated the same as a new wage determination and the same procedures as discussed above apply.

[13] - Rules relating to actions to be taken by the contracting officer in the event wage determinations are modified may be found in FAR § 22.404-6.

As you can see from this discussion, you should not wait until you are ready to issue the solicitation to start checking on the Davis-Bacon wage rates for your area and it should be equally obvious that a good working relationship with your local Department of Labor officials is very important. They generally are very cooperative and helpful in answering any questions you may have and notifying you of impending changes or revisions to existing wage determinations that would impact your contract because it is in their best interests that your project run smoothly from a minimum wage standpoint.

Contract Administration and the Davis-Bacon Act - Once the contract is awarded, it is initially the responsibility of the contracting officer to ensure that the contractor comply with the provisions of the contract clause. This means ensuring that the appropriate signs are available and posted, as well as ensuring that the appropriate payrolls and certificates are submitted not less frequently than weekly. If you have a construction management contractor, you may want to assign that firm the task of checking payrolls on a regular basis and spot- check the pay of individuals against the actual work that they are performing. The failure of the contracting officer to properly monitor the contractors compliance with Davis-Bacon may result in a determination by DOL that your agency is responsible for payment of the back wages.

If you do not have such a contractual relationship and your construction management is done "in-house," the contracting officer will have responsibility for compliance checks. Once you have reviewed the payrolls, they should be retained unless requested by an appropriate FTA official. In your initial meeting with the FTA regional officials for your project (or this particular contract) make sure it is clear to whom the payrolls should be transmitted. FTA may request that you hold them on-site or at the agency for them to review and not actually transmit them. FTA may also delegate the review function to its Project Management Oversight contractor.

Complaint Process - If DOL comes to the site to investigate a complaint (often the way minimum wage discrepancies are uncovered), you (and the contractor) will want to cooperate in that investigation. If a determination is made that the contractor is not in compliance with the Davis-Bacon Act contractual provisions, it is the contracting officer's responsibility to ensure that DOL and the FTA are informed of the discrepancy. If it is determined that back wages are owed, you will receive written communication to that effect from the DOL and the FTA and you should comply very strictly with that direction -- at this point in time, it is an issue between the contractor and the DOL, and the DOL regulations govern the reviews and appeals from determinations of that type.

8.1.3 Cargo Preference

REQUIREMENT
§ 14.b of the Master Agreement sets forth the Grantee's obligations to comply with the requirements of the United States Maritime Administration regulations entitled "Cargo Preference - U.S. -Flag Vessel," found at 46 CFR Part 381. Specifically, the grantee is obligated to incorporate the clause found at 46 CFR Section 381.7(b) into contracts in which equipment, materials, or commodities may be transported by an ocean vessel.

Best Practices

The fourth model clause in Appendix A.1 to this Manual contains a suggested clause that complies with the requirements of the United States Maritime Administration at 46 CFR Section 381.7(b), which provides a suggested clause for use as well.

If your contract contemplates the shipment of any equipment, materials, or commodities by ocean vessel, a clause that meets the requirements of 46 CFR Part 381 must be included in the contract. Additionally, if a subcontractor at any tier would be responsible for the ocean vessel shipment, the clause would flow down to that subcontractor. The clause in Appendix A.1 or as found at Section 381.7(b) meets that requirement and it is recommended that either of these clauses be utilized.

If it appears you have a contract in which ocean vessel transport would be required, it is recommended you check with your legal counsel and ascertain if there are any changes to the law or the clause. Questions about this clause frequently come up in the context of rail car procurements which, until recently, invariably required the shipment of rail cars from overseas locations. It is recommended that you either be prepared to address this requirement, or be prepared to respond to any questions offerors may have at any pre-bid or pre-proposal conferences held in conjunction with those procurements.

8.1.4 Buy America

REQUIREMENT
§ 14.a of the Master Agreement requires compliance with 49 U.S.C. § 5323(j) and FTA's Buy America regulations found at 49 CFR Part 661, as well as implementing guidance issued by the FTA.

DISCUSSION

Please see, Section 4.3.3.2.2 of this Manual for a thorough discussion of the Buy America requirements. Please see the Appendix for the required clauses.

8.1.5 Fly America

REQUIREMENT
§ 14.c of the Master Agreement states that if the contract or subcontracts may involve the international transportation of goods, equipment, or personnel by air, the contract must require contractors and subcontractors at every tier to use U.S.-flag air carriers, to the extent service by these carriers is available. 49 U.S.C. 40118 and 4 CFR Part 52.

DISCUSSION

A contract for goods or equipment must contain a Fly America provision as discussed in Appendix A.1, just as it contains a Cargo Preference provision, if there is reason to expect that international air travel would be involved. Although there is no Federally prescribed language for this provision, model language is contained in Appendix A.1. If there is no possibility of international shipments or travel under the contract, these provisions are not required.

8.2 SURETY BONDS

History

The idea behind surety bonding is straightforward. One person guarantees to another that a third person will perform.

The first corporate surety bonding company in the United States, the Fidelity Insurance Company, was formed in 1865. In 1894, Congress passed the Heard Act, which required surety bonds on all federally funded projects as a result of the large number of contractors working on public projects who had defaulted and in response to complains from unpaid suppliers and subcontractors. The Miller Act (40 U.S.C. §270a et seq.) was passed in 1935 to replace the Heard Act. The Miller Act requires performance and payment bonds for all public work contracts in excess of $100,000 and payment protection, with payment bonds the preferred method for contracts in excess of $25,000. [14] Almost all states and most local jurisdictions have enacted similar legislation requiring surety bonds on public works. These generally are referred to as "Little Miller Acts.

Today, surety bonds protect virtually every public construction project in the U.S. In 1977, nearly $160 billion in public works projects were so protected with surety bonds. From 1990-1997, more than 80,000 contractors failed, with losses of $21.8 billion, according to Dun and Bradstreet's *Business Failure Record.* From 2001-2003, surety companies incurred more than $1.8 billion in losses from surety bonds, according to The Surety Association of America.

Types of Surety Bonds

Surety Bond - A written agreement whereby one party, called the *surety*, obligates itself to a second party, called the *obligee* (the owner, grantee), to answer for the default of a third party, called the *principal* or *obligor*. Surety bonds used in construction are called *contract surety bonds*. There are three primary types of contract surety bonds: *bid bonds*, *performance bonds*, and *payment bonds*.

[14] The Miller Act does not apply to grantees. Bonding requirements for grantees are prescribed in the common grant rule, 49 CFR §18.36(h).

Bid Bond (or Bid Guarantee) – A promise from a surety (or a certified or cashier's check given by a bidder) for a supply or construction contract to guarantee that the bidder, if awarded the contract within the time stipulated, will enter into the contract at the price bid and furnish the prescribed performance and/or payment bond. Default ordinarily will result in liability to the obligee for the difference between the amount of the principal's bid and the bid of the next low bidder who can qualify for the contract. The liability of the surety is limited to the bid bond penalty. Contractors that have a relationship with a surety can normally obtain bid bonds at no cost. Bid bonds are not usually appropriate for negotiated procurements due to the nature of the process.

Performance Bond - A promise from a bonding company ("the surety") to perform (or cause to be performed) those obligations of the contractor ("the principal"), when the contractor fails to perform its obligations, in an amount up to but not exceeding the amount of the bond ("penal sum"). Performance bonds can incorporate payment bond (labor and materials) and maintenance bond liability (see below). A performance bond protects the owner (grantee) from financial loss should the contractor fail to perform the contract in accordance with its terms and conditions. Once a surety bond is issued, it cannot be withdrawn or cancelled. General contractors may also act as the obligee when bonding subcontractors. General contractors may require subcontractor bonds if the subcontractor is a significant part of the job or a specialized contractor that is difficult to replace.

Payment Bond - A promise from a surety that guarantees payment to certain subcontractors, laborers and suppliers for the labor and materials used in the work performed under the contract. Payment bonds are also called *labor and material bonds*. These bonds protect laborers and suppliers in the event the contractor fails to pay them. The surety's obligation is limited by the amount of the bond.

Maintenance Bond - A maintenance bond normally guarantees against defective workmanship or materials. However, maintenance bonds occasionally may incorporate an obligation guaranteeing "efficient or successful operation" or other obligations of like intent and purpose.

It is important to note that surety bonds are not intended to protect the contractors that post them. These bonds are for the protection of the owner of the construction project and for the protection of laborers, material suppliers and subcontractors. Since mechanic's liens cannot be placed against public property, the payment bond may be the only protection these claimants have if they are not paid for the goods and services they provide to the project. Under normal circumstances, sureties do not charge a separate premium for Payment Bonds.

General Indemnity Agreement

When a surety guarantees the performance of a firm (the principal), the principal remains liable for this obligation to the surety in the event of a contract default by the principal. The principal is obligated to reimburse the surety for whatever sums the surety is required to pay out to

complete the principal's contract. Many contracting firms do not have the capital to assure this repayment, and so most surety companies require a general agreement of indemnity (GAI) to be signed not only by the firm, but by individuals willing to support the firm. This might be the owner of the firm, the spouse of the owner, a parent corporation or other individuals willing to risk their assets for the firm.

Public vs. Private Sectors

Performance bonding is not typical in large private sector contracts but is required in the public sector. Public construction contract performance bonding is more common because:

- The public interest is served by the surety industry's protection of taxpayer dollars expended for public sector projects;
- the public sector undertakes large, fixed price public works projects;
- unforeseen costs could easily bankrupt a construction contractor that is a pure service organization with few assets;
- public agencies accept the lowest responsive bid from a responsible bidder without an opportunity to fully consider and adjust the contracting strategy and terms to the apparent low bidder; and
- if a contractor is unable to perform, (e.g. because it is having difficulty obtaining funds to pay suppliers and employees) and if the work is slowed down and ultimately turned over to other forces to complete, the cost to the public agency of mobilizing the substitute forces and picking up each of the work tasks where the failed contractor left them is higher than in a typical supply contract where there are usually a number of suppliers offering the product at competitively established market prices.

Payment Bonds have a related but secondary purpose. Usually in the public sector, a contractor's suppliers cannot place liens on the material and work supplied when payment to the subcontractor is overdue. States often protect public property and services by exempting public works from materialmen's liens. Therefore, although performance bonds alone would often guarantee payment to subcontractors, additional payment bonds are often required in construction contracts to assure there are no disputes over potential performance bond liability to satisfy second and third tier subcontractor claims.

Prequalification of Contractors

Most surety companies are subsidiaries or divisions of insurance companies, and both surety bonds and traditional insurance policies are risk transfer mechanisms regulated by state insurance departments. However, traditional insurance is designed to compensate the insured against unforeseen adverse events. The policy premium is actuarially determined based on aggregate premiums earned versus expected losses. Surety companies operate on a different business

model. *The surety prequalifies the contractor based on financial strength and construction expertise*. Since the bond is underwritten with little expectation of loss, the premium is primarily a fee for prequalification services and the allocation of the surety's capital to protect the obligee against the possibility of loss.

Although the bonding companies perform this prequalification for their own purposes and their interests are similar to those of the transit agency, the transit agency is still required to review potential contractors' responsibility before award. While surety bonds are a necessary condition in the determination of responsibility, they alone are not sufficient. Prequalification of contractors is the primary focus of surety underwriters. Surety bond underwriters must analyze applicants closely since they are committing the assets of their companies to guarantee the contractor's performance and payment of its suppliers. Underwriters must be certain that only those contractors who can complete a project receive a bond, and they must be fully satisfied that the contractor's business is well-managed and profitable. Prequalification is one of the most valuable services of the surety bond process. The process involves underwriters satisfying themselves that the contractor has:

- Good references and reputation;
- A track record of successful operations in the past and the ability to meet current and future obligations;
- Experience matching the contract requirements;
- The necessary equipment to do the work or the ability to obtain it;
- The financial strength to support the desired work program;
- An excellent credit history, and an established bank relationship and line of credit.

Surety bonds are obtained through insurance agents and brokers, called *producers.* These producers help their contractor clients during the prequalification process and assist them in developing a business relationship with the surety bond company. [15]

Surety Bonds vs. Bank Letters of Credit

Bank letters of credit are discussed below for consideration under "Best Practices" in the context of non-construction contracts. At first glance it may appear that letters of credit and surety bonds offer the same degree of financial protection. However, a more thorough review reveals that surety bonds provide greater benefits to both the grantee (obligee) and the contractor (principal).[16]

[15] The National Association of Surety Bond Producers (NASBP) web site address is: www.nasbp.org.

[16] An unforeseen bankruptcy by the contractor is especially troublesome, in that the bankruptcy court could freeze the funds committed by the LOC, rendering the LOC of no value to the grantee. *The grantee must be diligent to monitor the contractor's condition, and call the funds under the LOC if financial trouble is expected. There is no such danger with surety bonds.*

A Comparison	
Bank Letters of Credit	**Surety Bonds**
Prequalification Services:	
The underwriting bank focuses primarily on the quality and liquidity of the underlying collateral; i.e., on the ability of the contractor to repay any draws on the LOC.	The essence of surety underwriting is prequalification. The surety examines the contractor's entire business operation, checking for adequate finances, necessary experience, organization, existing work-load and its profitability, and management skills to successfully complete the project for which the bond is required.
Claims - Access to Funds:	
The beneficiary must make a demand prior to expiration date. No funds are available after expiration date, even for liabilities incurred prior to expiration. The bank has no obligation to complete the project. There is no completion clause in a LOC. The task of administering completion of the contract is left to the owner. The owner must evaluate work done, develop detailed specifications for completion of the work and solicit bids or negotiate (depending on state law) for a new contractor to complete the work. Under a performance bond, these tasks are the responsibility of the surety. The owner must determine the validity of claims by subcontractors, laborers, and material suppliers. If there is not enough money from the letter of credit to pay all of the claims, then the owner has to decide which claims will be paid and which will be rejected.	In most cases, a bond covers liabilities that were incurred during the bond term. A claim may be made on the bond after the termination of the bond for liabilities incurred prior to cancellation or nonrenewal. The surety has obligations to both the owner and the contractor. If the contractor and owner disagree on contract performance issues and the owner declares the contractor in default, the surety must investigate the claim. The surety has several alternatives if the Contractor defaults: 1. Finance the original contractor or provide support necessary to allow the contractor to finish the project; 2. Arrange for a new contractor to complete the contract; 3. Assume the role of the contractor an subcontract the remaining work; 4. Pay the penal sum of the bond. With payment bonds, the surety pays the rightful claims of certain subcontractors, laborers and suppliers.

Borrowing Capacity: Specific assets are pledged to secure bank letters of credit. LOCs diminish an existing line of credit, and are reflected on the contractor's financial statement as a contingent liability. The tying up of assets, or the reduction of an available line of credit, is counter-productive to both the owner and the contractor. This can adversely affect the contractor's cash flow during contract performance. Subcontractors and material suppliers may be reluctant to provide labor and supplies to the contractor since they have no access or rights to funds available from the LOC.	With few exceptions, performance and payment bonds are issued on an unsecured basis. They are usually provided on the strength of the corporate and personal signatures of the company owners. The issuance of bonds has no effect on the contractor's bank line of credit. Subcontractors and material suppliers may be more willing to provide labor and materials to the contractor when they are protected by a payment bond.
Cost: Cost is generally 1% of the contract amount covered by the LOC- e.g., if the LOC covers 10% of contract, Cost = 1% x (10% x Contract Amount).	Generally ½ - 2% of contract price. The premium includes 100% performance bond, a 100% payment bond, and normally a one-year maintenance period.

Cost of Bonds

The price or premium for a bond will vary depending on the type of construction, the contract amount, the duration of the project, the surety company, and the experience and financial strength of the contractor. Premiums range, on average, from ½ % to 2 % (or perhaps higher, and not necessarily tied to business strength) of the contract price for contractors with established bonding credit. If the contract amount changes, the bond premium will be adjusted for the change in contract price. There is usually no additional cost for bid bonds or payment bonds when purchased with a performance bond.

Bond premiums cannot be reduced by lowering the percentage of the bond from, say, 100% to 50%. Thus, it usually makes sense to require 100 percent performance and payment bonds so the owner receives maximum protection. [17] *The advantage, however, in considering a lower*

[17] It is not until one goes to the 20% level that premium rates may change.

percentage is that more contractors may be allowed to compete because some may not have the bonding capacity to get a 100% bond, but may qualify for a lesser amount. [18]

Surety bonds issued through the SBA *Surety Bond Guarantee Program* (see below) carry an additional 0.6 percent fee.

Government Oversight

Surety bond companies are regulated by state insurance departments. Surety bonds on state public works must be issued by a surety bond company licensed by the insurance department in that state. [19]

On the federal level, the U.S. Treasury Department maintains a list of surety bond companies that it has qualified to write surety bonds required for federal construction projects. To be on this list, a surety bond company must file financial and other information with the Treasury Department and undergo the Department's financial analysis. [20]

Bonding Assistance Programs

Since the early 1970s, the Small Business Administration (SBA) has operated its *Surety Bond Guarantee Program*, which provides some repayment of losses to surety bond companies from bonds they would otherwise not provide. Small contractors have performed more than $1 billion of contracts per year with the help of this SBA program.

The U.S. Department of Transportation (DOT) has established a *Bonding Assistance Program* that is administered by the Office of Small and Disadvantaged Business Utilization (OSDBU) within the Office of the Secretary. The Bonding Assistance Program offers certified minority, women-owned and disadvantaged business enterprises (DBEs) an opportunity to obtain bid, payment and performance bonds for transportation-related projects. The Program provides surety companies an 80% guarantee against losses on contracts up to $1,000,000. Bond approval and issuance are performed by the DOT approved surety companies.

A number of states have also established bond guarantee programs for contractors, as well as other special bonding assistance programs.

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[18] This appears to be true for bus manufacturers in the current business environment.

[19] To locate a state insurance department contact the National Association of Insurance Commissioners at www.naic.org. See also the U.S. Treasury List at www.fms.treas.gov/c570/index.html

[20] The Treasury List may be downloaded on the Internet at www.fms.treas.gov/c570/index.html. The Treasury List identifies the various states where the listed bonding companies are licensed and the state insurance departments with their phone numbers.

The Surety Association of America (SAA) is a nonprofit trade association that represents more than 650 U.S. and eight foreign surety bond companies. SAA has developed a *Model Contractor Development Program* (MCDP) to increase and promote the availability of surety bonds to small, minority and women contractors. The objectives of this program include:

- Educating emerging contractors about surety bonds and helping them become bondable,
- Identifying resources available to emerging contractors in obtaining their first bond, such as the SBA Surety Bond Guarantee Program and similar state and local programs,
- Providing assistance and referrals to emerging contractors in obtaining appropriate accounting, project management and financing expertise,
- Assisting these contractors with increasing their bonding capacity. [21]

SAA also offers an educational tool for contractors and subcontractors, *Your First Bond*, a videotape and brochure of what contractors need to do to apply for bonds, and other educational materials. [22]

Ratings Organizations

A.M. Best Company (Best's) is a private company that analyzes and rates insurance companies. Each year it publishes *Best's Insurance Reports, Property-Casualty*, which includes detailed profiles and financial information on almost every insurance company operating in the United States. Best's gives each company a rating (designated by an alphabetic character) and a financial size category (designated by a Roman numeral scale). Best also publishes an abbreviated version of its *Best's Key Rating Guide, Property-Casualty*, which contains only the alphabetic ratings and financial size categories of each insurance company. These books are available in many public and financial libraries or may be purchased from A.M. Best. [23]

[21] For more information about the SAA's Model Contractor Development Program, contact the Surety Association of America at 202-463-0600 or their Web site: www.surety.org.

[22] For this and other materials, contact the Surety Information Office at 202-686-7463 or their Web site: www.sio.org.

[23] Information and prices are available at www.ambest.com.

Other ratings organizations include Dun & Bradstreet, [24] Fitch Ratings, [25] Moody's Investors Service, [26] Standard & Poor's [27] and Weiss Ratings Inc. [28] FTA does not endorse any particular company or program.

8.2.1 Performance Bonds

REQUIREMENT

FOR CONSTRUCTION ACTIVITIES:

§ 15.m. (1) of the Master Agreement states that:

> Construction Activities. The Recipient agrees to provide bid guarantee, contract performance, and payment bonding to the extent deemed adequate by FTA and applicable Federal regulations, and comply with any other bonding requirements FTA may issue.

FTA Circular 4220.1E states the specific minimum bonding requirements for construction or facility improvement contracts with a value exceeding $100,000:

11. BONDING REQUIREMENTS. For those construction or facility improvement contracts or subcontracts exceeding $100,000, FTA may accept the bonding policy and requirements of the grantee, provided FTA determined that the policy and requirements adequately protect the Federal interest. FTA has determined that grantee policies and requirements that meet the following minimum criteria adequately protect the Federal interest. [29]

    a. A bid guarantee from each bidder equivalent to five (5%) percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified

[24] www.dunandbradstreet.com/us.

[25] www.fitchratings.com.

[26] www.moodys.com.

[27] http://www2.standardandpoors.com/servlet/Satellite?pagename=sp/Page/HomePg.

[28] www.weissratings.com.

[29] The language in this section has been amended from prior versions of the circular to better explain that FTA will accept a local bonding policy that meets the minimums of paragraphs a, b, and c but that a policy that does not meet these minimums still may be accepted where the local policy adequately protects the Federal interest. Grantees who wish to adopt less stringent bonding requirements generally, for a specific class of projects, or for a particular project may submit the policy and rationale to their regional office for approval.

check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified;

b. A performance bond on the part 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 a contract; and

c. A payment bond on the part of the contractor. A payment bond is one executed in connection with a contract to assure payment, as required by law, of all persons supplying labor and material in the execution of the work provided for in the contract. Payment bond amounts determined to adequately protect the federal interest are as follows: (1) 50% of the contract price if the contract price is not more than $1 million; (2) 40% of the contract price if the contract price is more than $1 million but not more than $5 million; or (3) $2.5 million if the contract price is more than $5 million.

d. A grantee may seek FTA approval of its bonding policy and requirements if they do not comply with these criteria.

State laws are sometimes specific in requiring or prohibiting security and guaranties in public procurements; performance bond requirements may apply even when the Federal requirements do not, and the state requirement may also affect bid guaranties.

FOR NON-CONSTRUCTION ACTIVITIES:

FTA does not require bonding in any amount for non-construction contracts, including rolling stock. FTA leaves the decision to require bonds for non-construction contracts to the discretion of its grantees. [30]

DISCUSSION

Construction: For construction contracts with a value exceeding $100,000, your solicitation documents must include the performance bond, payment bond, and bid security requirements specified above. Bids that do not include the required bid security are to be rejected. Your state law may require additional bond protection (e.g., for even smaller construction contracts).

[30] See FTA Dear Colleague Letter C-01-04, dated Jan. 20, 2004 – *Performance and Payment Bonding Requirements.*

Non-Construction: You may decide to include bond requirements in other procurements where your agency has a material risk of loss because of a failure of the prospective contractor. This is particularly so if the risk arises from the potential for contractor bankruptcy or financial failure at the time of partially completed work. If you require a performance bond, you may also require bid security that assures the execution of the performance bond as described in Section 4.3.3.3.2, "Bid Guarantee." Payment bonds are most typically used in construction contracts or contracts where the risk of failure of the prime contractor with debts to subcontractors is material. Since the contract is incorporated into the bond, it is essential that the grantee complies with the terms of the contract or the bond may not be enforceable.

In recent years sureties have been paying much more attention to the terms of their customers' contracts. One area of great concern to sureties in the current environment is the *length of contracts*. Here the issues tend to be *parts warranties* and *option* provisions. Sureties are tending to limit their exposure to five years, including warranties. [31] Another major surety issue affecting the transit industry, especially bus manufacturers, is the *poor financial condition of many suppliers*. The financial strength of the contractor affects the cost of the bond, as well as the ability of the contractor to secure a bond. If a grantee asks for a 100% performance bond on a bus procurement in the current environment, it may very well preclude potential suppliers from bidding. Another practice causing surety problems concerns liquidated damages; i.e., some agencies have contractual provisions that produce *unlimited liquidated damages.*

Alternative forms of acceptable security include *letters of credit* from financially secure institutions, such as banks, and cash deposits. Letters of credit are frequently used in a field or for a principal with which bonding companies have little experience. Letter of credit terms differ from bonds in that they do not provide for completion of the contract, in the event the principal is unable to perform. Procedures should be established to make certain the letter is issued by a bank or other financial institution that offers financial security similar to a bonding company. Cash deposits are not typically used except as bid security.

The FTA requirement discourages unnecessary bonding because it increases the cost of the contract and restricts competition, particularly by disadvantaged business enterprises. Bonding companies exercise their discretion and assure their profits primarily by declining to undertake excessive risks. Consequently many bidders have limited "bonding capacity." Unnecessary performance bonds reduce their ability to bid on bonded work. Small businesses with short histories may have particular difficulty obtaining a bond.

[31] Transit agencies procuring rolling stock tend to ask for ten year warranties on parts.

Best Practices

Bond Authenticity - It is essential that bonds be verified as being authentic when they are presented to owners. It is a fact that unscrupulous contractors have on occasion presented fraudulent bonds. *Owners (obligees) should always contact the surety company to confirm the authenticity of the bond that has been presented.* The Surety Association of America (SAA) maintains a list of surety companies that will assist in verifying the authenticity of a surety bond. The authenticity program is available via the Internet. [32]

Exclude Warranties from Bond – It has become increasingly difficult to obtain bonds of longer duration than two years. Since the warranty periods will greatly extend the duration of the bond, it would be best to remove any warranty requirement from the performance bond and cover the warranty risk through other techniques. Suggestions include withholding a reasonable portion of the contract price for warranty repairs and releasing the withholding in increments as the warranty time-period dissipates, or requiring a separate Maintenance or Warranty Bond in a reduced amount sufficient to cover the potential obligations of the Contractor for repairs or maintenance. This will remove a bonding obstacle and keep the bonding costs more reasonable. The key message here is to *keep long-term obligations with the manufacturers and not attempt to give them to sureties.*

Consider Letters of Credit – On non-construction contracts, where you are not required by FTA to have bonds, but where you may be required to protect your progress payments to the contractor prior to delivery of final products, consider the use of a bank *letter of credit* (LOC) from the contractor instead of a bond. A bank letter of credit (LOC) is a cash guarantee to the owner. The owner can call on the letter of credit on demand without cause. [33] Once called upon, the letter of credit converts to a payment to the owner and an interest-bearing loan for the contractor. Bonds may be an expense that you don't need to incur, and bonds may not even be available in the amounts you would need at reasonable prices. [34]

Cap the Liquidated Damages – The Contractor's maximum risk must be clearly expressed in the contract so that the surety will know how to price the risk. Damages should not be open-ended. Additionally, if damages are expressed "per day," make the daily damages accrue for *business days* only. Do not include Saturdays or Sundays since you cannot take delivery on those days.

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[32] At www.surety.org, click on "About the Industry," then "Bond Authenticity Program."

[33] A *conditional letter of credit* may require some burden of proof by the owner that the contractor has failed to perform before the bank will pay on the letter of credit. Most letters of credit are *irrevocable*, which means that both parties must agree to any changes to the letter of credit. Changes must be documented by an amendment signed by both parties.

[34] See BPPM Sections 2.4.4.2 – *Advance Payments* and 2.4.4.3 – *Progress Payments* where adequate security for these payments is discussed.

Design-Build Projects – For design-build projects and large transit capital projects (those over $200M) it would be advisable to *talk to prospective sureties before the solicitation is issued to see if the Design-Build contractors will have problems securing bonds because of the size of the project*. There are two problems to be aware of: (1) The lack of bonding capacity in the industry at the current time, and (2) The fact that surety practice has historically been based on the conventional *Design-Bid-Build* method, where design and construction are performed by separate companies and where sureties have detailed designs completed for which they can assess the performance risks. On a Design-Build project, the lack of detailed designs desired by sureties to evaluate project risk may make it difficult to obtain performance bonds for the full value of the contract. When this is the case, the grantee will want to involve their FTA regional office and request a waiver from the standard bonding requirements. It should also be noted that consultation with FTA would be advisable in any design-build project to create a reasonable bonding strategy. In any case, if a 100% bond were required by your agency, it would apply only to the value of the construction work within the design-build contract.

Technology - Surety companies like "brick and mortar" business because they understand it. They are adverse to *technology (e.g., projects requiring software development)*, and do not like to bond the *Operation and Maintenance* phase of contracts where rail cars are being bought with O&M responsibilities. If you are considering a bond in these situations, you should contact prospective sureties to determine if bonds will be available before you issue your solicitation.

Notify Surety of Problems Early – It is very important to *notify the surety of problems as soon as they occur*. When the surety is notified, and becomes involved, contractors are strongly motivated to perform because the *threat of losing the ability to obtain bonds is a very serious concern to contractors*.

If the Contractor is experiencing financial difficulties, the surety will often provide working capital to keep the contractor going. This *financial assistance* may occur without a formal declaration of default by the owner. Another form of financial assistance often provided by sureties is to guarantee a line of bank credit. This will assure a steady flow of materials to the job site and payments to subcontractors.

Sureties frequently will provide *technical assistance* in order to minimize problems and losses on a project. Many sureties employ professional engineers, accountants, and other technical staff or advisors who can help a contractor who is experiencing problems.

Sureties can provide *mediation between an owner and Contractor*. When problems occur on a construction project, it's likely that the relationship between the owner and Contractor is strained. The surety, as a third-party participant, can investigate the issues that are dividing the parties and offer workable solutions before the owner declares a default.

Subcontractor failure is a frequent cause of a prime's problems. Sureties can become involved in *assisting a subcontractor* with financing and technical help, just as they do with the prime

contractors they are bonding. They will do this to protect their bonded contractor from default. Once again, it is important that the surety be informed early of performance problems on all levels of the project so they can assist when circumstances require it.

Subcontractor Bonds – Grantees can help their prime contactors manage risk by *requiring performance bonds from major subcontractors*. If a subcontractor is a significant part of the job or so specialized that it will be difficult to find a replacement, bonding is a cost-effective way to limit the exposure of both the grantee and the prime contractor.

Remember the important contribution of the surety in *prequalifying the subcontractor*. This is an important step in ensuring that a responsible subcontractor is selected by the prime for a critical role on the project. While the cost of the subcontractor's bond will have to be paid by the prime and will be passed on to the grantee, it is nevertheless an insurance policy that can help avoid significant problems for the prime and thus for the grantee. It is also well to keep in mind that a subcontractor that is experiencing financial difficulties is more likely to complete a bonded project because corporate assets, and possibly personal assets, are at risk. This may be a singularly important factor in keeping the subcontractor performing on the job. Be sure to investigate the quality of the subcontractor's surety, using one of the industry rating companies mentioned above, and always confirm the authenticity of any bond presented.

Subcontractor bonding may also be beneficial when the prime contractor is not financially strong. For example, New York City Transit (NYCT) recently had a situation where the cost of a warranty bond was very expensive to a vehicle manufacturer because of their financial condition. In order to overcome this, the manufacturer had its major parts supplier provide the bond, and as a result the manufacturer saved $2,000 per vehicle. The supplier's cost for the bonding was significantly less since they were in excellent financial condition.

Consider More Stringent Prequalification/Responsibility Criteria - If performance bonding is a problem because the project is so large that few bidders can be fully bonded, or because of its effect on competition, you can consider other ways of reducing your agency's risk. You may (through prequalifying only strong bidders, or requiring a high standard of responsibility) be able to reduce your risk in a way that allows more competition than would result from a full performance bond requirement.

Balance the Costs of Bonding against Risks Present in a Range of Contractors - In addition to construction contracts, specialty supply contracts that involve custom manufacturing, e.g., for rail cars or buses, involve some risk of failure and consequences similar to construction situations. However, performance bonds are far less common in these situations than in construction contracts. Information technology development contracts also hold the potential for loss in the event of contractor failure, but performance bonding is less common in developmental work because the risks of failing are too expensive to insure and because the surety/contractor relationships have not developed as they have in the construction industry.

If you are seriously concerned about one or more of the following, considering your possible successful offerors, you can evaluate the need for a performance bond, in light of its cost, its effect on competition, and effect on DBEs:

- financial strength and liquidity of the offerors,
- inadequacy of legal remedies for contractor failure and the effect that failure of the contractor could have on your agency,
- difficulty and high cost of completing the contractor's work if it is interrupted,
- experience of the contractor on other contracts – whether there is a history of contract failure in a particular activity,
- degree of technical difficulty; e.g., where new working methods are required.

Consider Corporate Guaranty - Where your concern is partly that the proposers have limited financial resources, but they have relationships with financially stronger corporate entities, you could consider requiring a corporate guaranty of the contract rather than a performance bond. In this case, the parent corporation of your contractor, whose liquidity might rival the bonding company's, would promise to perform the contract should the contracting corporation fail to do so. This arrangement may not only be less expensive than a performance bond, but may also result in more influence on the contractor where contract disputes are involved.

Return Unnecessary Bid Guaranty - Because guarantees have a financial impact on proposers as long as they are in effect, unused bid guarantees should be returned to proposers as soon as it is determined that they have no reasonable chance of winning the contract. This is discussed in Section 4.3.3.3.2, "Bid Guaranty."

Surety Bond Claims and Counsel – Before a surety will assume responsibility for a contractor that you have defaulted, *the surety must be satisfied that its contractor owes a debt. The surety will conduct an investigation as a result of receiving your notice of claim*. Keep in mind that the issues of default and claims under the bond are predicated on the legal interpretation of a contractual relationship, as developed through statutes and legal precedents. This means it is critical that you seek legal assistance from counsel who is familiar with surety bonds and construction, which is a specialized field of law. Never rely on a layperson's interpretation of the contract. *Experienced counsel can save time, money, and frequently, unnecessary litigation.* The American Bar Association (ABA) Trial Tort and Insurance Practice Section's Fidelity and Surety Law Committee includes lawyers who specialize in surety law. Many state bar associations also have surety committees or construction law committees. For names of lawyers in your area, call the ABA (312) 988-5607 and ask for the FLSC membership directory or the pages for a particular state, or call the state bar association for a reference.

It is also of the utmost importance that you document the progress of your project. Remember that the surety promises to complete the contract when the "principal is in default of the contract

and has been declared to be in default by the obligee." Well documented project files will be a great asset to facilitate the surety's initial investigation and especially if the matter goes to court. See BPPM Section 11.2 – *Claims, Grievances and Other Disputes With Contractors*, paragraph titled "Avoiding Disputes Through Proper Documentation."

Indemnification Clauses– One of sureties' concerns in any construction contract today is the increasingly broad and unlimited indemnity that contractors are contractually required to provide. If this indemnification is needed to satisfy political constituencies or due to other factors, clearly stating that the liability is to be covered through insurance and not the performance and/or payment bond would eliminate one potential obstacle that sureties sometimes raise as an underwriting road block.

Grantees should not assume that contractual indemnification, whereby the contractor agrees to indemnify and hold the grantee harmless from and against various risks, is an adequate substitute for bonds or insurance. These contractual promises are only as good as the contractor's financial resources backing them. If the contractor fails to perform the contract, it is likely that the contractual indemnification provisions will be of little value. It is important, therefore, to ensure the contractor is bonded or has adequate insurance to support the indemnification clauses in the contract.

Resources – Following is a list of organizations offering information and resources related to surety bonds and insurance:

1. Surety Information Office (SIO)
   5225 Wisconsin Avenue NW, Suite 600
   Washington, DC 20015-2014
   (202) 686-7463
   www.sio.org

   SIO is the information source on contract surety bonds in public and private construction. SIO is supported by The Surety Association of America and the National Association of surety Bond Producers.

2. National Association of Surety Bond Producers (NASBP)
   5225 Wisconsin Avenue NW, Suite 600
   Washington, DC 20015-2014
   (202) 686-3700
   www.nasbp.org

   NASBP is the international organization of professional surety bond producers and brokers. NASBP represents more than 5,000 personnel who specialize in surety bonds for the construction industry and other types of bonds such as license and permit bonds.

3. The Surety Association of America (SAA)
   1101 Connecticut Avenue NW, Suite 800
   Washington, DC 20036
   (202) 463-0600
   www.surety.org

   SAA is a voluntary, non-profit, incorporated association of companies engaged in the business of suretyship. SAA represents more than 500 companies that collectively underwrite the majority of suretyship and fidelity bonds in the United States.

4. U.S. Department of the Treasury
   www.fms.treas.gov/c570

   This website offers a free download of the Federal Treasury List (Circular 570), which lists all surety companies qualified to underwrite surety bonds on federal construction.

5. The International Risk Management Institute (IRMI)
   www.irmi.com

   The IRMI site offers articles and information on surety bonds and other risk management tools, along with contact information for risk management professionals and advisors. The Expert Commentary section includes more than 500 articles on a variety of risk management issues.

6. The National Association of Insurance Commissioners
   www.naic.com

   The National Association of Insurance Commissioners site verifies that a surety company is licensed to conduct business in a particular state, and provides access to state insurance department websites.

7. The Risk & Insurance Management Society
   www.rims.org

   The Risk & Insurance Management Society website offers a number of helpful tools to assess and manage risk.

8. U.S. Small Business Administration (SBA)
   www.sba.gov/osg

   The SBA website offers information on the Surety Bond Guarantee Program, including free copies of forms required to be submitted for approval into the program and contacts for local SBA offices.

8.2.2 Options

REQUIREMENT
§ 9.i. of FTA Circular 4220.1E requires grantees to evaluate options: (1) Evaluation of Options. The option quantities or periods contained in the contractor's bid or offer must be evaluated in order to determine contract award. When options have not been evaluated as part of the award, the exercise of the options will be considered a sole source procurement. (2) Exercise of Options. (a) A grantee must ensure that the exercise of an option is in accordance with the terms and conditions of the option stated in the initial contract award. (b) An option may not be exercised unless the grantee has determined that the option price is better than the prices available in the market or that the option is the more advantageous offer at the time the option is exercised. § 7.m. of FTA Circular 4220.1E states that: Grantees shall not enter into any contract for rolling stock or replacement parts with a period of performance exceeding five (5) years inclusive of options.

DEFINITIONS

Option - A unilateral right in a contract by which, for a specified time, a grantee may elect to purchase additional equipment, supplies, or services called for by the contract, or may elect to extend the term of the contract.

DISCUSSION

If you include terms in a contract that permit you to choose, at the time of award or later, quantities and items in addition to the base amount (options), you must include the price of those quantities or items in the price evaluation of the offer before selecting an apparent low bidder or determining the competitive range for negotiations. Otherwise you may not use Federal funds for the additional quantity without a separate, non-competitive procurement process (i.e., processing as a sole-source procurement).

If you include the price in the evaluation and later choose to order the additional quantities or items, you must again review the prices to ensure that they are advantageous.

Purpose

Options are most often used where there is uncertainty as to the quantity of goods and services you will require under a contract. Rather than planning a separate, later procurement when the requirement becomes certain, and incurring potential delays in delivery of the items because of the procurement lead-time to buy additional items, you may want to specify the option to buy more in your present contract. Options may also be appropriate when there is a need for standardization of parts or interchangeability and it is best to get proposers to bid competitively on the entire potential need at the time of the first procurement, rather than processing a sole-source add-on at a later date when the supplier will be under no competitive pressures.

Another common use of options is to fit a construction project to a budget. For example, a number of elective items such as additional landscaping, signage that could be purchased separately, and a higher quality, lower maintenance finish are specified as options in a construction solicitation. When the bids are evaluated, you can elect the base construction plus those options that can be procured with the available funds. Those options that are not purchased under the basic contract would be established as options and ordered when future funding becomes available. When this approach is used, the optional items are often called "deductible options". In this case, the stated bid amount already includes the options, and each option is associated with a deduction from the stated bid. This method generally caries the clear implication to the offerors that the cost of optional items will be evaluated in determining the successful bid. If you award the contract minus certain options, and then wish later to add those optional items back, you must comply with the requirement to make a new determination that the option prices are advantageous.

Best Practices

Whenever the option quantities are a significant portion of the total potential requirement, you should carefully consider whether a *requirements* or *indefinite delivery* type of contract would better suit your circumstances and needs. A *requirements* contract would provide for filling all of your requirements for certain supplies or services during a specified time period by placing orders with the contractor who wins the competition. Your solicitation and contract would state what you believe to be a realistic estimated total quantity but you would not be legally required to order that quantity. The contract would also state the maximum limit of the contractor's obligation to deliver as well as the minimum quantities that you may order under an individual order. The contract would contain competitively bid, fixed unit prices for the items being procured.

An *indefinite quantity* contract works like the *requirements* contract above except that you do not obligate your agency to fill all of your requirements for a particular supply or service from any given contractor.

Orders placed under a requirements or indefinite delivery contract are not treated as sole-source procurements and do not have to be evaluated like option orders and found to be advantageous from a price standpoint before being placed.

When options are justified by the degree of uncertainty, the difficulty of conducting a separate procurement in a timely manner, or the importance of a single source, then include in your solicitation a clear statement that the full option price will be included in your evaluation of prices to determine the lowest bid.

When options may be exercised at a time of your choosing over a long contract period, you may wish to reduce the offeror's risk by including a price escalation provision. Consumer price indices or other indices of prices germane to your suppliers may be obtained from the Bureau of Labor Statistics of the U.S. Department of Labor.

In the case of rolling stock and similar custom equipment for which you have an ongoing need, you may find that the advantage of having an option for identical equipment at a predetermined price outweighs the pricing difficulties introduced by options.

You may also benefit from a competitive procurement conducted by another transit agency by asking that agency to specify optional quantities for rolling stock you expect you may need in the same time frame as the base procurement. The advantage of specifying your options in the other agency's original solicitation, rather than piggy-backing after the offers are submitted, is that you will take advantage of a competitive environment instead of a sole-source add on at a later date.

8.2.3 Liquidated Damages

REQUIREMENT
§ 13 of FTA Circular 4220.1E states: A grantee may use liquidated damages if it may reasonably expect to suffer damages from late completion and the extent or amount of such damages would be difficult or impossible to determine. The assessment for damages shall be at a specific rate per day for each day of overrun in contract time; and the rate must be specified in the third party contract. Any liquidated damages recovered shall be credited to the project account involved unless the FTA permits otherwise.

DEFINITION

Liquidated Damages - Liquidated damages are a specific sum (or a sum readily determinable) of money stipulated by the contracting parties as the amount to be recovered for each day of delay in delivery of the product or completion of the contract. They do not represent actual damages

but are established in the initial contract as a substitute for actual damages. They should represent, however, the most realistic forecast possible of what the actual damages are likely to be.

DISCUSSION

Liquidated damages are a widely used method of ensuring contractors perform timely. These provisions are regularly used in construction contracts and sometimes in supply and service contracts.

Liquidated damages clauses are most appropriately used when:

- **The time of delivery or performance is of particular importance and you may reasonably expect to suffer damage if the delivery or performance is delinquent; and**
- **The extent or amount of such damage would be difficult to prove.**

When determining whether to use a liquidated damages clause, you will wish to consider such factors as:

- **The probable effect on pricing and competition; and**
- **The costs and difficulties of contract administration.**

Liquidated damages may be used for supplies, services and construction.

Best Practices

Rate Determination - The rate of liquidated damages must be a reasonable estimate to compensate for possible damages and not be so large as to be construed as a penalty. If it is construed as a penalty it will be held unenforceable. The most prudent approach is to formulate the liquidated damages on a case-by-case basis. You will find it useful to briefly document the calculation of the rate of damages each time you use liquidated damages in a contract and keep the documentation on file. Appendix B.3 is an example of a *Liquidated Damages Checklist* being used by a Transit Authority. [35] Once liquidated damages are included in a contract, you will be unable to recover actual damages in many jurisdictions.

Application - When it is determined that a liquidated damages clause will be included in the contract, the applicable clause and appropriate rate(s) must be contained in the solicitation. For construction contracts, the rate to be assessed can be for each day of delay, and the rate typically, at a minimum, covers the estimated cost of inspection and superintendence for each day of delay

[35] - Bay Area Rapid Transit District (BART) Procurement Manual, Rev 4, July 20, 1994, Attachment Y.

in completion. If you will suffer other specific losses due to failure of timely completion, the rate can also include an amount for these items (for example, the cost of substitute facilities or the rental of buildings or equipment). The contract may include an overall maximum dollar amount or period of time, or both, during which liquidated damages may be assessed. This will help ensure that there is not an unreasonable assessment of damages.

It is important to note, that in your establishment of liquidated damages, you may use whatever consequential damages may result from a failure to deliver or perform, even damages for items which are not within the scope of the grant. However, it must be understood that all liquidated damages collected from the contractor must be credited to the grant and treated as a reduction to the allowable costs of the grant, in accordance with § 13 of FTA Circular 4220.1E. This will have the effect of making the funds collected (or the contract price reduction taken) available to the grantee for other activities/costs which are within the scope of the grant. In other words, while you may use the incurred cost of activities which are not within the scope of the grant to estimate and establish liquidated damages amounts, you will not be able to directly apply the collected damages to those impacted activities unless they are within the scope of the grant. The funds returning to the grantee must be credited to the grant where they become available for other activities which are within the scope of the grant.

Collection - If your agency has a financial obligation to the contractor under the contract, you may simply credit the amount of liquidated damages due from the contractor to your agency as payment by your agency of part of its remaining obligation to the contractor. Some contracts in which liquidated damages are particularly critical contain retainage provisions which are activated when liquidated damages are anticipated. In most jurisdictions you may also have a right of offset to credit the liquidated damages as payment to the contractor under other contracts it holds with your agency. If you decide to pursue this approach be sure you comply with the FTA approval requirements in Circular 4220.1E concerning the crediting of the project account with the amount of the liquidated damages. Finally, like any claim, you may settle your claim for liquidated damages in exchange for credit on future purchases such as spare parts or other items within the scope of the contract.

Excusable Delay - Contracts with liquidated damages clauses should also contain excusable delay clauses. These typically provide that if the contractor is delayed by certain specified causes that are beyond the contractor's control (e.g., weather, strikes, natural disasters) then the resulting delay is excused and liquidated damages will not be assessed. Whenever a contractor incurs liquidated damages, the precise counting of each day's delay based on these conditions directly affects the sum paid; therefore, it is worth making the calculation of delay in your contracts as clear as possible. When excusing construction delay caused by rainfall beyond normal, for example, you may specify in the contract what normal rainfall is and how the number of days of greater than normal rainfall will be computed.

Substantial Completion - Liquidated damages are not assessed after the date on which the work is substantially completed. Substantial completion is usually defined as the time when the construction site or the supplies delivered are capable of being used for their intended

purposes.[36] There is no predetermined percentage that will establish substantial completion and the decisions place more emphasis on the availability of the work for its intended use than on the use of formulas as to the percentage of completion of the work. [37]

8.2.3.1 Relationship with Default Termination

DISCUSSION

When a contract containing liquidated damages is terminated for default the contractor will be liable for both liquidated damages and the excess costs of reprocurement (i.e., the amount by which the replacement contractor's price exceeds the terminated contractor's price). You have an obligation to the defaulting contractor to mitigate both his liquidated damages and the excess reprocurement costs. This means that you need to not unduly delay your termination for default action once the contractor is in default, and you will need to take expeditious action to resolicit bids/proposals for the supplies or work not performed. The time period for the liquidated damages will be the time between the contractually required date of completion of the defaulted contract and the actual completion date of the new contract assuming there is no unreasonable delay in awarding the new contract. Contractors will not be assessed liquidated damages for any period of delay caused by your agency. This reprocurement must not only be done expeditiously to mitigate liquidated damages but must also be in accordance with sound procurement procedures, producing a fair and reasonable price, so as to mitigate excess reprocurement cost damages. The contract to reprocure should be awarded competitively, with bids/offers solicited from a sufficient number of competent potential sources to ensure adequate competition.

8.2.4 Intellectual Property Rights

8.2.4.1 Disclosure of Trade Secrets

DEFINITIONS

Trade Secret - A plan, process, tool or other intellectual property which is used in some process of commercial value and which is known to a group of individuals who have been intentionally restricted by the trade secret owner. The key attribute of a trade secret is that the owner has

[36] - Theon v. United States, 765 F.2d 1110 (Fed. Cir. 1985); Central Ohio Bldg. Co., PSBCA 2742, 92-1 BCA ¶ 24,399.

[37] - Electrical Enters., Inc., IBCA 972-9-72, 74-1 BCA ¶ 10,400.

diligently and effectively restricted knowledge so that its competitors cannot obtain the information.

DISCUSSION

If you gain access to trade secrets either to evaluate the offer or to use and support use of the product or service, you may undertake an obligation to protect the trade secret. More particularly, there may be a direct conflict between the supplier's interest in the trade secret, and sunshine laws that require you to disclose any information upon request. By not retaining the proprietary documents or by use of intermediaries, you may be able to reduce the potential for a violation of trade secrets.

The laws permitting public access to government data vary by state. It is helpful to contractors to disclose your obligations under the laws in any solicitation document which calls for you to receive confidential information from a supplier. Consideration for the suppliers' legitimate interests will be an important factor in their continuing willingness to participate in your programs.

Best Practices

Return Data - One method of accommodating the supplier's interest in the confidentiality of the data is to return all the documents to the supplier. This is particularly feasible at the conclusion of a procurement in which you have been evaluating known trade secrets.

Inspect Data Off Site - If concerns about trade secrets and confidential information are particularly acute, you may find it advantageous to visit the contractor's premises and inspect the information or materials there, returning with only the minimum necessary data in recorded form.

Third Parties - Another way to resolve the conflict is to use a third party (e.g., one of your advisors) to evaluate the data or retain the data. The possession of data by an agent of a public agency is sometimes also subject to action under public access laws. However, this method is common in software licensing agreements, where a trustee retains confidential source code data until specified conditions occur under which the supplier has agreed that the data can be disclosed to the public agency.

Opportunity to Defend - A final strategy is to incorporate into your contract clauses a provision granting (or requiring, depending on the circumstances) the owner of the trade secret the ability to defend your agency in any action against your agency to force disclosure. Often, this takes the form of the contractor indemnifying your agency for your cost in defending against disclosure, or, at your agency's option, the contractor's own attorneys undertaking the defense.

8.2.4.2 Contract Work Products, Patents, and Copyrights

REQUIREMENT
Appendix A.1 of this Manual contains the requirements for intellectual property rights created under research and development contracts. These requirements apply only where a primary purpose of the contract is research or development.

DISCUSSION

In research and development contracts, you are required to obtain certain rights in the intellectual property created for FTA, and also, incidentally, to obtain indemnification for FTA in case the contractor violates another's rights. A clause satisfying these requirements is contained in Appendix A.1.

In contracts that are not primarily research and development contracts, you may also consider including portions of these provisions for your agency's own benefit. You may consider this where intellectual property (e.g., computer software) will be developed with your funds as part of a larger effort which is not developmental.

In contracts that involve the use but not the development of intellectual property (e.g., the use of patented equipment) indemnification against the contractor's violation of another's rights may be advantageous.

Best Practices

Indemnification - The indemnification provision, in case the contractor violates the intellectual property rights of a third party, (e.g., reproduces copyrighted material or incorporates a patented device in your equipment) is a useful provision wherever intellectual property is involved. Even though you may have little knowledge of the intellectual property the contractor is using, the intellectual property owner may name you in the suit and you may have more funds to pay damages than does your contractor.

Secure Support Rights - When you take delivery of intellectual property which you will need for your program, you will also need to carefully anticipate and define your agency's rights to use, modify, or disseminate the material to others. If licenses control the software or patents control the components of your vehicles, you may wish to obtain the right to reproduce the intellectual property for your agency's own internal use, without the right to resell it or distribute it outside your agency. Whether the contractor is willing to grant that right depends on the practices in the industry, the competitive value of the intellectual property, and the contractor's policies. If a practice is not well-established, the matter may have to be addressed in pre-bid discussions or in negotiations. Where the contractor is unwilling to grant access except through additional purchases, the contractor may be willing to place the intellectual property in a trust arrangement

whereby the trustee would grant you access in case of the contractor's demise or inability to support your ongoing use of the product.

Evolving Law - The law of intellectual property, particularly as it pertains to information technology, is evolving rapidly. If you are involved in procuring software or other intellectual property with any substantial value, you may wish to have attorneys who are current in this area review your contract provisions.

8.2.5 Termination

REQUIREMENT
§ 15.b of FTA Circular 4220.1E requires grantees to include provisions in their contracts and subcontracts that allow for: b. Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of $10,0000.)

DISCUSSION

It is sometimes necessary to end a contractual relationship prior to the completion of the work called for in the contract. In the public sector, when that relationship is ended because of a problem with the contractor's compliance with one or more terms of the contract, that termination is most commonly referred to as a *termination for default or a termination for cause*.

When the public agency decides to end the contract for a reason other than the default of the contractor, that termination is most frequently referred to as a *termination for the convenience of the public entity*.

If you do not plan for the possibility of one or the other of these events occurring in your contractual relationships, through the careful drafting of clauses which define the rights and obligations of the parties under a default and convenience situation, the consequences can be substantial from a monetary and contract performance standpoint.

Because of the nature of the different types of contracts, you may want to consider having different termination clauses for fixed price as opposed to cost reimbursement contracts.

Because of the different nature of the product or services being bought, you may want to have different termination clauses for construction, supply, and services contracts, including professional services.

You may want to have an abbreviated termination clause for contracts below a dollar threshold (say $100,000). Likewise for purchase orders, you will need to decide how sophisticated you want these to be.

You need to address *partial* as well as *complete* terminations.

8.2.5.1 Termination For Convenience

DISCUSSION

The development of clauses allowing the government to terminate contracts for its convenience was a necessity growing out of the major wars and the need to end the large number of procurement contracts once the wars were ended. Without such clauses the government could terminate its contracts but such action constituted a breach. This meant having to pay profits to contractors on unperformed work (anticipatory profits). Thus the need for and the development of these convenience termination clauses, which give the government the right to terminate without cause and which limit the contractor's recovery of profit based upon the work actually performed up to the point of termination.

Best Practices

You will note that the FTA Circular requires a clause which defines "the manner by which the termination will be effected and the basis for settlement". Appendix A.1, Model Contract Clauses, section 21, contains model clauses with suggested language for both convenience and default terminations. These model clauses are very broad in their definition of the basis for settlement. For example, while the clauses clearly limit the contractor's profit to work actually performed, and they commit to pay the contractor its costs, they do not define how those costs will be determined, i. e., the *cost principles* which will be used to determine allowable costs. It is highly recommended that you supplement these clauses to stipulate the *cost principles* which will be operative in the event of a termination, and which will determine which costs are allowable and which are not. By using an objective and clearly defined method for determining allowable costs you will avoid problems which may otherwise arise in the negotiation of final costs.

The American Public Transit Association has published a procurement manual with a Termination for Convenience Clause referencing Part 49, *Termination of Contracts*, of the Federal Acquisition Regulations (48 CFR 49) as the basis for settlement of claims. [38] Another approach is to reference the FAR, Part 31.205, which deals very comprehensively with *Selected Costs* and their allowability. [39]

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[38] - American Public Transit Association, 1201 New York Avenue, N. W., Suite 400, Washington, D. C. - *Standard Bus Procurement Guidelines* § 2.2.6.1, January 1997. Phone: (202) 898-4089 to order copies.

[39] - Washington Metropolitan Area Transit Authority - *Procurement Procedures Manual* § 1311.2, Dec. 1994.

The APTA approach of referencing FAR Part 49 as the basis for settlement of terminations for convenience would seem to be a very effective solution to the problem of defining the basis for settlement. Part 49.113 of the FAR incorporates Part 31, *Contract Cost Principles and Procedures*, thus covering all the normal cost issues which arise on cost- type contracts, but going beyond the normal to define those costs and issues peculiar to terminations in the rest of FAR Part 49. The termination clauses themselves may be found in FAR Part 52, and you will see that they refer to both Part 31 and Part 49 of the FAR in order to define the cost standards to be used for the settlement.

Suggested termination clauses are also contained in the ABA's *Model Procurement Code for State and Local Governments* and implementing suggested regulations. [40]

8.2.5.2 Partial Terminations

DISCUSSION

Your Termination for Convenience clause must include a provision allowing for a partial termination of the work, in which case the contractor must continue with the unterminated portion. The Federal government clause at FAR 52.249-2(k) allows the contractor to file a proposal for an equitable adjustment of the price(s) for the continued portion of the contract. Note that the model clauses in Appendix A.1 do not address this issue of an equitable price adjustment for the continued work, and you should consider this provision as a matter of equity to the contractor. This price adjustment would allow the contractor to recover those costs of a fixed nature which he would have recovered in the prices of the terminated work, had there been no termination. This is not anticipatory profit but recovery of fixed overhead. [41] An example might be the rental of a facility whose costs would have been recovered over all the deliverable units of the original contract but which can only be recovered over a smaller number of units on the partially terminated contract, assuming you allow a price adjustment for the unterminated portion of the contract.

8.2.5.3 Termination for Default

DISCUSSION

Fixed Price Supply Contracts - If you are using a default termination clause similar to the federal clauses, the termination is likely to have the following effects:

[40] - See the discussion of how this publication may be obtained in Note 3. under Section 8.1.1.

[41] - Wheeler Bros., ASBCA 20465, 79-1 BCA § 13,642.

- **Your agency is not liable for the costs of unaccepted work. The contractor will only be paid for work which you accept.**

- **You are entitled to a return of all progress, partial, or advance payments.**

- **You have the right to take custody of the contractor's material, inventory, construction plant and equipment at the site, and of the drawings and plans, with the price to be negotiated.**

- **The contractor will be liable for the excess costs of reprocurement or completion.**

- **The contractor will be liable for either actual damages or liquidated damages if your contract provides for them.**

Services and Construction Contracts - Some of the above consequences for supply contracts are also applicable to services and construction contracts but a contractor furnishing services or construction will be entitled to payment for work that was properly performed prior to the default termination. Under supply contracts the contractor will not be paid costs for producing supplies not accepted, whereas services and construction contractors can recover costs because your agency will be seen as having benefited from the contractor's partial performance in the services rendered or the improvements made to your property. [42]

Best Practices

Defining "Default" - The clause must define what "default" means -- i.e., failure to deliver the supplies or perform the services within the time specified in the contract, failure to make progress so as to endanger performance of the contract, refusal or failure in a construction contract to prosecute the work or any separable part within the time specified in the contract.

Excess Reprocurement Costs - The model contract clauses in section 21 of Appendix A.1 include default termination clauses for various types of contracts. You will need to decide if you wish to hold the contractor responsible for excess reprocurement costs and include an appropriate provision in your clause. Only the construction contract termination clause [21.(h)] in Appendix A.1 includes excess reprocurement costs.

The APTA bus procurement *Guidelines* at § 2.2.6.2 (see note 20 in this chapter) include a provision for excess reprocurement costs for "similar supplies or services."

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[42] - John Cibinic, Jr. and Ralph Nash, Jr. *Administration of Government Contracts.* Third Ed. Washington, D.C.: George Washington University, 1995.

Excusable Reasons for Non-performance - The clause typically defines acts or events that will excuse the contractor's default - i.e., causes beyond the control and without the fault or negligence of the contractor, such as acts of God, unusually severe weather, etc.

Conversion to Convenience Termination - If you terminate a contract for default, and it is later determined that the contractor was not in default or that the default was excusable, it would be very helpful if your default termination clause specifically stated that the termination will be treated as if it had been issued for the convenience of the agency. This will act to limit your liability for a wrongful termination by invoking the procedures of the convenience termination clause, thus precluding the contractor from recovering anticipatory profits. The default termination clauses in Appendix A.1 contain this stipulation.

Notice Provisions - The clause typically defines what kind of written notices, if any, must be furnished to the contractor prior to the termination taking place - i.e., *cure* and *show cause* letters. Within a specified time after you notify the contractor in writing to *cure* the deficiency in performance, the contractor has the opportunity (without jeopardy of immediate termination) to *show cause* why it should not be terminated; it may accelerate performance, present new information, or offer additional promises. If the contractor does not successfully show that it should not be terminated, your agency may then proceed with a termination for default. If your clause grants the contractor a cure period, you may wish to specify exceptions such as where default is necessary to take over the work in the interest of public safety.

Acronyms

ASBCA - Armed Services Board of Contract Appeals

BCA - Board of Contract Appeals

IBCA - Department of Interior Board of Contract Appeals

PSBCA - Postal Service Board of Contract Appeals

Chapter 9

9 - Contract Administration

9.1 Documentation of Contract Administration (5/96)
9.2 Changes (2/99)

9.2.1 Contract Scope and Cardinal Changes (10/99)
9.2.2 Cost/Price Analysis of Changes (2/99)
9.2.3 Construction Changes (2/99)

9.2.3.1 Differing Site Conditions (2/99)
9.2.3.2 Field Change Orders (2/99)
9.2.3.3 Pricing of Construction Changes (2/99)
9.2.3.4 Variations in Estimated Quantities (2/99)
9.2.3.5 Delays (2/99)
9.2.3.6 Acceleration (2/99)

9.3 Improving Vendor Delivery Performance (10/00)
9.4 Approval of Subcontractors (11/03)

9.1 DOCUMENTATION OF CONTRACT ADMINISTRATION

REQUIREMENT

In listing the "General Procurement Standards Applicable to Third-Party Procurements," FTA has established two standards that address contract administration documentation as opposed to procurement [1] administration documentation:

b. Contract Administration System – Grantees shall maintain a contract administration system that ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders. . . .

k. Responsibility for Settlement of Contract Issues/Disputes - Grantees alone will 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 grantee of any contractual responsibility under its contracts.

[1] - See § 7.i., FTA Circular 4220.1E, and discussion in Section 2.4.1, "File Documentation."

> FTA will not substitute its judgment for that of the grantee or subgrantee, unless the matter is primarily a Federal concern. Violations of the law will be referred to the local, state, or Federal authority having proper jurisdiction. [2]

DEFINITIONS

Contract Administration - The post-award administration of the contract to ensure compliance with the terms of the contract by both the contractor and the Governmental entity.

Contract Administration File Documentation - The documentation contained in the contract file maintained by, or on behalf of the contracting officer. It reflects the actions taken by the contracting parties in accordance with the requirements of the contract and documents the decisions made, and the rationale therefore, of matters which may result (or have resulted) in controversy or dispute.

Procurement File Documentation - The documentation contained in a procurement file which details the history of the procurement through award of the contract. It includes, at a minimum, the rationale for the method of procurement, the selection of the contract type, the reasons for selection or rejection of the contractor, and the basis for the contract price.

DISCUSSION

Now that your contract has been awarded, performance is set to begin. It is important to get off to the right start in terms of documenting the administration of the contract and identifying what information should be maintained in the contract administration files. Different people involved in the project (QA, engineers, inspectors, financial, DBE office, safety, etc.) may have their own individual files relating to the contract reflecting their involvement with the administration of the contract, but it is good practice for the procurement official to maintain the "official" contract file. The "official" file would include all official correspondence relating to the administration of the contract so as to verify the contractor's adherence to the terms of the contract and demonstrate that the agency is following good administrative practice and sound business judgment in settling all contractual and administrative issues arising during contract performance.

Purpose

Any contract involving the expenditure of public funds is subject to review/audit during and after performance to ensure that, at the very broadest level, the Government got what it paid for. This

[2] - § 7.k. FTA Circular 4220.1E. See also the discussion of the documentation required for the settlement of claims and disputes found in Paragraph 7, Chapter I, FTA Circular 5010.1C, "Grant Management Guidelines," dated 10/1/98. As appropriate, some of these requirements will be discussed later in the "Best Practices" portion of this section.

concept means that at the contract administration level, you want the file (standing alone and without need of interpretation or augmentation of the contract administrator or other staff element) to demonstrate that the contracting officer and the contractor have complied with the terms of the contract (i.e., bonds have been submitted, contractual issues requiring the approval of the contracting officer have been submitted and approved, requests for payment have been submitted, reviewed, approved, and processed, etc.) and that contractual and administrative issues in dispute have been addressed and settled in accordance with good administrative practice and sound business judgment.

Best Practices

File Contents - For sealed bid procurements and competitive negotiations, consider including as standard practice in the contract administration file the following:

- The executed contract and notice of award;
- Performance and payment bonds, bond-related documentation, and correspondence with any sureties;
- Contract-required insurance documentation;
- Post-award (pre-performance) correspondence from or to the contractor or other Governmental agencies;
- Notice to proceed;
- Approvals or disapprovals of contract submittals required by the contract and requests for waivers or deviations from contractual requirements;
- Modifications/changes to the contracts including the rationale for the change, change orders issued, and documentation reflecting any time and or increases to or decreases from the contract price as a result of those modifications;
- Documentation regarding settlement of claims and disputes including, as appropriate, results of audit and legal reviews of the claims and approval by the proper authority (i.e., city council, board of directors, executive director) of the settlement amount;
- Documentation regarding stop work and suspension of work orders and termination actions (convenience as well as default); and
- Documentation relating to contract close-out.

For small purchases and micro-purchases, you may wish to automate the documentation or keep some of the above elements on a standard record.

Administration Duties - Every type of contract will have different contract administration actions and the documentation required to support that administration will differ as well. Supply contracts have different specific administrative actions than construction contracts do just as fixed price contracts are administered differently than cost-reimbursement contracts. The FAR has an extensive listing of contract administration functions that are considered "normal" and you might want to review them to see what might be applicable to your particular contract. [3]

File Location - On any given contract, there may be a number of different agency personnel involved in monitoring various aspects of the administration of the contract such as the maintenance department quality control office, the engineering department, the construction management office, the safety office, the disadvantaged business department, and the finance department. In some agencies, these offices may have official contract roles for which they will be maintaining an "official" file as to their delegated responsibility. For instance, your contract may have a "contracting officer's representative" or "contracting officer's technical representative" that has delegated authority from the contracting officer to approve submittals and payments. Your agency may have delegated to your program office the authority, up to a certain dollar amount, to issue change orders and settle claims. In all situations, whether the contractual role is performed by the contracting officer or another designee, the files should be documented so that it would be possible to recreate, from the files alone, what happened and how issues were resolved. [4]

9.2 CHANGES

REQUIREMENT
49 CFR § 18.30 *Changes* discuses certain classes of changes which require grantees to obtain the prior written approval of the Federal awarding agency. FTA Circular 4220.1E paragraph 9.h. states: A contract amendment or change order that is not *within the scope of the original contract* is considered a sole source procurement . . .

DEFINITIONS

Contract Modification - Any written change in the terms of the contract.

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3 - FAR § 42.302.

4 - It is important that the files stand on their own because at the time a matter comes into controversy or at the time of a post-contract performance audit or review. The key characters may not be available (dead, moved away, terminated from employment, etc.) to respond to those issues.

Bilateral Contract Modification - A modification which is signed by the Contractor and the Contracting Officer**;** also referred to as a *supplemental agreement*. They are used to (1) make negotiated equitable adjustments to the contract price, delivery schedule and other contract terms resulting from the issuance of a change order, (2) definitize letter contracts, and (3) reflect other agreements of the parties modifying the terms of the contract.

Unilateral Contract Modification - A contract modification that is signed only by the Contracting Officer. They are used to make administrative changes, issue change orders, make changes authorized by clauses other than a *Changes clause* (e.g., *Options clause*), and issue termination notices.

Administrative Change - A unilateral contract change, in writing, that does not affect the substantive rights of the parties (e.g., changes of address for submittals of documents, reports, etc.).

Changes Clause - A clause which permits the grantee Contracting Officer to make unilateral changes, in designated areas, *within the general scope of the contract*, to be followed by such equitable adjustments in the price and delivery schedule as the change makes necessary. Although the grantee has a unilateral right, two general principles are important:

> *The right exists only because it is specifically conferred by the terms of the contract*; and
>
> When such unilateral rights are exercised, the grantee has an obligation to adjust the price and/or other provisions to compensate for the alteration in the contractor's obligations.

Change Order - A written order, signed by the Contracting Officer, directing the Contractor to make a change that the *Changes clause* authorizes the Contracting Officer to order without the Contractor's consent.

Cardinal Change **-** A contract change which is "outside the scope" of the original contract, and thus not within the authority of the Changes clause to order. Such changes are "sole source procurements, and must be processed according to the requirements of FTA Circular 4220.1E, paragraph 9.h. (See Section 9.2.1 *Contract Scope and Cardinal Changes*.)

Constructive Contract Change **-** A change to a contract resulting from the conduct of the grantee's officials that has the effect of requiring the Contractor to perform additional work. A *constructive change* results from the acts, written or oral, or from the omissions of the grantee's officials, which have the same effect as if the Contracting Officer had issued a formal, written change order. Actions giving rise to constructive changes should, of course, be avoided. Such changes represent actions which usually exceed the authority of the individual responsible for them, e.g., improper technical direction by the Technical Officer which is actually a change to the contract. When these actions occur, contractors need to be advised as part of the terms of their contracts to bring any such actions to the immediate attention of the Contracting Officer so

that an official determination can be made by the appropriate grantee officials and proper directions given in writing under the Changes clause. Some common examples are:

- Specifications or contract provisions that are "impossible to perform."
- Specifications that are ambiguous.
- Drawings that contain errors, omissions or inconsistencies.
- Grantee-provided information that is late, defective, etc.
- Technical direction by personnel that modifies the expressed terms of the contract.
- Acceleration of work, where the grantee insists that the contract delivery schedule be met despite the Contractor's valid claims of excusable delays.
- An inspector's interpretations of test specifications, procedures, methods, conditions and results that go beyond a reasonable interpretation of the specification.

Deductive Change - A change resulting in a reduction in the contract price because of a net reduction in the Contractor's work.

Equitable Adjustment - An adjustment in the contract price, delivery schedule or other terms of the contract arising out of the issuance of a *change order*.

DISCUSSION

49 CFR § 18.30 *Changes,* requires grantees to obtain the approval of the awarding agency (FTA) whenever a change would result in the need for additional funding from the awarding agency, and for other specified situations which grantees should be aware of.

FTA Circular 4220.1E paragraph 9.h. concerns the issue of contract changes and whether they are *within the scope of the original contract.* This issue is discussed in Section 9.2.1 *Contract Scope and Cardinal Changes.*

Purpose

The Changes clause has several purposes:

(1) To give the grantee flexibility to order changes in the work, which may be necessary due to advances in technology or changes in the grantee's requirements.

(2) To give the Contractor a method of suggesting changes to the work, thus improving the quality of the contract end-items. The equitable adjustment provisions of the

Changes clause will encourage the Contractor to suggest improvements when those suggestions will increase the contract price. When, however, the situation calls for suggestions regarding dollar savings, the Changes clause may not incentives the Contractor if it stands to lose the dollar savings because of a price reduction in the contract. For this reason, *value engineering clauses* are included in contracts.

(3) To give the grantee authority to order additional work which is "within the general scope of the contract, and thereby avoid having to procure this work as a "new procurement with all of the time and expense associated with another solicitation.

(4) To require the Contractor to proceed with the changed work and resolve the issue of compensation later. This is important since it gives the grantee a contract right to order changes without having to agree beforehand on the price of the work. Emergency situations can thus be handled expeditiously without placing the Contractor in a position of demanding a certain amount of compensation before the work can proceed. In the event of a failure to agree on price, the issue can be resolved by a third party in accordance with the dispute procedure in the Disputes clause of the contract. But disputes over compensation will not impede the progress of the contract as changed.

Best Practices

National Transit Institute - The National Transit Institute (NTI) offers several in-depth courses for FTA which would be of great value to grantees who have to manage contracts with significant change order activity. [5]

Grantee third party contracts should contain a *Changes* clause. The language of the clause may differ depending upon the nature of the contract and the end-item being procured. The American Bar Association (ABA) recommends several different *Changes* clauses in its *Model Procurement Code for State and Local Governments*. There is a suggested clause for *supply* contracts and another for *construction* contracts. [6]

The *Federal Acquisition Regulation* covers the subject of changes within Part 43 *Contract Modifications*, with alternative contract *Changes* clauses in Subpart 52.243. The Federal clauses are tailored to the specific contracting situation, e.g., fixed-price supply, construction, services, cost-reimbursement, etc. The Federal clauses direct the Contractor to proceed with the work in accordance with the change order directive and submit a proposal within 30 days, following

[5] - National Transit Institute, 120 Albany Street, Suite 705, New Brunswick, NJ 08901-2163. Phone (732) 932-1700. FAX (732) 932-1707. Courses include: *An Effective Change Order Process*, *Management of Transit Construction Projects* and *Contract Administration.*

[6] - MPC § R6-101.03 *Changes Clause* (supplies), and § R5-401.03 *Changes Clause* (construction).

which the parties are to negotiate an equitable adjustment to the price, delivery schedule and other affected terms. In the event of a failure to agree, the resolution is to be handled as a dispute in accordance with the *Disputes* clause of the contract. This provision is important because disputes over compensation do not delay the work. The Contractor is required to proceed with the work as changed and settle the issue of compensation later. The Contractor cannot quit work because of a disagreement over price.

Non-emergency changes - When time permits, the best procedure for issuing changes is to solicit a cost and technical proposal from the contractor *before the change is issued*, and to negotiate an equitable adjustment to the contract price, delivery schedule, etc. A bilateral supplemental agreement can then be issued setting forth the change in work and the adjustment to the contract price, etc.

Emergency changes - When time will not permit the negotiation of the change prior to issuance, it should be possible to obtain a "not-to-exceed" price from the Contractor prior to the beginning of work. A bilateral contract Change Order could then be issued defining the changed work, with a maximum/ceiling price which is to be negotiated at a later date, but *downward only*. This Change Order would have to be issued as a two-party modification because it contains a "not-to-exceed," maximum/ceiling price for the change, and the grantee could not unilaterally impose a ceiling price commitment on the Contractor. The Contractor would then submit a formal proposal within thirty days and negotiations would take place. A bilateral contract modification (supplemental agreement) would then be issued reflecting the equitable adjustment to the price, etc.

9.2.1 Contract Scope and Cardinal Changes

REQUIREMENT
FTA Circular 4220.1E paragraph 9.h. states: A contract amendment or change order that is not *within the scope of the original contract* is considered a sole source procurement . . .

DISCUSSION

Changes clauses limit the authority of the issuer in two ways. First, they stipulate that changes must be "within the general scope of the contract." Second, they describe the types of changes that may be made. In order for the change to be binding on the Contractor, it must meet both tests. It must be within the general scope and be one of the types of changes described in the clause.

With respect to the FTA requirements governing changes, the change must be *within the scope of the original contract.* If it is not *within the scope*, it is considered a *cardinal change*. Such changes are not properly processed as changes under the Changes clause, but are

properly processed as *new procurements* according to the principles of FTA Circular 4220.1E 9.h. --*Procurement By Noncompetitive Proposals.*

***Within the general scope* - The meaning of this phrase is somewhat vague and has been the subject of much interpretation by various judicial bodies processing contractor protests and claims. The Federal Court of Claims coined the term "cardinal change" to describe those changes that are beyond the scope of the contract. There are various tests used to determine if a change is within scope. One test examines changes in the *nature of work* to be performed. Another looks at the *amount of effort* the Contractor is required to perform. Still another test concerns whether the proposed change is within the *scope of the original competition*.**

***Nature of work* - In one case the court held that the changed work is considered to be within the general scope if it "should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into." [7] The Federal Court of Claims stated the test to be whether the work performed was "essentially the same work as the parties bargained for when the contract was awarded." [8] In another case the court stated that a cardinal change occurs if the ordered deviations alter the nature of the thing to be constructed. [9] The general principle appears to be that if the function or nature of the work as changed is generally the same as the work originally called for, the changes are considered to be within the general scope. For example, in a contract to build a hospital where there were many changes in the materials used, but where the size and layout of the building remained the same, the changes were held to be within the scope. [10]**

***Amount of effort* - The second test for determining if a change is within scope concerns the amount of effort in terms of *work disruption* and *cost increases* experienced by the Contractor. In one case requiring a subcontractor to place backfill simultaneously with the work of other subcontractors, the change was considered so disruptive as to be a cardinal change because it added over 200% to the cost of the backfill work. [11] In another case the court decided to hold a trial on the cardinal change issue where there had been 130 changes, the time of performance had doubled, and costs of $4.6 million were incurred**

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[7] - Freund v. United States, 260 U.S. 60 (1922).

[8] - Aragona Constr. Co. v. United States, 165 Ct. Cl. 382 (1964).

[9] - Air-A-Plane Corp. v. United States, 187 Ct. Cl. 269, 408 F.2d 1030 (1969).

[10] - See Aragona above.

[11] - Peter Kiewit Sons Co. v. Summit Constr. Co., 422 F.2d 242 (8th Cir. 1969).

above the contract price of $5.8 million. [12] But it should be noted that contractors have rarely been successful in arguing for cardinal changes on the basis of *amount of effort.*

***Scope of the original competition* - Competitors sometimes protest the issuance of changes when they believe that a new competitive procurement process should have been used for the changed work. In deciding these cases, the courts have used the criterion of whether the change was within *the scope of the original competition,* i.e., what the competitors should have anticipated to be within the scope of the competition. An important factor to be considered is "whether the original solicitation adequately advised offerors of the potential for the type of changes during the course of the contract that in fact occurred . . . or whether the modification is of a nature which potential offerors would reasonably have anticipated under the changes clause." [13] This issue is an important one because the Changes clause lends itself to potential abuse in the matter of ordering quantities not originally competed. This practice tends to become an expedient to avoid the time and expense of a new procurement action, but it is improper when the additional quantities exceed the scope of the original competition. Such additional quantities should either be bought through a new competitive procurement, or processed as a sole source action with the requisite organizational approvals.**

***Number of changes* - The *number of changes* issued has not been a determining factor as to whether the changes cumulatively are within scope. The Board of Contract Appeals held that approximately 100 change orders was not beyond the general scope. [14] Another case held that 200 change orders was not beyond the general scope. [15]**

***Time of issuance* - The *time of issuance* of the changes has not been considered a factor. In one case the Contracting Officer issued six changes after completion of the work, which extended the contract period by 120 days, and the court held that these changes were within the general scope. [16]**

***Changes in quantity - Major changes in the quantity* of the work have been held to be cardinal changes. This principle applies to both additive and deductive changes. Major additions in the quantity should be processed as new competitive procurements. Large reductions in quantity should be processed as contract *termination actions*. The**

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[12] - Atlantic Dry Dock Corp. v. United States, 773 F. Supp. 335 (M.D. Fla. 1991).

[13] - Neil Gross & Co., 69 Comp. Gen. 247 (B-237434), 90-1 CPD ¶ 212.

[14] - Coley Properties Corp., PSBCA 291, 75-2 BCA ¶ 11,514.

[15] - Reliance Ins. Co. v. United States, 20 Cl. Ct. 715 (1990).

[16] - J.D. Hedin Constr. Co. v. United States, 171 Ct. Cl. 70, 347 F.2d 235 (1965).

Comptroller General has held that a change adding quantities *above the contractual maximums* was outside the scope and therefore a cardinal change. [17]

***Collateral impacts of change* – This criteria involves looking at all the various factors, such as changes in schedule, quantity, quality, and costs, no one of which may be sufficient in itself to render a change outside the contract's scope, but the cumulative impact of the change being such as to alter the nature of the item being procured. For example, a change in specification from a gasoline to a diesel driven heater was outside the scope because the change required substantial alteration of other components: (1) it substantially increased the heater's weight, (2) added an electrical starting system, (3) required a redesigned fuel control, (4) required a redesigned combustor nozzle, (5) altered the performance characteristics, (6) increased unit price by 29%, and (7) doubled the delivery schedule. [18]**

Best Practices

Buying additional vehicles – In order to avoid the problem of having to conduct a new competitive procurement for minor increases in quantities, grantees should structure their initial competitive solicitation with option provisions for additional quantities that could conceivably be required. When there are no option provisions, however, and it becomes clear that increases in the quantity of vehicles are necessary, grantees should either conduct a new competition or process a justification for noncompetitive procurement (sole source) through the required internal approving official or board.

Changing bus specifications – Certain types of specification changes are clearly within the authority of the Changes clause. They satisfy all of the "within scope" criteria noted above. For example, changes to seating fabrics and colors, exterior paint schemes, signage, and floor coloring. Such changes are "reasonably within the contemplation of the parties when the contract was entered into," and they do not alter the nature of the vehicle being procured.

Bus engine changes - There are other potential bus design changes, however, which may not be proper under the Changes clause. One of these would be a change in engine type, which was not *within the scope of the original competition*. For example, several manufacturers do not build buses with certain engine types (CNG or Diesel). Such a change would be one that was not *within the scope of the original competition* (i.e., what the competitors should have anticipated to be within the scope of the original competition). This type of change is so critical that it would have affected the original bidding seriously enough that another company could have won the contract.

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17 - Liebert Corp., 70 Comp. Gen. 448 (B-232234.5), 91-1 CPD ¶ 413.

18 - American Air Filter Co., 78-1 CPD 136.

High floor vs. low floor buses - Another design change that would not be proper under the Changes clause would be a change from a "high floor" to a "low floor" configuration. The *cumulative impacts of the change* would be so serious that it would in fact be a "cardinal change."

Construction contract changes – For a discussion of changes to construction contracts and the issue of the types of changes that would be "within scope" vs. "cardinal changes," see section 9.2.3 *Construction Changes*.

9.2.2 Cost/Price Analysis of Changes

REQUIREMENT

Paragraph 10 of FTA Circular 4220.1E requires a cost or price analysis for every procurement action:

> Grantees must perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals**.**
>
> (a) Cost Analysis - A cost analysis must be performed when the offeror is required to submit the elements (i.e., Labor Hours, Overhead, Materials, etc.) of the estimated cost; e.g., under professional consulting and architectural and engineering services contracts.
>
> A cost analysis will be necessary whenever adequate price competition is lacking and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalogue or market price of a commercial product sold in substantial quantities to the general public or on the basis of prices set by law or regulation.
>
> (b) Price Analysis - A price analysis may be used in all other instances to determine the reasonableness of the proposed contract price.
>
> (c) Profit – Grantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed.
>
> (d) Federal Cost Principles – Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles. Grantees may reference their own cost principles that comply with applicable Federal cost principles.

DISCUSSION

FTA Circular 4220.1E paragraph 10 requires that grantees perform a cost or price analysis, as appropriate, for every contract action, including change orders. Paragraph 10(d) requires the use of Federal cost principles, which are found in the Federal Acquisition Regulation Part 31, whenever grantees are negotiating costs or prices based on estimated costs. The nature of change orders is such that contractors will almost always be required to submit change order cost proposals which are based on estimated costs which are expected to be incurred as a result of the change order. Thus, change order proposals will almost always be subject to the Federal cost principles found in FAR Part 31 (or equivalent grantee cost principles). Grantees should ensure that their third-party contract provisions provide for the Federal cost principles, or equivalent grantee cost principles, in determining allowable costs for equitable adjustments arising out of changes to the contract. For a general discussion of cost and price analysis techniques, see Section 5.2 *Cost And Price Analysis*. For a discussion of price adjustment criteria for construction contracts, see Section 9.2.3.3 *Pricing of Construction Changes*.

9.2.3 Construction Changes

REQUIREMENT
§ 23 of the Master Agreement MA(12), *Construction*, requires grantees to provide and maintain competent and adequate engineering *supervision at the construction site* to ensure that the complete work conforms to the approved plans and specifications. FTA Circular 4220.1E paragraph 10a. requires a *cost analysis* for every procurement action, including contract modifications and *change orders*. Paragraph 10e. of the Circular *prohibits cost-plus-percentage-of-cost* methods of contracting, including percentage of construction cost methods. With respect to pricing methods, FTA Circular 4220.1E paragraph 7j states that *the Time and Materials* type of pricing requires that a determination be made that no other type of agreement is suitable and that a ceiling price be specified in the contract.

DISCUSSION

The issue of on-site supervision as it relates to the issuance of construction contract changes will be discussed in Section 9.2.3.2 *Field Change Orders*. The pricing of construction contract changes is discussed in Section 9.2.3.3 *Pricing of Construction Changes*.

Every construction contract should include a Changes clause giving the grantee the unilateral right to order changes in the contract work during the course of performance, and the Contractor the duty to proceed with the work as changed upon receipt of the change order, assuming that the change is within the scope of the contract. The Changes

clause must contain language deferring the pricing of the changed work until some later time, while obligating the Contractor to proceed with the work and resolve the issue of compensation later. Failure to reach an agreement on compensation would be a dispute to be processed according to the procedures of the *Disputes* clause of the contract.

It is not a best practice to issue change orders where the price and schedule for the changed work is not negotiated and agreed upon beforehand. However, in construction projects, proceeding with work prior to agreement may be necessary to avoid delay. In such cases, time and material records must be kept, and a price agreed upon as soon after the beginning of work as practicable. Grantees must ensure that they are authorized to do this under their own regulations.

The Federal clause for construction changes is found at FAR 52.243-4. It authorizes changes, within the general scope of the contract:

(1) In the specifications (including drawings and designs);
(2) In the method or manner of performance of the work;
(3) In the Government-furnished facilities, equipment, materials, services, or site; or
(4) Directing acceleration in the performance of the work.

The Federal clause also provides guidance on the processing of *claims* which the Contractor regards as *"constructive changes,"* i.e., Government actions, directions, interpretations or determinations which were not identified as changes, but which cause the cost of the work or the time required to do the work to change.

The ABA Model Procurement Code (MPC) Changes clause for construction contracts is very broad in giving owners the right to order:

(1) Changes in the work within the scope of the contract; and
(2) Changes in the time for performance.

The MPC clause gives the Contractor *the duty to proceed with the work while the issue of compensation is being resolved.* This clause also contains a notice to the Contractor not to perform work above a certain dollar amount unless the change order has been signed by an appropriate fiscal officer or other responsible official *certifying that the funds are available* for the work being ordered. [19]

Within scope v. cardinal changes - Construction contracts are, of course, subject to the same criteria as other contracts with respect to the requirement that changes be *within the general scope of the contract.* See Section 9.2.1 *Contract Scope and Cardinal Changes*. A

[19] - MPC R5-401.03 *Changes Clause.*

few observations can be made concerning construction contracts as they have been litigated in the Federal realm with respect to the within scope issue:

Changes in quantity - Increases in the quantity of the major items are not generally regarded as authorized by the *Changes clause*. For example, on a construction project, additional buildings may not be added by the *Changes clause*. [20] On unit price contracts, this rule regarding additional quantities has been interpreted to allow increases in the quantity of subsidiary items unless the variation is so large that it alters the entire bargain. For example, on a contract requiring the doubling of the amount of material for an embankment to build a levee, the court held that the change was beyond the scope of the contract. [21] *Deletions* of major items or portions of the work are likewise not within the scope of the *Changes clause*. For example, buildings may not be deleted from construction contracts. [22] However, deletions of portions of the work are permissible unless the deletion becomes so large as to alter the original bargain. When large deletions are necessary, they should be made under the *Termination for Convenience clause*.

Changes in time of performance - The Federal clause lists *acceleration of performance* as one of the types of changes permitted by the Changes clause. In contracts which do not contain the acceleration language, it is unclear whether such changes are permitted by the Changes clause or not. Some Federal Contract Appeals Boards have held that the contract schedule was part of the specifications, and therefore a permissible change. Grantees may wish to review their changes clause and add the ability to accelerate or delay performance. Another approach would be to state in the contract that the schedule was part of the specifications for purposes of ordering accelerated or decelerated performance under the Changes clause. Remember that having this ability under the Changes clause gives the grantee the right to change the schedule of work immediately and resolve compensation later, instead of having to agree on the price of the change before the schedule can be altered.

Changes in method or manner of performance - Changes in the method or manner of performance have traditionally not been a "changes issue" under the Federal clause because such changes altered the work itself and were seen as changes to the specifications. It is not necessary that the contract initially specify a certain method or manner of work in order to find a change if, in fact, the Contractor is ordered to perform in such a manner or use a method other than one that could have properly been used.

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[20] - A-66501, 15 Comp. Gen. 573 (1935); B-95069, 30 Comp. Gen. 34 (1950).

[21] - Saddler v. U.S., 287 F. 2d 411 (Ct. Cl. 1961).

[22] - General Contracting & Constr. Co. v. U.S., 84 Ct. Cl. 570 (1937); McMasters v. State, 15 N.E. 417 (N.Y. 1888).

9.2.3.1 Differing Site Conditions

Unless the contract provides otherwise, the construction contractor will usually be held to bear the risk of unexpected subsurface site conditions. This creates a serious problem for the company wishing to bid on a construction project. The contractor must either perform a costly site inspection, even though there is no assurance that its bid will be successful, or it must include a substantial contingency in its bid price to cover the risk of the unknown site conditions. The latter alternative results in much higher bid prices to the owner than would be the case if the risk were not being assumed by the bidders. It is only where the contract contains a clause shifting the risk to the owner that the bidder can safely assume it will be compensated for "differing site conditions" or "changed conditions." For these reasons most construction solicitations will contain a "differing site conditions" clause describing the types of risk being assumed by the owner, promising the contractor an *equitable adjustment* if the defined conditions materialize.

The usual clause will refer to *"subsurface or latent physical conditions at the site differing materially from those indicated in the contract, or unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the contract."* [23] The clause will normally require the Contractor to notify the owner prior to disturbing the site conditions so that the owner's representative can investigate the site and confirm the conditions alleged by the Contractor.

Equitable adjustments - The phrase *equitable adjustment* allows for considerable latitude in establishing the measurement of the compensation. The *equitable adjustment* includes added costs for *any* contract work, whether changed or unchanged by the unforeseen conditions; i.e., the Contractor is entitled to recover any increased costs for any portion of the contract work, presuming it can demonstrate that it will incur increased costs, including delay and impact costs, on account of the differing site condition. [24] In the event that the parties cannot agree on the amount of compensation, the clause will require the Contractor to proceed with the work and resolve the issue at a later date, which is the same procedure as the Changes clause.

This clause enhances the competitive bidding environment by allowing bidders to submit their best prices, without having to include substantial contingencies. It provides a mechanism to compensate the contractor through negotiation rather than litigation. The clause does not, however, automatically guarantee the contractor an adjustment; the contractor must prove that

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23 - ABA Model Procurement Code clause R5-401.06 *Differing Site Conditions Clause.* FAR 52.236-2 *Differing Site Conditions.*

24 - Kenny Constr. Co. v. Metropolitan Sanitary Dist., 309 N.E. 2d 221 (Ill. 1974).

the site conditions encountered differ materially from the conditions indicated by the owner's contract or from conditions ordinarily encountered.

9.2.3.2 Field Change Orders

REQUIREMENT
§ 23 of the Master Agreement MA(12), *Construction*, requires grantees to provide and maintain *competent and adequate engineering supervision at the construction site* to ensure that the complete work conforms to the approved plans and specifications.

Construction projects require on-site engineering supervision by a resident engineer/program manager. At the same time it is not feasible to have a contracting officer at each construction site. It is also inherent in the nature of construction projects that emergencies will occur which require immediate direction to the contractor to do changed work. For these reasons it has become generally accepted practice by most organizations doing construction contracting that some type of delegation of authority from the contracting officer to the resident engineer to direct field changes is essential. Delegations of authority to issue and/or negotiate field changes are the prerogative of the grantee. Where the grantee chooses to delegate authority to resident engineers, several procedures should be observed:

(1) The grantee's procurement policies and procedures must clearly establish organizational responsibility and provide a general procedural framework for the process of contract modifications to construction contracts. This policy will clearly define which personnel are authorized to issue change orders, including the limits of their dollar authority.

(2) The grantee should ensure that any person authorized to issue change orders has met certain educational, training and experience requirements. Suggested courses for resident engineers/project managers would include: [25]

- Basic Contract Administration (1 week)
- Cost and Price Analysis (1 week)
- Contracting Officer's Representative Course (1 week)
- Construction Contracting Basics (1 week)
- Contracting by Negotiation (1 week)
- Changes under Contracts (1 week)
- Federal Contract Law (1 week)
- Construction Claims (1 week)
- Contracting by Sealed Bidding (1 week)

25 - Courses of this nature are offered by Management Concepts, Inc., the U.S. Agriculture Department, (888) 744-GRAD, and the National Transit Institute at Rutgers University, (732) 932-1700.

(3) Delegations of authority to issue field changes should be limited to those situations where time is critical; *where there is insufficient time to process the change through the contracting officer*. Where time permits, the change should be processed through the contracting officer, who would obtain a proposal from the contractor and conduct negotiations before the change is issued. The change could then be issued as a bi-lateral contract modification setting forth the changed work and the equitable price adjustment and time extension for the change. Where time is critical, however, the resident engineer would issue the change, furnish the contracting officer with an in-house cost estimate for the work, evaluate the contractor's proposal when received, and assist the contracting officer in the negotiation of the change.

9.2.3.3 Pricing of Construction Changes

Price adjustments under contract clauses - When a contract clause exists which addresses the action causing the change (e.g., the changes clause, differing site conditions clause, etc.), the contract clause will determine the manner of the price adjustment. For Federal contracts and many State and local contracts, the term *equitable adjustment* is used to describe the method of adjusting the contract price. [26] The term *equitable adjustment* includes an allowance for profit, while the term *adjustment*, which is used in the Federal *Suspension of Work* clause, [27] provides for an adjustment for increased performance *costs*, due to directed suspensions of work under this clause, but *not profit*. The specific language in the grantee contract clause will determine whether the adjustment is to include profit or will be limited to costs only. There are certain rules governing equitable adjustment methodology which have been developed in Federal cases, and these Federal contract rules have generally been adopted in cases involving non-Federal contracts as well. The Federal contract rules pertaining to *equitable adjustments* arising out of change orders on construction contracts are summarized below.

A. Basic Pricing Formula

The basic pricing formula for an *equitable adjustment* is "the difference between what it would have reasonably cost to perform the work as originally required and what it reasonably cost to perform the work as changed." [28] State courts have adopted the same basic formula for equitable adjustments. When repricing as a result of the change order, courts have limited the repricing to the changed work, without altering the original profit or loss position of the contractor. This is known as the "leave them where you find them approach." This rule would preclude a contractor from converting a loss to a profit or vice versa.

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26 - FAR 52.236-2 *Differing Site Conditions Clause*, and FAR 52.243-4 *Changes Clause*.

27 - FAR 52.242-14.

28 - Modern Foods, Inc., ASBCA 2090, 57-1 BCA § 1229.

a) Pricing the deleted work - Under the basic pricing formula, the amount of the adjustment for the deleted work is the cost that the contractor would have incurred had the change not been issued; i.e., had the work been performed. Usually one of the parties will argue that the amount should be the amount originally estimated by the contractor when the original bid was prepared. However, the courts have usually rejected this argument if better information is available showing what the contractor's actual cost of performance would have been had the change not been issued. The "would have cost" rule is applied to cases involving deductive changes or changes where work is deleted, and other work is substituted for the deleted work.

- In one Federal case, the contractor had failed to include costs in its original bid price for a certain specification requirement, which was later deleted by the Government. The contractor argued that the Government was not entitled to a price credit because there was nothing in the contractor's original price for the work, but the Board held that the Government was entitled to a price credit based on the amount that the contractor would have spent to comply with the deleted specification requirement. [29]

- In another case involving a change from underground electrical ducts and cable to an overhead system, it was determined that the original electrical work "would have cost" about $61,000. The work as changed only cost about $19,000. The Government argued for a price reduction of $42,000, which was the net difference. The contractor, however, had only included about $35,000 in its original bid for the underground work. The contractor argued that, if the Government's price reduction of $42,000 were allowed, the contractor would actually be paying the Government $7,000 on account of the changed work. The court, however, ruled for the Government, finding that the contractor's own negligent bid caused the problem, not the change order. [30] Here again we see the basic pricing formula applied -- the amount of the adjustment for the deleted work is the cost that the contractor would have incurred had the work actually been performed. The cost adjustment is not based upon the amount included in the contractor's original bid if that amount is not indicative of the cost to actually perform the work.

b) Pricing the added work - The basic pricing formula requires that the contractor recover the increased cost of performing the work as changed. This is true even if the amount included in the original bid/contract was more than what was necessary for performance of the original work.

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29 - Noblebrook Contractors, Inc., ASBCA 9736, 1964 BCA § 4283, 1964 BCA & 4408.

30 - S.N. Nielsen Co., v. U.S., 141 Ct. Cl. 793 (1958).

- In one case where the contract was improperly changed to require the contractor to comply with the Davis-Bacon Act, the contractor was entitled to an increase in the contract price even though its bid already included enough costs for Davis-Bacon wages. [31]

B. Exceptions to the Basic Pricing Formula

a) Complete Deletion of a Severable Item - When the contract contains *severable items*, the *complete deletion* of such an item will result in an equitable adjustment which deducts the *original price of the deleted item as stated in the contract*. This is an exception to the "would have cost rule." Whether the contract items are *severable* or not depends on the provisions of the solicitation, the nature of the work, and the intentions of the parties. Merely because an item has a separate unit price in the contract does not make the item *severable.*

- In a case where the Government awarded a contract for work to be performed in four phases and priced each phase separately in the original contract, a cancellation of one phase in its entirety resulted in a price reduction equal to the amount of the price for that phase in the original contract. This was proper even though the contractor had seriously overpriced that phase and had underpriced another phase. [32]

b) Advance Agreements in the Contract - The parties to the contract may agree in advance upon the methodology to be followed in making *equitable adjustments*. For example, the contract may state that equitable adjustments for deductive changes will be the unit prices included in the contract. Another approach to deductive changes is to state in a contract clause that price credits for deductions will be based upon estimated costs at the time the contract was made.

c) Deletion of Minor Items - It is customary to use the contractor's bid price to delete relatively minor items. To attempt to base the adjustment on a "would have cost" approach may be costly without producing a better result, so courts usually follow the expediency of using the original bid price for deletion of minor items or work.

31 - B-E-C-K Christensen Raber-Kief & Assocs., ASBCA 16467, 73-1 BCA § 9884.

32 - Gregory & Reilly Assoc., Inc., FAACAP 65-30, 65-2 BCA § 4918. Holtzen Constr. Co., AGBCA 413, 75-2 BCA § 11,378.

C. Cost Impact on Contractor

The contractor's cost must be affected in order for there to be an equitable adjustment. The use of *market value* of the old/new work is generally rejected. [33]

a) Incurrence of Costs - A contractor must make payments or incur obligations which are greater than it would have incurred to do the original work. When no payment has yet been made, or when the loss is recoverable, costs are not considered incurred. For example, where the contractor's "loss" is covered by insurance, no costs are incurred and therefore no adjustment is due. In the case of a credit for decreased work, the amount of credit is the cost savings to the contractor. If the contractor realizes no savings from the change, then no credit will be due.

   - In a case where the Government waived a *requirement for an American product*, but the contractor had used foreign costs in its bid initially, the waiver did not result in cost savings to the contractor. The Court found that the Government was not entitled to a price reduction. [34]

b) Allowable Costs - Whenever a contract modification requires the submission of estimated costs for negotiation, as is the case in virtually all construction change orders, the cost principles in FAR Part 31 (or equivalent grantee cost principles) must be used to determine what is an *allowable cost*. This is true for all contracts, whether they be cost-type or fixed price. FAR 31 provides that allowable costs must meet all of the following tests:

   - Reasonableness;
   - Allocability;
   - In accordance with generally accepted accounting principles and cost accounting standards (if applicable);
   - Not excluded by specific contract provisions such as *advance agreements*.

D. Burden Of Proof

The party seeking the adjustment has the burden of proof in establishing the amount of the price adjustment. The grantee has the burden to prove, for example, how much price reduction is

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33 - Bruce Constr. Corp. v. U.S., 324 F.2d 516 (Ct. Cl. 1963).

34 - L.G. Lefler, Inc. v. U.S., 6 Cl. Ct. 514 (1984).

appropriate for deleted work, while the contractor carries the burden of proving how much of a price increase it may be entitled to receive. To meet this burden, the party must show the *reasonableness of the claimed costs* and demonstrate that these *costs have a causal connection to the change or other action on which the claim is based.* [35]

a) Causation - The cost increase or decrease must be caused by the event for which an adjustment is being claimed. There must be a *relationship in time* between the costs and the event on which the claim is based. This relationship is demonstrated when the costs follow the event in a predictable sequence. Also, the costs must bear a logical relationship to the event, resulting from its occurrence.

b) Reasonableness of Amount - FAR 31.201-3(a) places the burden of proof of *reasonableness* for both direct and indirect costs on the contractor. However, the *test of reasonableness* gives the contractor broad discretion in how it performs the work. A "reasonable cost" has been defined as follows:

> "A cost is reasonable if, in its nature or amount, it does not exceed that which would be incurred by an ordinary prudent person in the conduct of competitive business." [36]

E. Major Cost Elements

a) Labor - The contractor bears the burden of demonstrating that the cost of its additional labor effort has been caused by the event on which the claim is based. In some cases the contractor may be able to segregate the cost of the changed work in its records, and thus demonstrate the additional labor hours due to the change. However, when it is impossible to segregate the additional labor hours resulting from the change or other action of the owner, courts have accepted an approach to pricing the change
known as the *total cost method*. By this is meant *the total costs actually incurred compared to the original estimate. This method can only be used if:*

- The original labor estimates in the contractor's bid are reasonable, based on objective, external evidence, and
- The owner was solely responsible for the overrun--there must be no concurrent delays, etc.

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35 - 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).

36 - Bruce Constr. Corp. v. U.S., 324 F.2d. 516 (Ct Cl. 1963).

- There is no other reliable method to establish the additional labor costs. If there is another method, the *total cost* approach cannot be used. [37]

If the change disrupts the labor effort on unchanged work, having a "ripple effect or impact" on the effort required to do the unchanged work, the additional costs of performing the unchanged work are compensable. [38] One case of this nature involved a "disruption of the work because of the unexpected and excessive number of change orders." [39] Increases in labor costs are recoverable when a contractor incurs higher wage rates because of compensable delays in performing the work. Contractors are also entitled to compensation when there is a disruption to the work sequence, thus resulting in inefficiencies; for example, disruptions which preclude planned simultaneous work activities, or forced use of overtime work paid at premium rates, or delay of work because of unfavorable weather conditions.

b) Field Overhead - *Field overhead* is the cost of maintaining the contractor's field operations staff, facilities and equipment at the job site. Field overhead includes the cost of personnel chargeable to the specific project, such as the salaries for office clerks, project supervisors, timekeepers and engineers. It may also include rental or ownership costs for on-site trailers, office equipment, utilities, telephones, automobiles, trucks, etc. *Field overhead* is different than *Home Office Overhead,* which are general costs of conducting the contractor's overall business and cannot be attributed directly to any one project.

Direct vs. indirect costs - In any proposal for a price adjustment arising out of a change order, it is always important to determine if the costs being proposed are direct or indirect (overhead) costs. If your contract includes a clause specifying the markup for field overhead--the percentage which will be allowed in the pricing of changes--then it is critical to ensure that the contractor is being consistent in its treatment of direct vs. indirect costs, and that there is no duplication of costs. For example, if the contractor's normal accounting practice is to include the cost of its salaried general foreman in the field overhead pool, then a change order claim cannot propose this foreman's salary as a direct labor cost because the cost is already included in the field overhead markup which is applied to direct labor costs. It is important, therefore, for the grantee's contract administrator to have an in-depth knowledge of all of the elements in the contractor's field overhead pool; that is, a good understanding of the various accounts which make up the pool. The contract administrator will then be in a position to evaluate the contractor's

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37 - 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).

38 - Paul Hardeman, Inc. v. U.S., 406 F.2d 1357 (Ct. Cl. 1969).

39 - Clarke Baridon, Inc. v. Meritt-Chapman & Scott Corp., 311 F.2d 389 (4th Cir. 1962).

cost proposals and ensure that there is no duplication of costs because of the improper charging of overhead costs as direct costs. An audit of the Contractor's indirect cost pools may be necessary to obtain the required degree of information/knowledge concerning the composition of the indirect cost pools.

Extended performance - When the contractor is delayed or the contract performance period is extended by a change order or other action of the owner, the contractor will incur additional job site overhead expenses which are time-related. These will consist of additional costs for supervision, maintenance of trailers, telephones, insurance, etc. There are two ways to price these additional overhead expenses. The first is to total all of the job site overhead expenses for the entire project and divide this total by the number of days over which the costs were incurred in order to compute a daily overhead cost. This average daily overhead cost is then multiplied by the number of days of delay in order to compute the cost of the delay. However, this method of using the average daily cost may not produce an equitable result. For example, if the contractor is delayed in the earlier stages of a project when it has a full complement of supervisory personnel and equipment at the job site, the field overhead cost of a day's delay will be much greater than if it occurs at the end of the project when most of the supervisors have been released and the equipment has been removed. Because daily field overhead charges may vary materially depending on the stage of the project when the delay occurs, it may be more equitable to use another method of computing the field overhead delay costs. This method computes *the daily field overhead cost for the time period when the delay occurs*. In one Federal case involving this issue, the Government argued that the delay costs should be computed using the tail end of the project; i.e., the extended period of performance. The court, however, ruled that the delay damages should be calculated using *the specific time periods in which the delay occurred--the actual period of the work disruption.* The average daily field overhead costs during this period of actual work disruption were considerably higher than the daily costs at the tail end of the job, and the court chose a more equitable method of compensating the contractor for its actual costs during the period of work disruption. [40]

c) Home Office Overhead - Home office overhead is generally referred to as "General and Administrative" (G&A) costs, and these costs include those activities necessary for the overall business of the contractor. They would include the salaries of the company's executives, legal counsel, corporate liability insurance, accounting, depreciation, proposal/bidding costs, bad debts, etc. These costs are usually fixed costs, not varying with the volume of business, and continuing to be incurred with the passage of time. These costs cannot be assigned to any specific project. They are not of the type that can be reduced, or mitigated, during periods of project delays associated with work stoppages, change orders, etc. These costs are allowable and

[40] - Laburnum Contrs. Corp. v. U.S., 325 F.2d 451 (Ct. Cl. 1963).

recoverable by the Contractor as part of its cost proposal for an equitable adjustment arising out of delays (assuming the delays are compensable). The method of computing the recovery is discussed below.

Federal cost principles - Since virtually all construction change order proposals/claims involve the submission of cost data/estimates by the contractor, the Federal cost principles contained in FAR Part 31 would apply to the determination of an *allowable cost for the purpose of negotiating these change order proposals or claims.* [41] These cost principles stipulate that certain costs, usually included in home office overhead costs (G&A) are unallowable, including entertainment costs, contributions, interest, and bad debts. [42] Thus, while the contractor may have based its original sealed bid price on the company's full home office overhead rate, it will not be able to base its change order proposals or claims on this full rate--the rate must be adjusted to remove unallowable costs because the proposal is being negotiated on the basis of cost data and not sealed bidding as was the original contract. [43] In order to remove these costs, the Contracting Officer may wish to obtain an advisory audit of the indirect rate cost pools prior to negotiations, or simply ask the Contractor to submit overhead information identifying the unallowable portion of the rate and accept the Contractor's submission as being factually accurate without an audit. The dollar value of the negotiations, (as well as the future potential for changes) may be the determining factor in deciding whether to audit the rates or not.

Extended performance - The contractor's performance time may be extended by owner-caused disruptions of work, suspensions or change orders. Some of these actions may have a negligible effect on the contractor's direct costs, and thus entitle the contractor to only a small amount of markup on the direct costs for home office overhead. This type of situation may leave the contractor with a significant under recovery of its home office overhead costs. The courts have recognized that the nature of construction projects is such that contractors may be entitled to recovery of extended home office expenses when their contracts are delayed, and this recovery is beyond the usual percentage markup on the direct costs. Where actual overhead cannot be demonstrated or agreed upon, the *Eichleay formula* has been widely used as a method of calculation. [44] This formula, however, should be used with caution, as it can overstate actual contractor's overhead. The use of the formula varies from State to State and you should consult with your legal counsel for guidance in the use of this formula.

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41 - CFR § 18.22 (b).

42 - FAR 31.105 and FAR 31.2.

43 - FTA Circular 4220.1E paragraph 10.d.

44 - This method is named after the landmark 1960 decision in Eichleay Corp., ASBCA 5183, 60-2 BCA § 2688, aff'd., 61-1 BCA § 2894.

In the Eichleay case, the Government had argued for a percentage computation which applied the contractor's normal home office overhead rate to the excess direct costs incurred during the delay period. The Government argued that there was no increase in the overhead rate during the delay. But the Board found that the Government's method was totally inadequate because (1) the delay added very little direct costs to the contract price; thus there was very little for the contractor to recover for home office overhead using a recovery method of a percentage of direct costs for overhead, and (2) the contractor's home office overhead costs continued throughout the delay period and could not be reduced (the costs were fixed, not variable). The facts were that the delays and suspensions occurred through an extended series of interruptions, and it would not have been prudent for the contractor to lay off its Home Office personnel or to take on other new business commitments during this delay period. *The Eichleay formula is proper, then, if the contractor can demonstrate that it was not "prudent or practical" to reduce its home office staff or to seek new business commitments during the period of the disruption.* [45] The Eichleay formula is accepted in Federal and State courts, boards of contract appeals and by arbitrators as a fair and reasonable method for compensating construction contractors for extended home office expenses resulting from owner-caused, compensable performance delays.

The Eichleay formula - The formula consists of three calculations: [46]

1.	Contract Billings During Performance / Total Billings During Performance	x	Total Corporate Overhead During Performance	= Corporate Overhead Allocable to Contract
2.	Contract Allocable Corporate Overhead / Total Calendar Days of Contract Performance	=	Contract Corporate Overhead Daily Cost	
3.	Compensable Delay Days	x	Corporate Overhead Daily Cost	= Additional Corporate Overhead Expense During Contract Delay

45 - Capital Elec. Co. v. U.S., 729 F.2d 743 (Fed. Cir. 1984).

46 - The formula as stated in *Construction Contracting*, The George Washington University, 1991.

The methodology outlined above consists of taking the total home office overhead costs for the contract performance period and multiplying this total cost by the ratio of contract billings to total company billings; this calculation produces the amount of home office overhead dollars allocable to the contract. That amount is then divided by the number of days of contract performance; the result is the daily home office overhead rate in dollars per day allocable to the contract. That rate is then multiplied by the number of days of delay. The final result is the dollar amount of recovery for home office overhead costs.

d) Profit - Profit is allowed as part of any owner action which entitles the contractor to an "equitable adjustment" under the terms of the contract. The profit would be that which is reasonable and customary for the type of work being performed. The contract may include a recoverable profit rate on change order work, but it is suggested that the rate be stated as a maximum percentage, negotiable downward only. The reason for this approach is to avoid a cost-plus-percentage-of cost methodology, which is prohibited. [47] In this way the grantee can negotiate a lower rate of profit on changes where the nature of the work and the risks might warrant a lower rate of profit than for the basic contract.

9.2.3.4 Variations in Estimated Quantities

Many construction contracts contain unit prices and estimated quantities of the various pay items. This procedure is used when the quantity of work cannot be estimated with sufficient accuracy so as to permit the work to be priced on a lump-sum (total price) basis. When it is necessary to use unit prices with estimated quantities, owners frequently include a clause requiring adjustment of the unit prices only when the actual quantities vary significantly from the estimates. For example, both the Federal clause and the Model Procurement Code clauses require that actual quantities must vary by more than 15% (up or down) before an adjustment will be made in the unit prices. [48] The adjustment can be at the request of either party.

Relationship to Differing Site Conditions clause - The *Variation In Quantity* clause will not govern the Contractor's entitlement to an equitable adjustment when the Contractor encounters conditions of the type described in the *Differing Site Conditions* clause. In such situations, where the Contractor encounters materially differing physical conditions not anticipated by either party, the *Differing Site Conditions* clause will take precedence and the Contractor will be entitled to an equitable price adjustment even if the final quantities vary by less than the % stated in the *Variation In Quantity* clause. [49] In one case the Board of Contract Appeals found a

[47] - FTA Circular 4220.1E paragraph 10.e.

[48] - FAR 52.211-18. MPC R5-401.04.

[49] - Brezina Constr., Inc., ENGBCA 3215, 75-1 BCA ¸ 10,989.

differing site condition when the Contractor encountered an unforeseen rock ledge in a river being dredged. The contract contained a pay item for dredging loose rock, and the removal of the rock ledge did not cause the Contractor to exceed the estimated quantities of rock actually removed. However, the Board ruled that the methods required to remove the rock ledge were not those normally used for loose rock, and thus the Contractor was entitled to a price adjustment under the *Differing Site Conditions* clause even though the total quantity of rock removed was not in excess of the estimated quantity in the contract.

Unit price adjustments - Both the Federal clause and the MPC clause call for a unit price adjustment when the Contractor's costs increase or decrease *due solely to the variation* above 115% or below 85% of the estimated quantity. The phrase "due solely to variation" means that the amount of the equitable adjustment is determined solely from the difference in costs which is due to the larger or smaller quantity, rather than from a complete repricing of the work based on actual incurred costs for the excess quantity. Furthermore, the party demanding the adjustment has the burden of proving that costs have varied *because of a difference in quantity*. [50]

The typical *Variation In Quantity* clause entitles the Contractor to a price adjustment for under-runs as well as over-runs in quantities. This presumes the Contractor can demonstrate that its unit costs have risen because of the under-runs. Typically the Contractor's fixed costs per unit will be higher because of fewer units over which to amortize the fixed costs. In the case of over-runs to the estimated quantity, *the repricing would apply to only those quantities falling outside the range specified.* In the case of under-runs, the repricing would apply to the entire actual quantity produced/delivered.

Payment on basis of actual costs - Some transit agencies have adopted contract provisions paying contractors' *actual costs,* on a "force account" basis, for quantities outside the range specified in the estimated quantities clause. In such cases the methodology is different than that described above where the contractor's starting point for establishing an equitable price adjustment is the unit price in the original contract, adjusted for cost increases or decreases due solely to the variation in quantities. In those cases where the price adjustment is to be based on actual costs for the increased/decreased quantities, the contract terms may describe in detail the methodology for determining payments, including the establishment of ceiling rates to cover such costs as home office overhead, field office overhead, equipment rental, etc. Where ceiling rates are used, they are subject to a final audit, and may be adjusted downward after audit to reflect the contractor's actual costs for the various individual cost elements (e.g., home office overhead). The rates are not fixed, predetermined percentages applied to actual costs of labor, materials, etc.--such an arrangement would be an impermissible cost-plus-percentage-of-construction-cost method which is prohibited by FTA Circular 4220.1E 10e. [51]

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50 - Victory Constr. Co. v. U.S., 510 F.2d 1379 (Ct. Cl. 1975).

51 - Bay Area Rapid Transit District (BART), *General Conditions For Construction Contracts,* Articles GC4.5 *Increased or Decreased Quantities,* and GC9.3 *Force Account*.

9.2.3.5 Delays

There are many events which can occur to delay a contractor's performance. Delays can be of three generic types:

(1) Those where the contractor bears the risk of both time and cost--these are delays within its control. These delays are *non-excusable.*

(2) Those for which the owner is responsible for both time and cost impacts--these are delays for which the owner agrees to be responsible or which are caused by it. These are *compensable* delays.

(3) Those for which neither party is responsible to the other--these are delays, such as *concurrent* delays, where both parties have caused delays which have an equal impact on completion, and it is impossible to apportion or separate the delays. In such cases, the contractor may not recover its increased costs and the owner may not enforce liquidated damages.

The following provides typical examples of these types of delays. However, there are many variations used in contracts and grantees must make their own determination as to how the risks associated with delays are allocated between themselves and their contractors.

Excusable delays - The primary purpose of an *excusable delay* provision is to protect the contractor from sanctions for late performance (e.g., default termination, liquidated damages, and actual delay damages). *Excusable* delays may not be *compensable*. Whether a delay is considered *excusable* depends on the language of the particular clause in the contract. The Federal clause for construction contracts names a number of events which can give rise to an *excusable delay*, but there are *three elements which are critical in determining whether an excusable delay has occurred.* [52] The three elements are:

(1) The delay must arise from *unforeseeable causes*. If circumstances which are known when the contract is entered into make certain delays foreseeable, then courts have held the contractor responsible and refused to grant relief. [53]

(2) The event must be *beyond the control of the contractor*. If a contractor cannot prevent an event from occurring, that event is beyond the contractor's control. Also, the standard applied is one of reasonable economic practice. For example, where

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52 - FAR 52.249-10, *Default (Fixed-Price Construction).*

53 - Dicon, Inc. v. Marben Corp., 618 F.2d 40 (8th Cir. 1980).

there has been unusually severe weather, the contractor is not obligated to institute a two-shift operation to overcome the delays caused by the weather. [54]

(3) The delay must be *without the fault or negligence of the contractor*. Fault or negligence deals with either acts or omissions of the contractor that cause delays. A contractor was not granted relief when its subcontractor failed to perform because the contractor was negligent for failing to assure itself of the subcontractor's ability to perform. [55]

If the excusable delay provision lists a type of event relieving the contractor from responsibility, then, under the Federal clause, the three criteria discussed above are applied to the event to determine the issue of excusability. It should be noted, however, that private contracts may or may not contain the same language as the Federal clause, and thus the proper interpretation of the clause should be sought from the grantee's in-house legal counsel. The types of events usually included in these provisions would include:

- Strikes - To obtain an excusable delay for a strike *under the Federal clause*, a contractor must prove that it acted reasonably and did not wrongfully precipitate or prolong the strike, and it must take steps to avoid its effect. In other words, the three-fold criteria of being unforeseeable, beyond the contractor's control, and without the fault or negligence of the contractor, must be met. *In private contracts* which do not contain this language, however, a court may well excuse a delay even where the strike is precipitated by the contractor's actions, such as reducing its workers' wages. [56]

- Weather - Most contracts will contain excusable delay provisions concerning adverse weather. Generally, adverse weather is *abnormal in comparison to the previous weather patterns at the same location for the same time of year*. Some grantee construction contracts contain provisions noting the anticipated non-work weather days for each month of the year, and contractors are advised to bid with this information and to plan their schedules accordingly. [57] The usual method of proving that weather is unusually severe is to obtain comparative data from the U.S. weather bureau for past periods in the area with those recorded during the period of performance.

54 - Southern Flooring & Insulation Co., GSBCA 1360, 1964 BCA ¶ 4480.

55 - Kaufman DeDell Printing, Inc., ASBCA 19268, 75-1 BCA ¶ 11,042.

56 - Panzieri-Hogan Co. v. Bender, 143 N.E. 739 (N.Y. 1923).

57 - BART, Clause GC.8.5.1.4 -- *Anticipated Non-Work Weather Days*.

- Subcontractor and supplier delays - Where the delay is caused by a subcontractor or supplier, and the excusable delay clauses mention this as an excusable cause, there is usually the added requirement that the subcontractor's or supplier's delay be excusable based on the same three-fold criteria as discussed above in connection with other causes of delay; i.e., it must have been due to circumstances unforeseen by the subcontractor, beyond the subcontractor's control, and without the subcontractor's fault or negligence.

- Owner conduct - To be excused for owner conduct, contractors must show that the contractual acts or omissions of the owner were wrongful (e.g., an improper failure to pay for services performed, or improper interference with the work of the contractor(. But where delays are due to owner acts properly taken, there is no basis for an excusable delay (e.g., where owner rightly insists on compliance with specifications, or properly rejects subcontractors who do not meet qualification/ experience requirements). Of course when the owner issues Change Orders (which are not wrongful acts), the contractor is entitled to both a price and schedule adjustment in accordance with the terms of the Changes clause.

Compensable delays - These are delays for which the *contractor is entitled to compensation*, not merely an extension of time, as with many of the *excusable delays*. Entitlement to compensation may be expressly stated in a specific contract clause, but if not, *there is an implied duty of each party not to hinder, delay or make more expensive the performance of the other party*. Thus, even in the absence of a specific contract clause granting the contractor compensation for owner-caused delays, many courts find an implied owner duty not to hinder or delay, and they will grant compensation to contractors for such delays. [58] This implied duty has been used as justification for compensation in a wide variety of circumstances.

Compensable delays may arise because of *express orders of the owner* (e.g., suspensions of work for owner's convenience, written Change Orders, etc.), or because of so-called *constructive changes*; i.e., some act of the owner or failure to act which causes a compensable suspension of work (e.g., delay in the availability of the site, delay in issuing approvals where prior approval is required before starting work, delays in the inspection process, or owner's interference with the contractor's work).

In order to be compensated for delays, *a contractor must demonstrate that the delay is unreasonable in duration*. It is important to determine if the delay is the result of the owner's fault or whether it results from an action taken by the owner pursuant to a contractual right. If the delay results from an owner's fault, the courts have generally held that the entire period of the delay is unreasonable and therefore compensable. If, on the other hand, the delay arises out of an

58 - Peter Kiewit Sons Co. v. Summit Constr. Co., 422 F2d 242 (8th Cir. 1969).

action taken pursuant to an owner's contractual right, the contractor will be compensated only for the unreasonable portion of the delay. [59]

Delays where the total delay period has been found unreasonable include:

- Delay in issuing notice to proceed beyond date needed by contractor to perform work efficiently.
- Delays because of conflicting or defective specifications.
- Delays in obtaining city authorizations which could only be obtained by the owner.

Delays which have been found to be reasonable include:

- Delays in awarding the contract arising out of compliance with bid protest procedures.
- Delays in issuing changes which were not attributable to defective specifications.

Concurrent delays - When both parties contribute to a delay, the issue arises as to how to resolve the question of responsibility for the delay. The courts have resolved this issue by assessing the losses attributable to each party's delay and apportioning the damages accordingly. [60] The case law in this area focuses on apportioning the delay to its appropriate category of owner-caused, contractor-caused, and caused by neither--"excusable" per the contract terms. What this means is that if one party contributed in part to the delay, it will not be barred from recovering damages from the other party (e.g., an owner who is *partly responsible* for the delay will not be precluded from recovering liquidated damages). [61] Where it is impossible to allocate or separate the delays, or where the delays are truly concurrent (where each party has had an equal impact on completion, the following rules would apply:

- Where contractor-caused delay is concurrent with owner-caused delay, the contractor may not recover its increased costs resulting from the delay.
- Where *noncompensable* delays are concurrent with owner-caused delays, a contractor may not recover its increased costs resulting from the delay.
- Where the owner has contributed to the project delay, and such contribution cannot be separated from other causes of delay, liquidated damages cannot be enforced by the owner.

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59 - Davho Co., VACAB 1005, 72-2 BCA 9683 at 45,214.

60 - U.S. ex. Rel. Heller Elec. Co. v. William F. Klingensmith, Inc., 670 F2d 1227, 1231 (D.C. Cir. 1982).

61 - Aetna Casualty & Sur. Co. v. Butte-Meade Sanitary Water Dist., 500 F. Supp. 193, 197 (D.S.D. 1980).

9.2.3.6 Acceleration

Acceleration is the speeding up of the rate of performance in order to complete the contract earlier than would be the case if the contractor pursued the effort in a normal manner. There are two situations where contractors are entitled to compensation for acceleration costs.

Owner-caused delay - When an owner causes a delay which would entitle a contractor to recover its increased costs (see *compensable delays* in section 9.2.3.5), the contractor may attempt to mitigate the costs of the delay by voluntarily accelerating its efforts. In this case the contractor is entitled to recover the costs of accelerating the effort and these increased costs are actually recoverable as part of the delay costs because they were incurred in mitigation of those delay costs. [62]

Owner-directed acceleration - When an owner orders the contractor to complete the work earlier than the contract requires, the contractor is entitled to recover the costs of acceleration. The owner may expressly order the contractor to accelerate performance, thus creating a compensable acceleration, but in the majority of cases the acceleration is *constructive* rather than expressed; i.e., the owner orders the contractor to meet the contract completion date even though there has been an *excusable delay* which would entitle the contractor to an extension in the completion date. (See *excusable delays* in section 9.2.3.5). The effect of this order by the owner is to require a rate of performance which is faster than the contract requires, and this is equivalent to an express order to accelerate. [63]

Elements required for constructive acceleration: - In order to recover for constructive acceleration, it is generally held that the contractor must demonstrate three elements:

(1) the delays which occasioned the order to accelerate were excusable.
(2) the contractor was ordered to accelerate.
(3) the contractor in fact accelerated performance and incurred extra costs. [64]

Order to accelerate - An order to accelerate does not have to be a specific command. If the owner "requests" the contractor to accelerate, it has the same effect as an "order." Further, it makes no difference whether the contractor complies willingly or unwillingly. If the initiative comes from the owner and the work is done in a manner different than the contract requires, then the contractor will be entitled to compensation. Other circumstances giving rise to constructive

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62 - Canon Constr. Corp., ASBCA 16142, 72-1 BCA 8622.

63 - Contracting & Material Co. v. City of Chicago, 314 N.E. 2d 598 (Ill App. Ct. 1974).

64 - Norair Eng'g. Corp v. U.S., 666 F. 2d 546 (Ct. Cl. 1981).

acceleration would be: (a) a wrongful threat to terminate for default where the delays were excusable, [65] and (b) a threat to assess liquidated damages where delays were excusable. [66]

Acceleration orders where both excusable and non-excusable delays exist - The Federal cases have held that when the owner directs the contractor to accelerate in order to recover the non-excusable delay, the acceleration costs are not recoverable. [67] It has also been held that where both excusable and non-excusable delays exist, and the contractor accelerates performance pursuant to an order of the owner, the acceleration costs are not compensable when the time recovered is less than the amount of the non-excusable delay. [68]

Recovery of acceleration costs not dependent on recovery of lost time - When the owner orders completion ahead of schedule, and the contractor uses its "best efforts" to accelerate completion of the project but fails to recover the lost time, the contractor is permitted to recover the increased costs associated with its efforts to accelerate. [69]

9.3 IMPROVING VENDOR DELIVERY PERFORMANCE

Late deliveries from vendors can be, and often are, a serious problem for many agencies, especially those that are awarding and administering many thousands of purchases annually. New York City Transit (NYCT) is an agency that has faced this problem with respect to its maintenance materials and developed some innovative solutions to deal with it. This agency has faced all of the normal difficulties in dealing with vendors, including late deliveries, quality and quantity problems as well as difficulties in motivating its suppliers to grasp the significance of improved performance. The following summarizes some of the methods NYCT has used to address vendor performance problems.

Vendor Performance Module – The first step in addressing poor vendor delivery performance was to develop a computer software program or module that would accurately gather and report different measurements of vendor performance.

This permits NYCT's procurement and receiving functions to be electronically linked, thereby enabling receiving personnel to enter the data summarizing the details of each inventory receipt transaction. For example, the data recorded includes the actual date of delivery in comparison to

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65 - William Lagnion, ENGBCA 3778, 78-2 BCA ¶ 13,260. Lewis Constr. Co., ASBCA 5509, 60-2 BCA ¶ 2732.

66 - Pathman Constr. Co., ASBCA 14285, 71-1 BCA ¶ 8905.

67 - Electrical Enters., Inc., IBCA 971-8-72, 74-1 BCA ¶ 10,528.

68 - Pan-Pacific Corp., ENGBCA 2479, 65-2 BCA ¶ 4984.

69 - Varo, Inc., ASBCA 15000, 72-2 BCA ¶ 9717.

the date promised by the vendor, purchase order quantity vs. actual quantity received and quality assurance rejections. The module accumulates this data on a vendor specific basis and provides performance information. Using this performance information, NYCT has implemented several programs to improve on-time delivery performance.

"100 Worst" Program – Utilizing the vendor performance data, NYCT can identify the "vital few" vendors who are generally responsible for the greatest number of late deliveries and are having the most significant impact on NYCT's ability to support maintenance and production efforts. Presently NYCT has directed its focus on the 100 firms having the highest number of late deliveries through open, non-adversarial meetings between agency procurement staff and the chief executives of the companies in question. Specific emphasis is placed upon the expansion of the vendor's understanding of the significance of late deliveries. Individualized action plans are developed with clearly defined remedial steps and corresponding milestone dates. For the most part this approach has been successful; however, in those rare instances where a vendor is completely unable to improve, determinations of non-responsibility, suspensions, defaults and debarments are invoked.

Top 100 Suppliers – This program looks at the 100 best suppliers. NYCT holds an annual vendor conference and invites senior management officials from these suppliers. Awards are presented to the very best companies for excellent on-time performance, with special emphasis on companies showing marked improvement. These awards are perceived as prestigious within the industry and are anticipated to have an extremely positive effect on a vendor's ability to attract future business with other transit properties. Goals and strategies are discussed for continued improvement and the attendees are given a complete understanding of the major initiatives that NYCT has embarked upon which will require the support of the vendor community through timely performance.

"STATUS" Program – *System To Automatically Track Untimely Shipments*
The STATUS program is a standard method of late delivery notification to any vendor. At set time periods, letters detailing a missed delivery date are mailed to the vendor. The system officially notifies each vendor's sales representative and chief officer of late deliveries, advising them of potential action and affording the company an opportunity to respond.

Program Results - The programs adopted by NYCT (Vendor Performance Module, "100 Worst" Program, "STATUS" Program, and "Top 100 Suppliers") have proven to be highly successful in improving vendor performance.

Another program that has proven successful at MARTA involves linking employee performance to on time vendor deliveries.

9.4 APPROVAL OF SUBCONTRACTORS

REQUIREMENT
FTA Circular 4220.1E paragraph 16 requires grantees to evaluate Federal statutory and regulatory requirements for relevance and applicability to a particular procurement. Appendix A.1 – *Federally Required and Other Model Contract Clauses*, and Chapter 8 – *Contract Clauses*, contain a discussion of many contract clause requirements, including the applicability to subcontracts. 49 CFR Part 26 sets forth the requirements of the Federal Department of Transportation concerning Disadvantaged Business Enterprise (DBE) participation in FTA programs. A discussion of these requirements may be found in Chapter 7 of this Manual.

DISCUSSION

The management of subcontracts usually involves three areas:

(1) Assurance that the prime contractor has included the required "flow-down" provisions (clauses) from the prime contract in the subcontract. A discussion of the requirements related to the flow-down of Federal contract clauses may be found in Chapter 8 – *Contract Clauses*, and Appendix A.1 – *Federally Required and Other Model Contract Clauses.*

(2) The prime contractor's compliance with the Disadvantaged Business Enterprise (DBE) requirements in its prime contract. Guidance related to the DOT requirements concerning DBE matters may be found in Chapter 7 - *Disadvantaged Business Enterprise.*

(3) Assurance that the prime contractor has selected its critical subcontractors in a prudent fashion, so as to protect the grantee's program interests.

The purpose of this section relates to the third objective above – it is to furnish guidance concerning those circumstances when grantees may wish to require their prime contractors to submit certain subcontracts for the grantee's consent prior to award of the subcontract by the prime. [70]

When the prime contract is CPFF or T&M– Under a cost-plus-fixed-fee contract (CFPP) and a time-and-materials (T&M) contract, the grantee bears the burden of allowable costs

[70] - The grantee may find it helpful to review the Federal policies and procedures concerning subcontracting in the FAR Part 44. Grantees are not required to follow these Federal procedures.

incurred by the prime contractor, including amounts spent for supplies and services on purchase orders or subcontracts. It behooves the grantee, therefore, to exercise diligence in the management and administration of these types of prime contracts with respect to the primes' selection of its major subcontractors or suppliers. If the cost incurred by the prime is greater than necessary (for example, because of inadequate competition or a poorly negotiated subcontract), it is the grantee that will bear the higher than necessary costs. If the selected subcontractor performs poorly, it will be the grantee that will bear the cost of correcting the problems or be put in a position of having to accept a product that is substandard.

When the subcontract involves a critical component or subsystem – This situation is more likely to arise when the contract involves the procurement of a major system or involves new technology. Here the issue is not so much the cost risk that accrues to the grantee under every CPFF or T&M type of contract, but the risk of failure of the system being procured due to problems with subcontracted components or subsystems that are critical to the system's successful performance. For example, on a large contract for rehabilitating a subway station, a prime contractor with civil engineering experience may have to subcontract the electrical system work. You may very well require the prime to submit its proposed subcontractor for electrical work for your approval, and you will want to do a "responsibility" type of review of that particular subcontractor. If you have evidence of poor prior work by that subcontractor, or evidence of marginal financial resources, you may require the prime to select a different company with a better track record of performance or a stronger balance sheet.

When the subcontract exceeds a certain dollar threshold – Grantees may require their primes to submit all subcontracts over a certain stated value for consent. New York City Transit, for example, requires its prior approval of all subcontractors whose subcontracts will exceed $1,000,000 or 10% of the total contract price. For Federal contracts, the threshold for subcontract consent is 5% of the prime contract value when the prime contract is a CPFF or T&M type of contract. [71]

Best Practices

Determining Subcontractor Responsibility – Sealed Bids - You may wish to consider a standard provision in your solicitations that would require the bidders to submit certain subcontractor information for your review prior to contract award. This information would enable you to make a determination that a proposed subcontractor or supplier was technically and financially qualified to perform the work. This determination would be part of your "responsibility" determination for awarding the contract. New York City Transit uses a standard provision in its Invitation for Bids (IFB's) entitled "Bidder's Qualifications/Responsibility."

[71] - FAR 44.201-1.

This clause requires the bidder to demonstrate to the satisfaction of NYCT that it has the integrity, skill, experience, facilities and financial resources necessary to perform the contract. The clause covers major subcontractors as well as the prime contractor. The pertinent part of this clause concerning subcontractors reads as follows:

(h) *Except to the extent set forth in subparagraph (i) below, Authority approval of all Subcontractors and Suppliers is required. In order to assist the Authority in its evaluation of Bidder's qualifications, the Bidder shall supply to the Procurement Representative within three (3) working days after the opening of bids, or within three working days after notification, in the case of a subsequently identified apparent low bidder, a detailed list of: (i) proposed Subcontractors supplying labor or labor and materials, with a value exceeding the lesser of $1,000,000 or ten percent (10%) of the Total Contract Price as bid by the apparent low Bidder;*
and (ii) Proposed Subcontractors and Suppliers of the following equipment, materials or labor:

(See Information for Bidders Data Sheet)

Bidder's submission is to also include the completed form titled "Statement of Qualification of Subcontractor," a copy of which is available from the Procurement Representative. [72] *These requirements are in addition to, and not in lieu of, submission requirements pertaining to subcontractor's proposal to meet DBE or MBE/WBE or affirmative action requirements.*

The Bidder shall state in writing to the Authority the name and place of business of each proposed Subcontractor or Supplier, the portion of the work which such Subcontractor is to do or the equipment/materials which such supplier is to furnish and such other information as the Authority may reasonably require tending to establish that the proposed Subcontractor or Supplier has the necessary skill, facilities, integrity, experience and financial resources to perform the work or supply the equipment in a satisfactory manner and in accordance with the Contract. To be considered skilled and experienced, the proposed Subcontractor or Supplier must show that he has satisfactorily performed work, or supplied equipment, of the same general type that he is proposing to perform for the Bidder under this Contract. The Authority may require such proposed Subcontractor or Supplier to submit proof of financial or other qualification to do the Work. In addition to submitting for approval the above-mentioned categories of Subcontractors and Suppliers, Bidder may submit any other proposed Subcontractor or Supplier for approval prior to contract award.

72 - A copy of this Qualification Statement is included in this Manual as Appendix B. 17 – *Statement of Qualification of Subcontractor.*

The Authority will notify the Bidder within a reasonable time whether use of the proposed Subcontractor or Supplier has been approved. Where use of a proposed Subcontractor or Supplier has not been approved, the Bidder may propose another Subcontractor or Supplier, or propose to perform the work himself.

(i) *With respect to any Subcontractor(s)/Supplier(s), the successful Bidder will be required to obtain approval of such Subcontract(s)/Supplier(s) in accordance with the provisions of Article 1.08.*

The contract Article No. 1.08 referenced above in the solicitation provision requires the Bidder to use the Subcontractors/Suppliers that were approved by NYCT. The contract clause reads, in part:

ARTICLE 1.08 - SUBCONTRACTS

(a) Any Subcontractor or Supplier which required and received pre-award approval in accordance with paragraph 16 of the Information for Bidders, must be utilized by the Contractor for the portion of the Work for which they were approved. The Authority will generally not entertain any post-award substitutes of any such Subcontractor or Supplier in the absence of compelling circumstances to do so. [73]

Several points can be noted concerning the above solicitation provision and contract clause:

a. Every subcontract greater than 10% of the bid price will automatically be captured for review.

b. The provision is tailored on a case-by-case basis to capture any subcontract deemed important or critical by the grantee regardless of dollar value. You would simply insert the equipment, materials or labor in your "Bidders Data Sheet" (or wherever you wish to note the items) so as to require your review and approval of those subcontractors.

c. The Bidder will be required by the contract Article 1.08 – *Subcontracts,* to use the Subcontractors/Suppliers that were proposed and approved unless there are "compelling circumstances" that preclude the Bidder from doing so.

Consenting to Subcontracts When the Prime Contract is Cost Plus Fixed Fee (CPFF) or Time & Materials (T&M) - For these types of contracts, grantees may wish to require the prime contractor to submit the proposed subcontract for the grantee's consent prior to award by the prime, especially if the subcontract is significant in dollar terms, involves a critical component,

73 - For a complete contract clause and further information dealing with Subcontracts, contact Stan Grill of NYCT at (718) 694-4350.

or is itself a CPFF or T&M subcontract. If the grantee determines that any subcontracts should be submitted for consent, the grantee will want to identify the types of information that the prime should submit with its request for consent. The type of information that will usually be relevant as part of an advance notification for consent package would consist of:

1. A description of the supplies or services to be subcontracted. The best description would be the actual subcontract specifications and/or statement of work.

2. Identification of the type of subcontract to be used. The actual subcontract document itself would be best since it would give you all the terms and conditions, which you can then review to ensure that all required flow-down clauses are incorporated in the subcontract. The BPPM Appendix A.1 contains the required Federal clauses and identifies those that have flow-down requirements.

3. An explanation of how and why the proposed subcontractor was selected, including an identification of the competitive proposals obtained, and their relative strengths and weaknesses.

4. The subcontractor's cost or price proposal, together with the prime contractor's cost or price analysis of the subcontractor's proposal.

5. Evidence from a competent auditor that the subcontractor's accounting system is adequate for cost-type subcontracts (if the subcontract is cost-type) and that the proposed labor and indirect expense rates are reasonable in light of recent actual rates incurred and the best available business projections for the company.

6. The Prime contractor's explanation of how the subcontract price was determined.

7. The Prime contractor's assessment of the subcontractor's "responsibility," including the subcontractor's performance record on prior jobs of a similar magnitude.

Degree of Work that is Subcontracted - Grantees may consider requiring the prime contractor to perform certain tasks on a project or a minimum percentage of the work, to insure that the prime contractor maintains a certain degree of control over the project. For instance, where a job is primarily civil/structural work, bidders may be allowed to subcontract associated electrical work, but may be required to perform the civil/structural work with their own forces. In any event, where a significant amount of the work is subcontracted, the agency may wish to take a more active role in approving subcontractors. [74]

[74] - Some states or jurisdictions have established minimum requirements.

Chapter 10

10 – Closeout

10.1 Closeout Procedures (7/99)
10.2 Audits (7/99)
10.3 Record Retention (4/05)

10.1 CLOSEOUT PROCEDURES

REQUIREMENT
49 CFR Part 18.50, *Closeout*, addresses the requirements that grantees must adhere to in the closeout of their grants. In order to comply with these requirements, grantees will have to obtain the required information, reports, final invoices, and other documentation as appropriate from their third party contractors as part of the contract closeout process. The closeout information required by FTA from grantees pertains to the following: 1. Final performance or progress report. 2. Financial Status Report. 3. Final request for payment. 4. Invention disclosure (if applicable). 5. Federally-owned property report (does not include property obtained with grant funds).

DISCUSSION

A completed contract is one that is both physically and administratively complete. A contract is *physically complete* only after all deliverable items and services called for under the contract have been delivered and accepted by the grantee. These deliverable items include such things as reports, spare parts, warranty documents, and proof of insurance (where required by the contract terms). These deliverable items may or may not have been priced as discrete pay items in the contract, but they are required deliverables, and the contract is not physically complete until all deliverables are made. A contract is *administratively complete* when all payments have been made and all administrative actions accomplished. The steps that must be completed to close out a contract will depend upon the type and/or nature of the contract.

Routine commodity procurements – The closeout of routine purchase orders and contracts for commodities and other commercial products is usually a straightforward and uncomplicated process. The procurement person responsible for closeout will need to ensure that his end item user has inspected and accepted the deliverable items as being in

conformance with the purchase order/contract specifications. An inspection/acceptance form should be in the file attesting to the contractor's delivery of all contract end items, including any descriptive literature or warranty documentation. There must also be documentation attesting to final payment by the accounts payable department.

<u>Non-routine contracts for services, construction, rolling stock, etc.</u> – Contracts for personal services, complex equipment, construction, and other one-of-kind items will require a number of steps to effect an administrative closeout. Major elements of the closeout process, and related documentation, might include:

a) Resolution of all contract changes, claims, and final quantities delivered.

b) Determination/recovery of liquidated damages.

c) Review of the insurance claim file by counsel/insurance specialist to determine if funds need to be withheld from final payment to cover unsettled claims against the contractor.

d) Settlement of all subcontracts by prime contractor.

e) Performance of all inspections (and acceptance tests if any) by the grantee's project management office, with appropriate documentation.

f) Conduct of a cost audit for cost-reimbursement contracts and resolve questioned costs, if any.

g) Generation of a Contractor Performance Report. See *Best Practice* below.

h) The submittal of all required documentation by the Contractor, including such items as:

- **Final reports**
- **Final payroll records and wage rate certifications**
- **Spare parts list**
- **Manufacturer's Warranties and Guarantees**
- **Final corrected shop drawings**
- **Operation and maintenance manuals**

- **Catalogues and brochures**
- **Invention disclosure (if applicable)**
- **Federally-owned property report (if there was Government-furnished property)**
- **Resolution of final quantities (construction contracts)**
- **Final invoice**
- **Consent of Surety to release final payment to Contractor**
- **Contractor's Affidavit of Release of Liens**
- **Contractor's General Release (releasing the grantee from any further liabilities/claims under the contract)**
- **Maintenance Bond (if required)**

i) Conduct a Post-delivery Audit for rolling stock contracts as required by 49 CFR Part 663 – Pre-award and Post delivery Audits of Rolling Stock Purchases.

Federal closeout procedures – Should the grantee wish to review the contract closeout procedures used by the Federal Government for its contracts, they may be found in FAR Part 4.804, *Closeout of contract files*. FAR Part 42.15, *Contractor Performance Information*, discusses the preparation of *Contractor Performance Reports*. These procedures are not binding on grantees, and are included here for information purposes only.

Best Practice

Establishing That a Contract Is Completed – It is generally the responsibility of the Project Manager (PM) to establish that the work under a contract has been completed and the contract is ready for closeout. When the PM determines that the work is complete, the PM should prepare a checklist showing all the contract deliverables and submittals, and indicating on the checklist that all submittals and deliverables have been reviewed, inspected and accepted. The PM should notify the contract administrator by memorandum that the contract is complete and all required deliverables have been inspected and accepted.

Contract Closeout Checklist – The PM or contract administrator should have a *contract closeout checklist*, listing all the administrative steps required to close out a contract. The checklist is an extremely useful tool for the contract administrator or project manager who is responsible for contract closeout. Given the different requirements for the various contracting situations,

grantees may wish to have different checklists for different types of contracts; e.g., commodities, services, construction, cost-type contracts, etc. An example of a *contract closeout checklist* used by MARTA for construction contracts is shown in Appendix B.14.

Contractor Performance Report – Documentation of a contractor's performance for future source selection decisions is an option that grantees should consider for certain types of procurements such as professional services, complex equipment, construction, etc. These performance reports can be an important reference point for future source-selection decisions. See BPPM Section 5.1, *Responsibility of Contractor*. If the grantee chooses to document a contractor's performance, input to the report should be received from the technical office, contracting office, disadvantaged business office (if contract contained DBE requirements) and end users of the product or service (if appropriate). Contractors should be furnished with the report and given an opportunity to submit comments, rebutting statements or additional information. The Contractor's comments should be retained in the report file. It would be advisable to have a review level above the grantee Procurement Officer to consider disagreements between the parties regarding the evaluation. However, final decision on the content of the report must rest with the grantee. Copies of the final evaluation should be furnished to the Contractor. Grantees should have a time limit on the retention of these reports. [1]

Review by legal counsel – For procurements involving services, construction, and larger dollar value equipment purchases, grantees may wish to have their legal counsel review the closeout file to ensure the adequacy of the contractor's legal documents, including the contractor's general release, insurance certificates, surety's release, maintenance bonds, etc.

Proof of insurance coverage – For all contracts requiring the Contractor to maintain insurance for its products or services (e.g., professional liability or product liability insurance), the contract administrator should obtain *proof of insurance* from the Contractor as part of the closeout process. This documentation should be submitted to the grantee's Insurance Department for approval prior to final payment of the Contractor. The Insurance Department will be required to maintain these documents as "active" files until such time as the insurance requirement ceases under the terms and conditions of the contract; i.e., these insurance terms will continue past (survive) the final contract payment.

Final payment – The contract administrator (CA) must be sure that all administrative steps have been accomplished prior to final payment. Contract administrators should make use of a *contract closeout checklist* to the extent that the Program Manager's checklist does not cover everything in the closeout process (e.g., the contract administrator may have certain areas of concern not assigned to the Program Manager). The CA must ensure that all required inspections have been performed by the technical program office, and a memorandum has been received from the project manager certifying to the satisfactory completion of the contract, which includes

[1] - The Federal policy is to retain these reports for not more than three years [FAR Part 42.1503(e)].

all required documentation from the Contractor, before they authorize final payment or the release of any funds being retained under the contract. Contract administrators need to pay careful attention to those types of documents that are notoriously problematic, such as warranties. In fact, grantees may wish to consider making these warranty documents a pay item in their contracts when the contract pay items are being established, so that the Contractor will be motivated to deliver the documents in a timely manner, and there will be no dispute as to the proper amount that should be paid for these items.

Contractor's General Release – As part of the contract closeout process, the contract administrator must send the Contractor a closeout letter that includes the Contractor's "general release." This document must be a standard statement prepared by the grantee's legal counsel for use on all of the grantee's contracts. The release will say that for the payment of a sum certain, which is the final contract amount agreed to by both parties, the Contractor releases the grantee from any and all claims of every kind arising directly or indirectly out of the contract. The release may also contain a certification that the contractor has paid its subcontractors and suppliers for all their labor, materials, services, etc. furnished under the contract. The release is to be signed by a corporate official authorized to bind the Contractor. The *general release* is important to obtain prior to final payment because it assures the grantee that there will be no further claims from the Contractor once the final payment has been made. The grantee should have the release reviewed by its legal counsel if the Contractor makes any changes to the grantee's standard release language that was sent to the Contractor for signature. Of course it will be necessary for the grantee and the Contractor to have resolved all open issues of a financial nature prior to the execution of the release (change orders, claims, liquidated damages, etc.), and this resolution of all outstanding claims is an important step in the contract closeout process.

Retainage and the problem of contractors who quit work – Occasionally a construction contractor may "walk away" from a project that is almost complete, refusing to sign a general release and forgoing final payment. This situation may occur when the contractor lacks sufficient financial incentive to complete the contract; e.g., if the "punch list" is large and there is very little money left in retainage, the contractor may profit by refusing to correct the punch list items and leave the retainage with the grantee. Or the contractor may have been awarded another contract which requires the reassignment of his personnel to another job. Whatever the reason, *the grantee should anticipate this possibility by carefully estimating the amount of retainage in such a way that it represents twice the amount of the punch list work and undelivered items (manuals, drawings, spare parts, etc.).* For example, MARTA's procedures (which are spelled out in the contract provisions) call for the retainage of at least 5% of the total contract value as the work progresses (10% if there are problems observed with the work). At the point of final inspection and punch list preparation, the resident engineer estimates the value of the punch list items and the undelivered items such as spares, manuals, warranties, etc., and then MARTA pays out the retainage minus twice the value of all the unfinished work. By establishing the retainage in this way, the contractor is motivated to complete the contract, because the contractor will actually receive twice the amount of money that it takes to finish the work. In other words, the contractor is given a strong incentive to complete the contract. When all else fails, the grantee should definitely involve the surety in the issue of unfinished work

(even if the amount of work is relatively small) because the contractor's relationship with its surety is a vital one for its future business. If the contractor loses the confidence of its surety, it is effectively foreclosing on its ability to bid on future work requiring performance bonds.

Warranty and Guarantee Register – The contract specifications may require that individual warranties or guarantees be furnished for various installed equipment or building systems. For each completed contract requiring warranties, the contract administrator should develop a *Warranty and Guarantee Register*, which is a status form listing:

- each individual item of equipment and system for which a warranty or guarantee is specified (roofing, doors, sealants, etc.);
- the pertinent section in the contract specification;
- the name of the company providing the warranty;
- the expiration date of the warranty; and
- the address of the providing company

An example of a *Warranty and Guarantee Register*, used by MARTA, can be found in Appendix B.13. The *Warranty and Guarantee Register* will enable the grantee to monitor upcoming warranty expirations so that the equipment or building system can be inspected before the expiration date, and corrective actions taken by the Contractor if required.

10.2 AUDITS

REQUIREMENT
FTA's Grant Management Guidelines Circular 5010.1C, dated October 1, 1998, Chapter III-7, *Third Party Contract Audits*, provides guidance to grantees concerning those third party contract audits.

DISCUSSION

FTA's *Grant Management Guidelines* do not establish a contract value/dollar threshold requirement for conducting contract audits. Grantees must use their own discretion as to the nature and extent of third party contract audits. However, the FTA *Guidelines* mention certain types of contracts that usually include provisional overhead (burden) and General Administrative (G&A) rates. These provisional, or interim, rates need to be verified by audit for the applicable contract periods. The types of contracts that typically may be structured as cost-reimbursement contracts requiring final cost audits would include consultant, engineering or service contracts.

Contract audits may also be requested by FTA to verify that grantee payments to the contractor are consistent with the terms of the contract. In addition, audit of a third party contract may be recommended by the firm conducting the grantee's single annual audit. [2]

Third party contract audits must be conducted by auditors who are independent from the third party contractor. Many grantees assign the contract audit function to their own auditors or financial management personnel. However, some grantees do not have the personnel resources within their own organization to perform this function. There are two sources for audit services that are available to grantees: independent accounting firms and contract auditors from agencies of the Federal Government. Private accounting firms can usually respond more rapidly to the grantee's request for audit, but in some cases the Federal Government maintains a continuing audit function at contractor locations, and these auditors can be used for third party contract audits. In contracting for private firms to provide audit services, grantees should follow standard contracting procedures for third party contracts. Requests for Federal audit assistance should be directed to FTA.

When audits result in questioned costs, and the grantee is thus required to resolve the questioned costs through negotiation with the Contractor, the results of the negotiation should be documented in a *Summary of Negotiations* memorandum which must be placed in the contract file. This memorandum must explain how the final contract costs were arrived at.

The cost of performing an audit of a third party contract can be charged to the grant.

10.3 RECORD RETENTION

REQUIREMENT
1. The FTA Master Agreement MA(12) Section 8, *Reporting, Record Retention, and Access*, contains the following requirements concerning the retention of documents: c. Record Retention. The Recipient agrees to maintain intact and readily accessible all data, documents, reports, records, contracts, and supporting materials relating to the Project as the Federal Government may require during the course of the project and for three years thereafter. d. Access to Records of Recipients and Subrecipients. Upon request, the Recipient agrees to permit and require its Subrecipients to permit the Secretary of Transportation, the Comptroller General of the United States, and, if appropriate,

[2] - See FTA Master Agreement MA(12), 10-1-05, Section 10, for Single Annual Audit requirements.

the State, or their authorized representatives, to inspect all Project work, materials, payrolls, and other data, and to audit the books, records, and accounts of the Recipient and its Subrecipient pertaining to the Project.

e. Project Closeout. Project closeout does not alter these reporting and record retention requirements.

2. 49 CFR Part 18.36 (i), *Contract provisions*, requires grantees to incorporate certain provisions in their contracts dealing with access and records retention. Specifically, Part 18.36(i)(11) requires a three-year retention period for all documents after the grantee makes final payment.

DISCUSSION

The FTA Master Agreement (MA) deals with grantee and subgrantee record retention requirements in Section 8. Grantees are "recipients" and subgrantees are "subrecipients." The MA requires recipients and subrecipients to maintain their records for at least three years following completion of the project. *These rules do not pertain to third-party contractors since the latter are not "recipients" or "subrecipients."* [3]

The requirements pertaining to *third-party contractors* are set forth in the Common Grant Rule (49 CFR 18.36). Grantees are required to include a clause in their contracts whereby contractors agree to maintain records for inspection by the grantee, FTA, Comptroller General, etc. for three years *after final payment is made by the grantee and all other matters are closed.* [4] **This three-year period begins, not with completion of the contract work, but with final payment, which may be considerably longer than three years after work completion. This will especially be true with cost-type contracts that require a final audit before final payment can be made. In these cases the three-year retention period does not begin until the audit is completed and final payment is made. The BPPM includes suggested clause language for third-party contracts in Appendix A.1, Clause #11 – *Access to Records and Reports*. Grantees should develop their clause language so it complies with the common grant rule language that contractors must retain records for three years "after final payment is made by the grantee and all other matters are closed." The grantee may wish to ensure that such records are readily accessible.**

[3] These terms are defined in the MA, Section 1.m and 1.p. Grantees must ensure their contract terms and procurement policies clearly require record retention for three years after the final contract payment is made and not after completion of work.
[4] 49 CFR 18.36 (i)(11).

Chapter 11

11 - Disputes

11.1 Protests (6/03)
11.2 Claims, Grievances and Other Disputes with Contractors (6/99)

11.1 PROTESTS

REQUIREMENT

§ 7.l. of FTA Circular 4220.1E states:

> Written Protest Procedures. Grantees shall have written protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding protests to FTA. [1] All protest decisions must be in writing. A protester must exhaust all administrative remedies with the grantee before pursuing a protest with FTA.
>
> Reviews of protests by FTA will be limited to: (1) a grantee's failure to have or follow its protest procedures, or its failure to review a complaint or protest; or (2) violations of Federal law or regulation. [2]
>
> An appeal to FTA must be received by the cognizant FTA regional or Headquarters Office within five (5) working days of the date the protester learned or should have learned of an adverse decision by the grantee or other basis of appeal to FTA. [3]

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[1] - Prior versions of the Circular contained the language in this paragraph related to "disclos[ing] information regarding protests to FTA." FTA noted that this provision allowed for widely differing interpretations but found itself bound by the Common Grant Rule. FTA believes this provision requires grantees to, at a minimum, informally notify their FTA regional offices when they receive a protest related to a contract required to comply with the Circular and to similarly keep their regional offices apprised of the status of those protests. Regional offices may require grantees to forward copies of particular protests or all protests for information or review purposes at any time.

[2] - This paragraph has been aligned with the Common Grant Rule and practice by adding "violations of Federal law or regulation" to the basis of FTA protest jurisdiction. FTA will continue to limit its review of grantee protest decisions and will read this Common Grant Rule provision in conjunction with the provisions that express its intent to avoid substituting FTA's judgment for those of its grantees. FTA will not consider each and every appeal of grantees' protest decisions simply because a federal law or regulation may be involved. Instead, FTA will exercise discretionary jurisdiction over those cases deemed to involve issues important to the overall third party contracting program.

[3] - Additionally, we have noted that requiring an appeal to be filed within five days of "the violation" yet also requiring protestors to extinguish their local remedies before filing with FTA led to some confusion. FTA has attempted to clarify this standard by starting the protestor's clock when it receives actual or constructive notice of an adverse decision or that a grantee failed to have or follow its procedures or review a complaint.

DISCUSSION

You can adopt protest procedures that will provide an outlet for supplier concerns that cannot be informally resolved. These procedures will help you resolve these concerns on a schedule that minimizes the ultimate cost to your agency. Consider including the procedures or key requirements of the procedures in your solicitations. If you adopt and adhere to these procedures, FTA's involvement will be very limited.

Purpose

A protest is a potential bidder's or 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 his/her disagreement with you, his/her 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 am 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 and error. The success of this process enables FTA to discharge its responsibility while seldom becoming directly involved in a procurement dispute.

Best Practices

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.

Content of Procedures -To ensure that protests are received and processed effectively, all grantees must have adequate written bid protest procedures. It is recommended that these procedures be included or referenced in the solicitation document. If they are referenced, information must 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 grantee'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 grantee 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 grantee's determination will be final;
- Statement that FTA will only entertain a protest that alleges the grantee failed to follow their protest procedures and that such a protest must be filed in accordance with the Circular; and
- Allowance for request for reconsideration (if data becomes available that was not previously known, or there has been an error of law or regulation).

Effect on Pending Actions - 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 you. However, should the grounds for the protest be found valid by FTA, FTA may choose not to participate in the contract. You must weigh this risk against the cost to the agency for terminating the contract or providing alternative funding.

11.2 CLAIMS, GRIEVANCES AND OTHER DISPUTES WITH CONTRACTORS

REQUIREMENT
FTA Circular 4220.1E paragraph 7.k reads as follows: k. Responsibility for Settlement of Contract Issues/Disputes. Grantees alone will be responsible in accordance with good administrative practice and sound business judgement 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 grantee of any contractual responsibility under its contracts.

FTA will not substitute its judgement for that of the grantee or subgrantee, unless the matter is primarily a Federal concern. Violations of the law will be referred to the local, State, or Federal authority having proper jurisdiction.

FTA Circular 5010.1C, Chapter I, Section 7b deals with issues of *claims* and *change orders,* including the settlement of *disputes*.

The FTA Master Agreement MA(12), October 1, 2005, Section 43-*Disputes, Breaches, Defaults, or Other Litigation,* states that FTA has a vested interest in the settlement of any dispute, breach, default, or litigation involving the Project. Accordingly:

a. Notification to FTA. The Recipient agrees to notify FTA of any current or prospective major dispute, breach, default, or litigation that may affect the Federal Government's interests in the Project of the Federal Government's administration or enforcement of Federal laws or regulations. If the Recipient seeks to name the Federal Government as party to litigation for any reason, in any forum, the Recipient agrees to inform the FTA before doing so.

b. Federal Interest in Recovery. The Federal Government retains the right to a proportionate share, based on the percentage of the Federal share awarded for the Project, of any proceeds derived form any third party recovery, except that the Recipient may return any liquidated damages recovered to the Project Account in lieu of returning the Federal share to the Federal Government.

c. Enforcement. The Recipient agrees to pursue all legal rights available under any third party contract.

d. FTA Concurrence. FTA reserves the right to concur in any compromise or settlement of any claim involving the Project and the Recipient.

e. Alternative Dispute Resolution. FTA encourages the Recipient to use all alternative dispute resolutions procedures, as may be appropriate.

DISCUSSION

FTA Circular 4220.1E paragraph 7k gives grantees the authority to settle protests, claims and disputes with their third-party contractors. The Circular stipulates "FTA will not substitute its judgement for that of the grantee or subgrantee, *unless the matter is primarily a Federal concern."* The types of situations that constitute a *Federal concern* are discussed below in the paragraph entitled FTA *Review and Concurrence.*

Notification of FTA-The Master Agreement MA(12), Section 43a, requires grantees to notify FTA of any current or prospective major dispute, breach, default, or litigation pertaining to the Project. And if the Recipient seeks to name the Federal Government as a party to the litigation for any reason, the Recipient must inform the FTA before doing so.

FTA Circular 5010.1C, Chapter I, Section 7b(1)(d) requires grantees to notify FTA of any current or prospective litigation or major disputed claim in excess of $100,00 relating to any third party contract. This Circular also requires grantees to provide a list of all outstanding claims exceeding $100,000 and a list of all claims settled during the reporting period as part of each quarterly progress report. A brief description and reasons for each claim should accompany this list.

FTA Review and Concurrence - The FTA Master Agreement MA(12), Section 43d, states that FTA reserves the right to concur in any compromise of settlement of any claim involving the Project and the grantee. FTA Circular 5010.1C, Chapter I, Section 7b(4), *FTA Review and Concurrence,* requires grantees to secure the FTA review and concurrence in a proposed claim settlement before using Federal funds in the following instances:

1. **When the negotiated settlement exceeds $100,00. This would include any situation when the grantee is waiving liquidated damages in an amount over $100,000. The Government has a vested interest in the recovery of liquidated damages, and the general rule is that liquidated damages may not be waived. However, grantees may "set-off" the liquidated damages against some other valid claim of the contractor, but FTA concurrence is necessary in any "set-off" action.**

2. **When insufficient funds remain in the approved grant to cover the settlement. The Government cannot be obligated to pay the grantee an amount that would exceed the funds obligated on the grant. To do so would be a violation of the Anti-Deficiency Act.**

3. **Where a special Federal interest is declared because of program management concerns, possible mismanagement, impropriety, waste or fraud. FTA could notify the grantee that it wishes to review and concur in any particular claim/dispute settlement based on the criteria stated here in section 7b(4). Even more broadly, FTA may initiate a review of grantee claims under a particular grant whenever it deems a review to be necessary--5010.1C, Section 7b(5).**

4. **The requirement for FTA concurrence also applies to any settlement arrived at by arbitration, mediation, etc. Grantees must advise their contractors that any decisions reached through arbitration must be reviewed and approved by the FTA. The reason for this is that an arbitrator may require the grantee to pay for something that is ineligible for funding (unallowable cost) under the terms of the grant. The arbitrator may also require the grantee to pay its contractor an amount that would cause the funding limit of the grant to be exceeded, thus violating the Anti-Deficiency Act.**

5. **There are certain situations that grantees must seek to avoid because they may result in the grantee being liable to its contractor but unable to recover from FTA. These circumstances may give rise to a FTA review, through its Project Management Offices and other oversight reviews, before FTA will participate in the cost of settling the claim/dispute. If grantees encounter any of these situations, and they believe the claim to be legitimate, they should be prepared to support a challenge by FTA. If the grantees's claim records substantiate that reasonable and prudent measures were taken to prevent or offset the causes underlying the claim, FTA may participate in the negotiated cost [(5010.1C, Section 7b(3)]. The types of situations in question are those where the grantee has failed to:**

    a) **obtain clear access to all needed right-of-way prior to award of the construction contract;**

    b) **execute all required utility agreements in time to assume uninterrupted construction progress;**

    c) **undertake comprehensive project planning and scheduling to achieve proper coordination among contractors;**

    d) **inform potential contractors of all available geo-technical information on subsurface conditions;**

    e) **assure that all grantee-furnished materials are compatible with contractor project facilities and/or equipment, and available when needed;**

    f) **complete all pre-construction survey and engineering prior to issuing the contractor a Notice to Proceed;**

    g) **obtain the necessary approvals and agreements from all other public authorities affected by the project prior to contract award;**

    h) **assure that all design and shop drawings are promptly approved and made available to the contractor as needed.**

Freedom of Information Act - Grantees are cautioned that the written materials furnished to FTA with notifications of disputed claims or relating to proposed statements of claims and disputes, are subject to release to the public under the Freedom of Information Act (FOIA). Therefore, when the dispute is still in the evaluation/negotiation stage, and a settlement has not yet been reached, a prudent approach would be for grantees to include in their quarterly written reports to FTA only information that, if released, would not prejudice the grantee's negotiation or settlement strategy.

Best Practices

Steps to be Taken Prior to Negotiations - When a claim and/or grievance is initiated by one of the parties, the grantee should take the following steps:

a) Request from the contractor a written detailed position on each separate claim setting forth the amount and rationale for the contractor's positions on each item.

b) List all the counterclaims by the grantee, setting forth the amount and rationale for the grantee's position on each item.

c) Perform a price, cost, technical and legal analysis, as required, for each claim and/or grievance presented by the parties. See BPPM Section 5.2 *Cost and Price Analysis.* A *technical analysis* is to determine the validity of the claims and/or grievances, and to determine the rebuttals to those claims and grievances. The *legal analysis* is to consider all the factors available after the price, cost, and technical reviews have been completed to determine the contractor's, the grantee's and the Government's (FTA) legal position. Each review should be performed by the persons qualified to make the particular review/analysis.

d) The grantee should then establish its best position assuming it prevails on all of its claims and the other party loses all of its claims before a court or arbitration panel. This is considered the grantee's "best" position.

e) The grantee should then determine the contractor's best position, assuming the contractor prevails on all its claims before a court or arbitration panel. This is the grantee's "worst" position.

f) The grantee should then establish a "realistic" position, based on the grantee's best judgement as to each item in issue, by attempting to anticipate the outcome of a determination by a court or arbitration panel. The "realistic" position should result from consideration of all the arguments and facts gathered through the analysis above.

g) Each claim or grievance item should be considered and handled separately in the grantee's preparation for negotiations with the contractor.

h) If liquidated damages are involved in the claim/grievance settlement, the Government has a vested interest in the liquidated damages and will need a complete analysis of how the liquidated damages amount was determined. Once assessed, liquidated damages may not be waived by the grantee, without prior FTA concurrence. However, a valid setoff against some other contract claims or other tradeoff for other contractual deliverables may be appropriate with FTA approval. Liquidated damages are considered assessed when a written notification is sent to the contractor.

Sections 9.2.3.5 *Delays*, and 9.2.3.6 *Acceleration*, should be carefully reviewed for guidance when settling claims involving delays, or claims where the contractor alleges "constructive acceleration" on the part of the grantee. Where, for example, there are *concurrent delays* (those caused by both parties), and it is impossible to apportion or separate the delays as to how much is due to the actions of the separate parties, then liquidated damages cannot be enforced. On the other hand, if the delays can be apportioned as to contractor-caused, grantee-caused, and "excusable" per the contract terms, then the grantee can enforce liquidated damages to the extent of the contractor-caused delays (but not for the grantee-caused delays or for "excusable" delays). The end product of your negotiations with the Contractor on the issue of delays and liquidated damages would be a contract modification extending the delivery date for "excusable delays" as defined by the contract terms, as well as for delays for which the grantee is responsible (changes, constructive changes, etc.). The delivery date would not be extended for delays that were caused by the Contractor. The newly established delivery date would then become the date used to assess liquidated damages.

i) If there is an arbitration clause in the third party contract, FTA must be notified before the matter is submitted to arbitration. FTA must concur in any arbitration award before it becomes final and Federal Funds are released.

Negotiations - Negotiations should be on an *item-by-item basis* with written arguments for each side. The grantee should aggressively pursue all claims and counterclaims as well as defend against all claims and counterclaims of the contractor. The final position arrived at through the negotiations should be set forth and justified in writing.

If diligent efforts to settle the claims and/or disputes on an item-by-item basis have failed to resolve all the items, then a determination can be made regarding the feasibility of a *total cost* or other type settlement. If the determination is made by the parties to go to a *total cost* or other type settlement, the grantee should write a detailed explanation of how the parties arrived at the conclusion that the total cost or the other type settlement was the best way to proceed. In addition, the grantee should provide a complete explanation of how the final settlement figure was reached, and how each item in the claim/dispute was considered.

Finally, the grantee should not accept a contractor's claim for its cost without having conducted an appropriate review/analysis. If the grantee is unable to verify the cost prior to accepting it, the grantee should conditionally accept it subject to later audit verification.

When FTA Concurrence is Required - Should FTA request to review the proposed settlement before it is implemented between the grantee and its contractor, the grantee should send to the FTA Regional Office a detailed summary of the settlement, and include as backup the negotiation memorandum and all the pre-negotiation analyses, described above, that led to the negotiations. In addition, the grantee should provide a written opinion of counsel explaining

why the proposed settlement is fair and reasonable, consistent with State law, and in the best interests of the grantee and the Government.

Engaging Outside Counsel - If it becomes necessary for the grantee to engage outside counsel to handle the settlement negotiations or, if necessary, to litigate or arbitrate the case, the grantee must, if grant funds are requested to cover the legal costs, obtain FTA's concurrence in advance. Grantees must demonstrate to FTA that their own legal resources are inadequate to handle the issues at hand, whether because of the nature of the claim, the training and experience of its personnel, or the potential strain on the grantee's staff resources. Outside counsel must be selected through a competitive process that may range from being very informal to very formal. Note that a qualifications-based selection procedure, such as is permitted for A-E procurements, is not permitted for legal services; cost/price proposals must be requested and evaluated as apart of the selection process. The fee arrangement with outside counsel cannot be based upon a contingency or percentage of recovery methodology.

Avoiding Disputes Through Proper Documentation - *"Documentation of significant events as they occur in the form of correspondence, daily diary entries, inspector's daily reports, photographs, memoranda of telephone conversations and meetings, etc., creates a project record that is absolutely essential in evaluating claims reaching litigation. Absolute attention to documentation is vital in both discouraging submittals of invalid claims and properly analyzing any claim filed."* [4]

Daily Logs - The daily reports/logs of the grantee's inspector may be the most important source for claim research and defense. Inspectors and field engineers must be trained to spot change/claim situations and they must be instructed on what to include in their reports, both on a routine basis and when they sense a real or potential problem. The daily reports should track the construction progress against the approved schedule (CPM Schedule). The daily reports should also track the equipment on site as well as the utilization of equipment. These inspector reports must be monitored carefully by the inspector's supervisor to maintain high quality.

Documentation of meetings and telephone conversations - In order to avoid misunderstandings regarding agreements reached during meetings and telephone conversations with the Contractor and/or between grantee personnel, it is critical to prepare minutes of the meetings and distribute them to all of the attendees. All important telephone conversations should recorded on a Telephone Call Record, noting the pertinent issues discussed, how the issues were resolved, who is responsible for taking the required action, etc. The other party to the call should always be sent a copy of the completed Telephone Call Record.

Photographs - Frequently, photographs are a valuable form of documentation in a claim situation. The grantee's resident engineer must make an adequate photographic record of the progress of the contract. The photographs must be dated, properly identified, annotated as to

[4] - MARTA resident Engineer's Manual, Section 5.17 *Contractor Claims.*

who took the photograph and the weather conditions at the time, and filed. Photographs should cover the following items:

- Progress of the work
- Unusual construction techniques
- Accidents or damages
- Unsafe or hazardous working conditions
- Reinforcing steel prior to concrete placement
- Work completed prior to being covered
- Areas or activities where claims and/or changes are anticipated

The construction contract should itself contain provisions requiring the contractor to provide monthly progress photographs. The grantee's resident engineer must participate in the choosing of locations, angles, and subjects in order to maximize the usefulness of the photographs for progress records.

Alternative Dispute Resolution-The FTA Master Agreement MA(12), Section 43e, encourages grantees to use alternative dispute resolution procedures, as may be appropriate. The alternatives to litigation that are most commonly used are *arbitration and mediation*. Grantees are advised to be cautious in their decisions to use arbitration. In cases that are complex, arbitration may not be preferable over litigation because arbitrators frequently have limitations on the amount of time they can devote to any individual case. As a result, if the case is complex and time-consuming, it may be necessary to change arbitrators during the proceedings, and this may be very disruptive to the parties and their case. Arbitration may be more advisable for disputes that are not complex and do not involve a great deal of facts that must be determined in order to settle the claim. Grantees are advised to think the case through carefully before deciding not to litigate.

FEDERAL TRANSIT ADMINISTRATION

BEST PRACTICES PROCUREMENT MANUAL

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1. FLY AMERICA REQUIREMENTS
49 U.S.C. § 40118
41 CFR Part 301-10

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 Federal 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 mandate any specified clause or language. FTA proposes the following language.

Fly America Requirements

The Contractor agrees to comply with 49 U.S.C. 40118 (the "Fly America" Act) in accordance with the General Services Administration's regulations at 41 CFR Part 301-10, which provide that recipients and subrecipients of Federal funds and their contractors are required to use U.S. Flag air carriers for U.S Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act. The Contractor shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a U.S. flag air carrier was not available or why it was necessary to use a foreign air carrier and shall, in any event, provide a certificate of compliance with the Fly America requirements. The Contractor agrees to include the requirements of this section in all subcontracts that may involve international air transportation.

2. BUY AMERICA REQUIREMENTS
49 U.S.C. 5323(j)
49 C.F.R. Part 661

Applicability to Contracts
The Buy America requirements apply to the following types of contracts: Construction Contracts and Acquisition of Goods or Rolling Stock (valued at more than $100,000).

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. The $100,000 threshold applies only to the grantee contract, subcontracts under that amount are subject to Buy America.

Mandatory Clause/Language
The Buy America regulation, at 49 CFR 661.13, requires notification of the Buy America requirements in FTA-funded contracts, but does not specify the language to be used. The following language has been developed by FTA.

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 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, and include final assembly in the United States for 15 passenger vans and 15 passenger wagons produced by Chrysler Corporation, and microcomputer equipment and software. Separate requirements for rolling stock are set out at 49 U.S.C. 5323(j)(2)(C) and 49 C.F.R. 661.11. Rolling stock must be assembled in the United States and have a 60 percent domestic content.

A bidder or offeror must submit to the FTA recipient the appropriate Buy America certification (below) with all bids or offers on FTA-funded contracts, except those subject to a general waiver. Bids or offers that are not accompanied by a completed Buy America certification must be rejected as nonresponsive. This requirement does not apply to lower tier subcontractors.

Certification requirement for procurement of steel, iron, or manufactured products.

Certificate of Compliance with 49 U.S.C. 5323(j)(1)

The bidder or offeror hereby certifies that it will meet the requirements of 49 U.S.C. 5323(j)(1) and the applicable regulations in 49 C.F.R. Part 661.5.

Date _____

Signature _____

Company Name _____

Title _____

Certificate of Non-Compliance with 49 U.S.C. 5323(j)(1)

The bidder or offeror hereby certifies that it cannot comply with the requirements of 49 U.S.C. 5323(j)(1) and 49 C.F.R. 661.5, but it may qualify for an exception pursuant to 49 U.S.C. 5323(j)(2)(A), 5323(j)(2)(B), or 5323(j)(2)(D), and 49 C.F.R. 661.7.

Date _____

Signature _____

Company Name _____

Title _____

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

Certificate of Compliance with 49 U.S.C. 5323(j)(2)(C).

The bidder or offeror hereby certifies that it will comply with the requirements of 49 U.S.C. 5323(j)(2)(C) and the regulations at 49 C.F.R. Part 661.11.

Date _____

Signature _____

Company Name _____

Title _____

Certificate of Non-Compliance with 49 U.S.C. 5323(j)(2)(C)

The bidder or offeror hereby certifies that it cannot comply with the requirements of 49 U.S.C. 5323(j)(2)(C) and 49 C.F.R. 661.11, but may qualify for an exception pursuant to 49 U.S.C. 5323(j)(2)(A), 5323(j)(2)(B), or 5323(j)(2)(D), and 49 CFR 661.7.

Date _____

Signature _____

Company Name _____

Title _____

_____

3. CHARTER BUS REQUIREMENTS
49 U.S.C. 5323(d)
49 CFR Part 604

Applicability to Contracts
The Charter Bus requirements apply to the following type of contract: Operational Service Contracts.

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. The following clause has been developed by FTA.

Charter Service Operations - The contractor agrees to comply with 49 U.S.C. 5323(d) and 49 CFR 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 under one of the exceptions at 49 CFR 604.9. Any charter service provided under one of the exceptions must be "incidental," i.e., it must not interfere with or detract from the provision of mass transportation.

3. SCHOOL BUS REQUIREMENTS
49 U.S.C. 5323(F)
49 CFR Part 605

Applicability to Contracts
The School Bus requirements apply to the following type of contract: Operational Service Contracts.

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. The following clause has been developed by FTA.

School Bus Operations - Pursuant to 69 U.S.C. 5323(f) and 49 CFR Part 605, recipients and subrecipients of FTA assistance may not engage in school bus operations exclusively for the transportation of students and school personnel in competition with private school bus operators unless qualified under specified exemptions. When operating exclusive school bus service under an allowable exemption, recipients and subrecipients may not use federally funded equipment, vehicles, or facilities.

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4. CARGO PREFERENCE REQUIREMENTS
46 U.S.C. 1241
46 CFR Part 381

Applicability to Contracts
The Cargo Preference requirements apply to all contracts involving equipment, materials, or commodities which may be transported by ocean vessels.

Flow Down
The Cargo Preference requirements apply to all subcontracts when the subcontract may be involved with the transport of equipment, material, or commodities by ocean vessel.

Model Clause/Language
The MARAD regulations at 46 CFR 381.7 contain suggested contract clauses. The following language is proffered by FTA.

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 leading 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.) 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.

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5. SEISMIC SAFETY REQUIREMENTS
42 U.S.C. 7701 et seq. 49 CFR Part 41

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. The following language has been developed by FTA.

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 Seismic Safety Regulations 49 CFR 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.

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6. ENERGY CONSERVATION REQUIREMENTS
42 U.S.C. 6321 et seq.
49 CFR Part 18

Applicability to Contracts
The Energy Conservation requirements are applicable to all contracts.

Flow Down
The Energy Conservation requirements extend to all third party contractors and their contracts at every tier and subrecipients and their subagreements 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. The following language has been developed by FTA:

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.

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7. CLEAN WATER REQUIREMENTS
33 U.S.C. 1251

Applicability to Contracts
The Clean Water requirements apply to each contract and subcontract which exceeds $100,000.

Flow Down
The Clean Water requirements flow down to FTA recipients and subrecipients at every tier.

Model Clause/Language
While no mandatory clause is contained in the Federal Water Pollution Control Act, as amended, the following language developed by FTA contains all the mandatory requirements:

Clean Water - (1) The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 et seq. The Contractor agrees to report each violation to the Purchaser and understands and agrees that the Purchaser will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office.

(2) The Contractor also agrees to include these requirements in each subcontract exceeding $100,000 financed in whole or in part with Federal assistance provided by FTA.

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8. BUS TESTING
49 U.S.C. 5323(c)
49 CFR Part 665

Applicability to Contracts
The Bus Testing requirements pertain only to the acquisition of Rolling Stock/Turnkey.

Flow Down
The Bus Testing requirements should not flow down, except to the turnkey contractor as stated in Master Agreement.

Model Clause/Language
Clause and language therein are merely suggested. 49 CFR Part 665 does not contain specific language to be included in third party contracts but does contain requirements applicable to

subrecipients and third party contractors. Bus Testing Certification and language therein are merely suggested.

Bus Testing - The Contractor [Manufacturer] agrees to comply with 49 U.S.C. A 5323(c) and FTA's implementing regulation at 49 CFR Part 665 and shall perform the following:

1) A manufacturer of a new bus model or a bus produced with a major change in components or configuration shall provide a copy of the final test report to the recipient at a point in the procurement process specified by the recipient which will be prior to the recipient's final acceptance of the first vehicle.

2) A manufacturer who releases a report under paragraph 1 above shall provide notice to the operator of the testing facility that the report is available to the public.

3) If the manufacturer represents that the vehicle was previously tested, the vehicle being sold should have the identical configuration and major components as the vehicle in the test report, which must be provided to the recipient prior to recipient's final acceptance of the first vehicle. If the configuration or components are not identical, the manufacturer shall provide a description of the change and the manufacturer's basis for concluding that it is not a major change requiring additional testing.

4) If the manufacturer represents that the vehicle is "grandfathered" (has been used in mass transit service in the United States before October 1, 1988, and is currently being produced without a major change in configuration or components), the manufacturer shall provide the name and address of the recipient of such a vehicle and the details of that vehicle's configuration and major components.

CERTIFICATION OF COMPLIANCE WITH FTA'S BUS TESTING REQUIREMENTS
The undersigned [Contractor/Manufacturer] certifies that the vehicle offered in this procurement complies with 49 U.S.C. A 5323(c) and FTA's implementing regulation at 49 CFR Part 665.

The undersigned understands that misrepresenting the testing status of a vehicle acquired with Federal financial assistance may subject the undersigned to civil penalties as outlined in the Department of Transportation's regulation on Program Fraud Civil Remedies, 49 CFR Part 31. In addition, the undersigned understands that FTA may suspend or debar a manufacturer under the procedures in 49 CFR Part 29.

Date: _____

Signature: _____

Company Name: _____

Title: _____

_____

9. PRE-AWARD AND POST DELIVERY AUDITS REQUIREMENTS
49 U.S.C. 5323
49 CFR Part 663

Applicability to Contracts
These requirements apply only to the acquisition of Rolling Stock/Turnkey.

Flow Down
These requirements should not flow down, except to the turnkey contractor as stated in Master Agreement.

Model Clause/Language
Clause and language therein are merely suggested. 49 C.F.R. Part 663 does not contain specific language to be included in third party contracts but does contain requirements applicable to subrecipients and third party contractors.

- Buy America certification is mandated under FTA regulation, "Pre-Award and Post-Delivery Audits of Rolling Stock Purchases," 49 C.F.R. 663.13.

-- Specific language for the Buy America certification is mandated by FTA regulation,

"Buy America Requirements--Surface Transportation Assistance Act of 1982, as amended,"

49 C.F.R. 661.12, but has been modified to include FTA's Buy America requirements codified at 49 U.S.C. A 5323(j).

Pre-Award and Post-Delivery Audit Requirements - The Contractor agrees to comply with 49 U.S.C. § 5323(l) and FTA's implementing regulation at 49 C.F.R. Part 663 and to submit the following certifications:

(1) Buy America Requirements: The Contractor shall complete and submit a declaration certifying either compliance or noncompliance with Buy America. If the Bidder/Offeror certifies compliance with Buy America, it shall submit documentation which lists 1) component and subcomponent parts of the rolling stock to be purchased identified by manufacturer of the parts, their country of origin and costs; and 2) the location of the final assembly point for the rolling stock, including a description of the activities that will take place at the final assembly point and the cost of final assembly.

(2) Solicitation Specification Requirements: The Contractor shall submit evidence that it will be capable of meeting the bid specifications.

(3) Federal Motor Vehicle Safety Standards (FMVSS): The Contractor shall submit 1) manufacturer's FMVSS self-certification sticker information that the vehicle complies with relevant FMVSS or 2) manufacturer's certified statement that the contracted buses will not be subject to FMVSS regulations.

BUY AMERICA CERTIFICATE OF COMPLIANCE WITH FTA REQUIREMENTS FOR BUSES, OTHER ROLLING STOCK, OR ASSOCIATED EQUIPMENT

(To be submitted with a bid or offer exceeding the small purchase threshold for Federal assistance programs, currently set at $100,000.)

Certificate of Compliance

The bidder hereby certifies that it will comply with the requirements of 49 U.S.C. Section 5323(j)(2)(C), Section 165(b)(3) of the Surface Transportation Assistance Act of 1982, as amended, and the regulations of 49 C.F.R. 661.11:

Date: _____

Signature: _____

Company Name: _____

Title: _____

Certificate of Non-Compliance

The bidder hereby certifies that it cannot comply with the requirements of 49 U.S.C. Section 5323(j)(2)(C) and Section 165(b)(3) of the Surface Transportation Assistance Act of 1982, as amended, but may qualify for an exception to the requirements consistent with 49 U.S.C. Sections 5323(j)(2)(B) or (j)(2)(D), Sections 165(b)(2) or (b)(4) of the Surface Transportation Assistance Act, as amended, and regulations in 49 C.F.R. 661.7.

Date: _____

Signature: _____

Company Name: _____

Title: _____

10. LOBBYING
31 U.S.C. 1352
49 CFR Part 19
49 CFR Part 20

Applicability to Contracts
The Lobbying requirements apply to Construction/Architectural and Engineering/Acquisition of Rolling Stock/Professional Service Contract/Operational Service Contract/Turnkey contracts.

Flow Down
The Lobbying requirements mandate the maximum flow down, pursuant to Byrd Anti-Lobbying Amendment, 31 U.S.C. § 1352(b)(5) and 49 C.F.R. Part 19, Appendix A, Section 7.

Mandatory Clause/Language
Clause and specific language therein are mandated by 49 CFR Part 19, Appendix A.

Modifications have been made to the Clause pursuant to Section 10 of the Lobbying Disclosure Act of 1995, P.L. 104-65 [to be codified at 2 U.S.C. § 1601, *et seq.*]

- Lobbying Certification and Disclosure of Lobbying Activities for third party contractors are mandated by 31 U.S.C. 1352(b)(5), as amended by Section 10 of the Lobbying Disclosure Act of 1995, and DOT implementing regulation, "New Restrictions on Lobbying," at 49 CFR § 20.110(d)

- Language in Lobbying Certification is mandated by 49 CFR Part 19, Appendix A, Section 7, which provides that contractors file the certification required by 49 CFR Part 20, Appendix A.

Modifications have been made to the Lobbying Certification pursuant to Section 10 of the Lobbying Disclosure Act of 1995.

- Use of "Disclosure of Lobbying Activities," Standard Form-LLL set forth in Appendix B of 49 CFR Part 20, as amended by "Government wide Guidance For New Restrictions on Lobbying," 61 Fed. Reg. 1413 (1/19/96) is mandated by 49 CFR Part 20, Appendix A.

Byrd Anti-Lobbying Amendment, 31 U.S.C. 1352, as amended by the Lobbying Disclosure Act of 1995, P.L. 104-65 [to be codified at 2 U.S.C. § 1601, et seq.] - Contractors who apply or bid for an award of $100,000 or more shall file the certification required by 49 CFR part 20, "New Restrictions on Lobbying." Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose the

name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to that Federal contract, grant or award covered by 31 U.S.C. 1352. Such disclosures are forwarded from tier to tier up to the recipient.

APPENDIX A, 49 CFR PART 20--CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

(To be submitted with each bid or offer exceeding $100,000)

The undersigned [Contractor] 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 making lobbying contacts to 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 [as amended by "Government wide Guidance for New Restrictions on Lobbying," 61 Fed. Reg. 1413 (1/19/96). Note: Language in paragraph (2) herein has been modified in accordance with Section 10 of the Lobbying Disclosure Act of 1995 (P.L. 104-65, to be codified at 2 U.S.C. 1601, *et seq.*)]

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31, U.S.C. § 1352 (as amended by the Lobbying Disclosure Act of 1995). 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.

[Note: Pursuant to 31 U.S.C. § 1352(c)(1)-(2)(A), any person who makes a prohibited expenditure or fails to file or amend a required certification or disclosure form shall be subject to

a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure or failure.]

The Contractor, _____, certifies or affirms the truthfulness and accuracy of each statement of its certification and disclosure, if any. In addition, the Contractor understands and agrees that the provisions of 31 U.S.C. A 3801, *et seq., apply* to this certification and disclosure, if any.

_____ Signature of Contractor's Authorized Official

_____ Name and Title of Contractor's Authorized Official

_____ Date

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11. ACCESS TO RECORDS AND REPORTS

49 U.S.C. 5325
18 CFR 18.36 (i)
49 CFR 633.17

Applicability to Contracts
Reference Chart "Requirements for Access to Records and Reports by Type of Contracts"

Flow Down
FTA does not require the inclusion of these requirements in subcontracts.

Model Clause/Language
The specified language is not mandated by the statutes or regulations referenced, but the language provided paraphrases the statutory or regulatory language.

Access to Records - The following access to records requirements apply to this Contract:

1. Where the Purchaser is not a State but a local government and is the FTA Recipient or a subgrantee of the FTA Recipient in accordance with 49 C.F.R. 18.36(i), the Contractor agrees to provide the Purchaser, the FTA Administrator, the Comptroller General of the United States or any of their authorized representatives access to any books, documents, papers and records of the Contractor which are directly pertinent to this contract for the purposes of making audits, examinations, excerpts and transcriptions. Contractor also agrees, pursuant to 49 C.F.R. 633.17 to provide the FTA Administrator or his authorized representatives including any PMO Contractor access to Contractor's records and construction sites pertaining to a major capital project, defined at 49 U.S.C. 5302(a)1, which is receiving federal financial assistance through the programs described at 49 U.S.C. 5307, 5309 or 5311.

2. Where the Purchaser is a State and is the FTA Recipient or a subgrantee of the FTA Recipient in accordance with 49 C.F.R. 633.17, Contractor agrees to provide the Purchaser, the FTA Administrator or his authorized representatives, including any PMO Contractor, access to the Contractor's records and construction sites pertaining to a major capital project, defined at 49 U.S.C. 5302(a)1, which is receiving federal financial assistance through the programs described at 49 U.S.C. 5307, 5309 or 5311. By definition, a major capital project excludes contracts of less than the simplified acquisition threshold currently set at $100,000.

3. Where the Purchaser enters into a negotiated contract for other than a small purchase or under the simplified acquisition threshold and is an institution of higher education, a hospital or other non-profit organization and is the FTA Recipient or a subgrantee of the FTA Recipient in accordance with 49 C.F.R. 19.48, Contractor agrees to provide the Purchaser, FTA Administrator, the Comptroller General of the United States or any of their duly authorized representatives with access to any books, documents, papers and record of the Contractor which are directly pertinent to this contract for the purposes of making audits, examinations, excerpts and transcriptions.

4. Where any Purchaser which is the FTA Recipient or a subgrantee of the FTA Recipient in accordance with 49 U.S.C. 5325(a) enters into a contract for a capital project or improvement (defined at 49 U.S.C. 5302(a)1) through other than competitive bidding, the Contractor shall make available records related to the contract to the Purchaser, the Secretary of Transportation and the Comptroller General or any authorized officer or employee of any of them for the purposes of conducting an audit and inspection.

5. The Contractor agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.

6. The Contractor agrees to maintain all books, records, accounts and reports required under this contract for a period of not less than three 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 Contractor agrees to maintain same until the Purchaser, the FTA Administrator, the Comptroller General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related thereto. Reference 49 CFR 18.39(i)(11).

7. FTA does not require the inclusion of these requirements in subcontracts.

Requirements for Access to Records and Reports by Types of Contract

Contract Characteristics		Operational Service Contract	Turnkey	Construction	Architectural Engineering	Acquisition of Rolling Stock	Professional Services
I State Grantees a. Contracts below SAT ($100,000) b. Contracts above $100,000/Capital Projects		None None unless[1] non-competitive award	Those imposed on state pass thru to Contractor	None Yes, if non-competitive award or if funded thru[2] 5307/5309/5311	None None unless non-competitive award	None None unless non-competitive award	None None unless non-competitive award
II Non State Grantees a. Contracts below SAT ($100,000) b. Contracts above $100,000/Capital Projects		Yes[3] Yes[3]	Those imposed on non-state Grantee pass thru to Contractor	Yes Yes	Yes Yes	Yes Yes	Yes Yes

Sources of Authority:
[1] 49 USC 5325 (a)
[2] 49 CFR 633.17
[3] 18 CFR 18.36 (i)

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12. FEDERAL CHANGES
49 CFR Part 18

Applicability to Contracts
The Federal Changes requirement applies to all contracts.

Flow Down
The Federal Changes requirement flows down appropriately to each applicable changed requirement.

Model Clause/Language
No specific language is mandated. The following language has been developed by FTA.

Federal Changes - Contractor shall at all times comply with all applicable FTA regulations, policies, procedures and directives, including without limitation those listed directly or by reference in the Master Agreement between Purchaser and FTA, as they may be amended or

promulgated from time to time during the term of this contract. Contractor's failure to so comply shall constitute a material breach of this contract.

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13. BONDING REQUIREMENTS

Applicability to Contracts

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

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

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

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

(1) 50% of the contract price if the contract price is not more than $1 million;

(2) 40% of the contract price if the contract price is more than $1 million but not more than $5 million; or

(3) $2.5 million if the contract price is more than $5 million.

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

Flow Down

Bonding requirements flow down to the first tier contractors.

Model Clauses/Language

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

Bid Bond Requirements (Construction)

(a) Bid Security

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

(b) Rights Reserved

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

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

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

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

Performance and Payment Bonding Requirements (Construction)

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

(a) Performance bonds

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

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

(b) Payment bonds

1. The penal amount of the payment bonds shall equal:

(i) Fifty percent of the contract price if the contract price is not more than $1 million.

(ii) Forty percent of the contract price if the contract price is more than $1 million but not more than $5 million; or

(iii) Two and one half million if the contract price is more than $5 million.

2. If the original contract price is $5 million or less, the (Recipient) may require additional protection as required by subparagraph 1 if the contract price is increased.

Performance and Payment Bonding Requirements (Non-Construction)

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

(a) The following situations may warrant a performance bond:

1. (Recipient) property or funds are to be provided to the contractor for use in performing the contract or as partial compensation (as in retention of salvaged material).

2. A contractor sells assets to or merges with another concern, and the (Recipient), after recognizing the latter concern as the successor in interest, desires assurance that it is financially capable.

3. Substantial progress payments are made before delivery of end items starts.

4. Contracts are for dismantling, demolition, or removal of improvements.

(b) When it is determined that a performance bond is required, the Contractor shall be required to obtain performance bonds as follows:

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

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

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

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

1. The penal amount of payment bonds shall equal:

(i) Fifty percent of the contract price if the contract price is not more than $1 million;

(ii) Forty percent of the contract price if the contract price is more than $1 million but not more than $5 million; or

(iii) Two and one half million if the contract price is increased.

Advance Payment Bonding Requirements

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

Patent Infringement Bonding Requirements (Patent Indemnity)

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

Warranty of the Work and Maintenance Bonds

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

required by the [Project Manager], the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

2. The Work furnished must be of first quality and the workmanship must be the best obtainable in the various trades. The Work must be of safe, substantial and durable construction in all respects. The Contractor hereby guarantees the Work against defective materials or faulty workmanship for a minimum period of one (1) year after Final Payment by (Recipient) and shall replace or repair any defective materials or equipment or faulty workmanship during the period of the guarantee at no cost to (Recipient). As additional security for these guarantees, the Contractor shall, prior to the release of Final Payment [as provided in Item X below], furnish separate Maintenance (or Guarantee) Bonds in form acceptable to (Recipient) written by the same corporate surety that provides the Performance Bond and Labor and Material Payment Bond for this Contract. These bonds shall secure the Contractor's obligation to replace or repair defective materials and faulty workmanship for a minimum period of one (1) year after Final Payment and shall be written in an amount equal to ONE HUNDRED PERCENT (100%) of the CONTRACT SUM, as adjusted (if at all).

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14. CLEAN AIR
42 U.S.C. 7401 et seq
40 CFR 15.61
49 CFR Part 18

Applicability to Contracts
The Clean Air requirements apply to all contracts exceeding $100,000, including indefinite quantities where the amount is expected to exceed $100,000 in any year.

Flow Down
The Clean Air requirements flow down to all subcontracts which exceed $100,000.

Model Clauses/Language
No specific language is required. FTA has proposed the following language.

Clean Air - (1) The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 7401 et seq. The Contractor agrees to report each violation to the Purchaser and understands and agrees that the Purchaser will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office.

(2) The Contractor also agrees to include these requirements in each subcontract exceeding $100,000 financed in whole or in part with Federal assistance provided by FTA.

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15. RECYCLED PRODUCTS
42 U.S.C. 6962
40 CFR Part 247
Executive Order 12873

Applicability to Contracts
The Recycled Products requirements apply to all contracts for items designated by the EPA, when the purchaser or contractor procures $10,000 or more of one of these items during the fiscal year, or has procured $10,000 or more of such items in the previous fiscal year, using Federal funds. New requirements for "recovered materials" will become effective May 1, 1996. These new regulations apply to all procurement actions involving items designated by the EPA, where the procuring agency purchases $10,000 or more of one of these items in a fiscal year, or when the cost of such items purchased during the previous fiscal year was $10,000.

Flow Down
These requirements flow down to all to all contractor and subcontractor tiers.

Model Clause/Language
No specific clause is mandated, but FTA has developed the following language.

Recovered Materials - The contractor agrees to comply with all the requirements of Section 6002 of the Resource Conservation and Recovery Act (RCRA), as amended (42 U.S.C. 6962), including but not limited to the regulatory provisions of 40 CFR Part 247, and Executive Order 12873, as they apply to the procurement of the items designated in Subpart B of 40 CFR Part 247.

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16. DAVIS-BACON AND COPELAND ANTI-KICKBACK ACTS

Background and Application
The Davis-Bacon and Copeland Acts are codified at 40 USC 3141, *et seq.* and 18 USC 874. The Acts apply to grantee construction contracts and subcontracts that "at least partly are financed by a loan or grant from the Federal Government." 40 USC 3145(a), 29 CFR 5.2(h), 49 CFR 18.36(i)(5). The Acts apply to any construction contract over $2,000. 40 USC 3142(a), 29 CFR 5.5(a). 'Construction,' for purposes of the Acts, includes "actual construction, alteration and/or repair, including painting and decorating." 29 CFR 5.5(a). The requirements of both Acts are incorporated into a single clause (*see* 29 CFR 3.11) enumerated at 29 CFR 5.5(a) and reproduced below.

The clause language is drawn directly from 29 CFR 5.5(a) and any deviation from the model clause below should be coordinated with counsel to ensure the Acts' requirements are satisfied.

Clause Language
Davis-Bacon and Copeland Anti-Kickback Acts

(1) **Minimum wages** - (i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics.

Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in 29 CFR Part 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classifications and wage rates conformed under paragraph (1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii)(A) The contracting officer shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

(1) Except with respect to helpers as defined as 29 CFR 5.2(n)(4), the work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination; and

(4) With respect to helpers as defined in 29 CFR 5.2(n)(4), such a classification prevails in the area in which the work is performed.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(ii) (B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(v)(A) The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:

(1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the contracting officer agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, Washington, DC 20210. The Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the contracting officer do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination with 30 days of receipt and so advise the contracting officer or will notify the contracting officer within the 30-day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(v) (B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(2) **Withholding** - The [***insert name of grantee***] 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 the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or

advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the contract, the [***insert name of grantee***] may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) **Payrolls and basic records** - (i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(ii)(A) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the [***insert name of grantee***] for transmission to the Federal Transit Administration. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under section 5.5(a)(3)(i) of Regulations, 29 CFR part 5. This information may be submitted in any form desired. Optional Form WH-347 is available for this purpose and may be purchased from the Superintendent of Documents (Federal Stock Number 029-005-00014-1), U.S. Government Printing Office, Washington, DC 20402. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors.

(B) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(1) That the payroll for the payroll period contains the information required to be maintained under section 5.5(a)(3)(i) of Regulations, 29 CFR part 5 and that such information is correct and complete;

(2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;

(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(B) of this section.

(D) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.

(iii) The contractor or subcontractor shall make the records required under paragraph (a)(3)(i) of this section available for inspection, copying, or transcription by authorized representatives of the Federal Transit Administration or the Department of Labor, and shall permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the Federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

(4) **Apprentices and trainees** - (i) Apprentices - Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the

ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator of the Wage and Hour Division of the U.S. Department of Labor determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(ii) Trainees - Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment

and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) Equal employment opportunity - The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

(5) **Compliance with Copeland Act requirements** - The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.

(6) **Subcontracts** - The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the Federal Transit Administration may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

(7) **Contract termination: debarment** - A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

(8) **Compliance with Davis-Bacon and Related Act requirements** - All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.

(9) **Disputes concerning labor standards** - Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(10) **Certification of eligibility** - (i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

17. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

Background and Application

The Contract Work Hours and Safety Standards Act is codified at 40 USC 3701, *et seq.* The Act applies to grantee contracts and subcontracts "financed at least in part by loans or grants from … the [Federal] Government." 40 USC 3701(b)(1)(B)(iii) and (b)(2), 29 CFR 5.2(h), 49 CFR 18.36(i)(6). Although the original Act required its application in any construction contract over $2,000 or non-construction contract to which the Act applied over $2,500 (and language to that effect is still found in 49 CFR 18.36(i)(6)), the Act no longer applies to any "contract in an amount that is not greater than $100,000." 40 USC 3701(b)(3) (A)(iii).

The Act applies to construction contracts and, in very limited circumstances, non-construction projects that employ "laborers or mechanics on a public work." These non-construction applications do not generally apply to transit procurements because transit procurements (to include rail cars and buses) are deemed "commercial items." 40 USC 3707, 41 USC 403 (12). A grantee that contemplates entering into a contract to procure a developmental or unique item should consult counsel to determine if the Act applies to that procurement and that additional language required by 29 CFR 5.5(c) must be added to the basic clause below.

The clause language is drawn directly from 29 CFR 5.5(b) and any deviation from the model clause below should be coordinated with counsel to ensure the Act's requirements are satisfied.

Clause Language

Contract Work Hours and Safety Standards

(1) **Overtime requirements** - No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.

(2) **Violation; liability for unpaid wages; liquidated damages** - In the event of any violation of the clause set forth in paragraph (1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States 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 the clause set forth in paragraph (1) of this section, 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 the clause set forth in paragraph (1) of this section.

(3) **Withholding for unpaid wages and liquidated damages** - The (***write in the name of the grantee***) 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 the clause set forth in paragraph (2) of this section.

(4) **Subcontracts** - The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraphs (1) through (4) of 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 paragraphs (1) through (4) of this section.

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18. [RESERVED]

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19. NO GOVERNMENT OBLIGATION TO THIRD PARTIES

Applicability to Contracts
Applicable to all contracts.

Flow Down
Not required by statute or regulation for either primary contractors or subcontractors, this concept should flow down to all levels to clarify, to all parties to the contract, that the Federal Government does not have contractual liability to third parties, absent specific written consent.

Model Clause/Language
While no specific language is required, FTA has developed the following language.

No Obligation by the Federal Government.

(1) The Purchaser 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 Purchaser, Contractor, or any other party (whether or not a party to that contract) pertaining to any matter resulting from the underlying contract.

(2) The Contractor agrees to include the above clause in each subcontract financed in whole or in part with Federal assistance provided by FTA. It is further agreed that the clause shall not be modified, except to identify the subcontractor who will be subject to its provisions.

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20. PROGRAM FRAUD AND FALSE OR FRAUDULENT STATEMENTS AND RELATED ACTS

31 U.S.C. 3801 et seq.
49 CFR Part 31 18 U.S.C. 1001
49 U.S.C. 5307

Applicability to Contracts
These requirements are applicable to all contracts.

Flow Down
These requirements flow down to contractors and subcontractors who make, present, or submit covered claims and statements.

Model Clause/Language
These requirements have no specified language, so FTA proffers the following language.

Program Fraud and False or Fraudulent Statements or Related Acts.

(1) 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.

(2) 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. § 5307, the Government reserves the right to impose the penalties of 18 U.S.C. § 1001 and 49 U.S.C. § 5307(n)(1) on the Contractor, to the extent the Federal Government deems appropriate.

(3) 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.

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21. TERMINATION
49 U.S.C. Part 18
FTA Circular 4220.1E

Applicability to Contracts
All contracts (with the exception of contracts with nonprofit organizations and institutions of higher education,) in excess of $10,000 shall contain suitable provisions for termination by the grantee including the manner by which it will be effected and the basis for settlement. (For contracts with nonprofit organizations and institutions of higher education the threshold is $100,000.) In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

Flow Down
The termination requirements flow down to all contracts in excess of $10,000, with the exception of contracts with nonprofit organizations and institutions of higher learning.

Model Clause/Language
FTA does not prescribe the form or content of such clauses. The following are suggestions of clauses to be used in different types of contracts:

a. Termination for Convenience (General Provision) The (Recipient) may terminate this contract, in whole or in part, at any time by written notice to the Contractor when it is in the Government'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 (Recipient) to be paid the Contractor. If the Contractor has any property in its possession belonging to the (Recipient), the Contractor will account for the same, and dispose of it in the manner the (Recipient) directs.

b. 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 (Recipient) 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 only be paid 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 (Recipient) 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 (Recipient), 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.

c. Opportunity to Cure (General Provision) The (Recipient) 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 (Recipient)'s satisfaction the breach or default of any of the terms, covenants, or conditions of this Contract within [ten (10) days] after receipt by Contractor of written notice from (Recipient) setting forth the nature of said breach or default, (Recipient) 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 (Recipient) from also pursuing all available remedies against Contractor and its sureties for said breach or default.

d. Waiver of Remedies for any Breach In the event that (Recipient) elects to waive its remedies for any breach by Contractor of any covenant, term or condition of this Contract, such waiver by (Recipient) shall not limit (Recipient)'s remedies for any succeeding breach of that or of any other term, covenant, or condition of this Contract.

e. Termination for Convenience (Professional or Transit Service Contracts) The (Recipient), by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the Recipient shall be liable only for payment under the payment provisions of this contract for services rendered before the effective date of termination.

f. 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 (Recipient) may terminate this contract for default. The (Recipient) 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 Recipient.

g. 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 (Recipient) may terminate this contract for default. The (Recipient) 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 Recipient goods, the Contractor shall, upon direction of the (Recipient), protect and preserve the goods until surrendered to the Recipient or its agent. The Contractor and (Recipient) 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 (Recipient).

h. Termination for Default (Construction) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure 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 provisions of this contract, the (Recipient) may terminate this contract for default. The (Recipient) shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of the default. In this event, the Recipient 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 Recipient 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 Recipient in completing the work.

The Contractor's right to proceed shall not be terminated nor the Contractor 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 the Recipient, acts of another Contractor in the performance of a contract with the Recipient, epidemics, quarantine restrictions, strikes, freight embargoes; and

2. the contractor, within [10] days from the beginning of any delay, notifies the (Recipient) in writing of the causes of delay. If in the judgment of the (Recipient), the delay is excusable, the time for completing the work shall be extended. The judgment of the (Recipient) shall be final and conclusive on the parties, but subject to appeal under the Disputes clauses.

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 the Recipient.

i. Termination for Convenience or Default (Architect and Engineering) The (Recipient) may terminate this contract in whole or in part, for the Recipient's convenience or because of the failure of the Contractor to fulfill the contract obligations. The (Recipient) 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 Contracting Officer all data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this contract, whether completed or in process.

If the termination is for the convenience of the Recipient, the 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 Recipient may complete the work by contact or otherwise and the Contractor shall be liable for any additional cost incurred by the Recipient.

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 Recipient.

j. Termination for Convenience of Default (Cost-Type Contracts) The (Recipient) may terminate this contract, or any portion of it, by serving a notice or termination on the Contractor. The notice shall state whether the termination is for convenience of the (Recipient) 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 (Recipient), or property supplied to the Contractor by the (Recipient). If the termination is for default, the (Recipient) 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 (Recipient) and the parties shall negotiate the termination settlement to be paid the Contractor.

If the termination is for the convenience of the (Recipient), 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 (Recipient) determines that the Contractor has an excusable reason for not performing, such as strike, fire, flood, events which are not the fault of and are beyond the control of the contractor, the (Recipient), after setting up a new work schedule, may allow the Contractor to continue work, or treat the termination as a termination for convenience.

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22. GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)

Background and Applicability

In conjunction with the Office of Management and Budget and other affected Federal agencies, DOT published an update to 49 CFR Part 29 on November 26, 2003. This government-wide regulation implements Executive Order 12549, *Debarment and Suspension*, Executive Order 12689, *Debarment and Suspension*, and 31 U.S.C. 6101 note (Section 2455, Public Law 103-355, 108 Stat. 3327).

The provisions of Part 29 apply to all grantee contracts and subcontracts at any level expected to equal or exceed $25,000 as well as any contract or subcontract (at any level) for Federally required auditing services. 49 CFR 29.220(b). This represents a change from prior practice in that the dollar threshold for application of these rules has been lowered from $100,000 to $25,000. These are contracts and subcontracts referred to in the regulation as "covered transactions."

Grantees, 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) they propose to contract or subcontract with is not excluded or disqualified. They do this by (a) Checking the Excluded Parties List System, (b) Collecting a certification from that person, or (c) Adding a clause or condition to the contract or subcontract. This represents a change from prior practice in that certification is still acceptable but is no longer required. 49 CFR 29.300.

Grantees, contractors, and subcontractors who enter into covered transactions also must require the entities they contract with to comply with 49 CFR 29, subpart C and include this requirement in their own subsequent covered transactions (i.e., the requirement flows down to subcontracts at all levels).

Clause Language

The following clause language is suggested, not mandatory. It incorporates the optional method of verifying that contractors are not excluded or disqualified by certification.

Suspension and Debarment

> This contract is a covered transaction for purposes of 49 CFR Part 29. As such, the contractor is required to verify that none of the contractor, its principals, as

defined at 49 CFR 29.995, or affiliates, as defined at 49 CFR 29.905, are excluded or disqualified as defined at 49 CFR 29.940 and 29.945.

The contractor is required to comply with 49 CFR 29, Subpart C and must include the requirement to comply with 49 CFR 29, Subpart C in any lower tier covered transaction it enters into.
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 **{insert agency name}**. If it is later determined that the bidder or proposer knowingly rendered an erroneous certification, in addition to remedies available to **{insert agency name}**, 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 49 CFR 29, Subpart C 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.

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23. PRIVACY ACT
5 U.S.C. 552

Applicability to Contracts
When a grantee maintains files on drug and alcohol enforcement activities for FTA, and those files are organized so that information could be retrieved by personal identifier, the Privacy Act requirements apply to all contracts.

Flow Down
The Federal Privacy Act requirements flow down to each third party contractor and their contracts at every tier.

Model Clause/Language
The text of the following clause has not been mandated by statute or specific regulation, but has been developed by FTA.

Contracts Involving Federal Privacy Act Requirements - The following requirements apply to the Contractor and its employees that administer any system of records on behalf of the Federal Government under any contract:

(1) The Contractor agrees to comply with, and assures the compliance of its employees with, the information restrictions and other applicable requirements of the Privacy Act of 1974,

5 U.S.C. § 552a. Among other things, the Contractor agrees to obtain the express consent of the Federal Government before the Contractor or its employees operate a system of records on behalf of the Federal Government. The Contractor understands that the requirements of the Privacy Act, including the civil and criminal penalties for violation of that Act, apply to those individuals involved, and that failure to comply with the terms of the Privacy Act may result in termination of the underlying contract.

(2) The Contractor also agrees to include these requirements in each subcontract to administer any system of records on behalf of the Federal Government financed in whole or in part with Federal assistance provided by FTA.

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24. CIVIL RIGHTS REQUIREMENTS

29 U.S.C. § 623, 42 U.S.C. § 2000
42 U.S.C. § 6102, 42 U.S.C. § 12112
42 U.S.C. § 12132, 49 U.S.C. § 5332
29 CFR Part 1630, 41 CFR Parts 60 et seq.

Applicability to Contracts
The Civil Rights Requirements apply to all contracts.

Flow Down
The Civil Rights requirements flow down to all third party contractors and their contracts at every tier.

Model Clause/Language
The following clause was predicated on language contained at 49 CFR Part 19, Appendix A, but FTA has shortened the lengthy text.

Civil Rights - The following requirements apply to the underlying contract:

(1) Nondiscrimination - In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. § 2000d, section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6102, section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, and 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, creed, national origin, sex, age, or disability. In addition, the Contractor agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA may issue.

(2) Equal Employment Opportunity - The following equal employment opportunity requirements apply to the underlying contract:

(a) Race, Color, Creed, National Origin, Sex - In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e, 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. Parts 60 et seq., (which implement Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," 42 U.S.C. § 2000e note), and with any applicable Federal statutes, executive orders, regulations, and Federal policies that may in the future affect construction activities undertaken in the course of the Project. 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, creed, national origin, sex, or age. Such action shall include, but not be limited to, the following: employment, upgrading, 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.

(b) Age - In accordance with section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 623 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.

(c) Disabilities - In accordance with section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. § 12112, the Contractor agrees that it will comply with the requirements of U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 C.F.R. Part 1630, pertaining to employment of persons with disabilities. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

(3) The Contractor also agrees to include these requirements in each subcontract financed in whole or in part with Federal assistance provided by FTA, modified only if necessary to identify the affected parties.

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25. BREACHES AND DISPUTE RESOLUTION
49 CFR Part 18
FTA Circular 4220.1E

Applicability to Contracts

All contracts in excess of $100,000 shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. This may

include provisions for bonding, penalties for late or inadequate performance, retained earnings, liquidated damages or other appropriate measures.

Flow Down
The Breaches and Dispute Resolutions requirements flow down to all tiers.

Model Clauses/Language
FTA does not prescribe the form or content of such provisions. What provisions are 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.

Disputes - Disputes arising in the performance of this Contract which are not resolved by agreement of the parties shall be decided in writing by the authorized representative of (Recipient)'s [title of employee]. This decision shall be final and conclusive unless within [ten (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.

Performance During Dispute - Unless otherwise directed by (Recipient), 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 his employees, agents or others for whose acts he 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 of damage.

Remedies - Unless this contract provides otherwise, all claims, counterclaims, disputes and other matters in question between the (Recipient) 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 (Recipient) 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 (Recipient), (Architect) 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.

26. PATENT AND RIGHTS IN DATA

37 CFR Part 401
49 CFR Parts 18 and 19

Applicability to Contracts
Patent and rights in data requirements for federally assisted projects ONLY apply to research projects in which FTA finances the purpose of the grant is to finance the development of a product or information. These patent and data rights requirements do not apply to capital projects or operating projects, even though a small portion of the sales price may cover the cost of product development or writing the user's manual.

Flow Down
The Patent and Rights in Data requirements apply to all contractors and their contracts at every tier.

Model Clause/Language
The FTA patent clause is substantially similar to the text of 49 C.F.R. Part 19, Appendix A, Section 5, but the rights in data clause reflects FTA objectives. For patent rights, FTA is governed by Federal law and regulation. For data rights, the text on copyrights is insufficient to meet FTA's purposes for awarding research grants. This model clause, with larger rights as a standard, is proposed with the understanding that this standard could be modified to FTA's needs.

CONTRACTS INVOLVING EXPERIMENTAL, DEVELOPMENTAL, OR RESEARCH WORK.

A. **Rights in Data** - This following requirements apply to each contract involving experimental, developmental or research work:

(1) The term "subject data" used in this clause means recorded information, whether or not copyrighted, that is delivered or specified to be delivered under the contract. The term includes graphic or pictorial delineation in media such as drawings or photographs; text in specifications or related performance or design-type documents; machine forms such as punched cards, magnetic tape, or computer memory printouts; and information retained in computer memory. Examples include, but are not limited to: computer software, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identifications, and related information. The term "subject data" does not include financial reports, cost analyses, and similar information incidental to contract administration.

(2) The following restrictions apply to all subject data first produced in the performance of the contract to which this Attachment has been added:

(a) Except for its own internal use, the Purchaser or Contractor may not publish or reproduce subject data in whole or in part, or in any manner or form, nor may the Purchaser or Contractor

authorize others to do so, without the written consent of the Federal Government, until such time as the Federal Government 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.

(b) In accordance with 49 C.F.R. § 18.34 and 49 C.F.R. § 19.36, 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 in subsections (2)(b)1 and (2)(b)2 of this clause below. As used in the previous sentence, "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.

1. Any subject data developed under that contract, whether or not a copyright has been obtained; and

2. Any rights of copyright purchased by the Purchaser or Contractor using Federal assistance in whole or in part provided by FTA.

(c) When FTA awards Federal assistance for experimental, developmental, or research work, it is FTA's general intention to increase transportation knowledge available to the public, rather than to restrict the benefits resulting from the work to participants in that work. Therefore, unless FTA determines otherwise, the Purchaser and the Contractor performing experimental, developmental, or research work required by the underlying contract to which this Attachment is added 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 that 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 the underlying contract, is not completed for any reason whatsoever, all data developed under that contract shall become subject data as defined in subsection (a) of this clause and shall be delivered as the Federal Government may direct. This subsection (c) , however, does not apply to adaptations of automatic data processing equipment or programs for the Purchaser or Contractor's use whose costs are financed in whole or in part with Federal assistance provided by FTA for transportation capital projects.

(d) Unless prohibited by state law, upon request by the Federal Government, the Purchaser and the Contractor agree 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 Purchaser or 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. Neither the Purchaser nor 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.

(e) 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.

(f) Data developed by the Purchaser or Contractor and financed entirely without using Federal assistance provided by the Federal Government that has been incorporated into work required by the underlying contract to which this Attachment has been added is exempt from the requirements of subsections (b), (c), and (d) of this clause, provided that the Purchaser or Contractor identifies that data in writing at the time of delivery of the contract work.

(g) Unless FTA determines otherwise, 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 provided by FTA.

(3) Unless the Federal Government later makes a contrary determination in writing, irrespective of the Contractor's status (i.e., a large business, small business, state government or state instrumentality, local government, nonprofit organization, institution of higher education, individual, etc.), the Purchaser and the Contractor agree to take the necessary actions to provide, through FTA, those rights in that invention due the Federal Government as described in

U.S. Department of Commerce regulations, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," 37 C.F.R. Part 401.

(4) The Contractor also agrees to include these requirements in each subcontract for experimental, developmental, or research work financed in whole or in part with Federal assistance provided by FTA.

B. **Patent Rights** - The following requirements apply to each contract involving experimental, developmental, or research work:

(1) General - If any invention, improvement, or discovery is conceived or first actually reduced to practice in the course of or under the contract to which this Attachment has been added, and that invention, improvement, or discovery is patentable under the laws of the United States of America or any foreign country, the Purchaser and Contractor agree to take actions necessary to provide immediate notice and a detailed report to the party at a higher tier until FTA is ultimately notified.

(2) Unless the Federal Government later makes a contrary determination in writing, irrespective of the Contractor's status (a large business, small business, state government or state instrumentality, local government, nonprofit organization, institution of higher education, individual), the Purchaser and the Contractor agree to take the necessary actions to provide,

through FTA, those rights in that invention due the Federal Government as described in U.S. Department of Commerce regulations, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," 37 C.F.R. Part 401.

(3) The Contractor also agrees to include the requirements of this clause in each subcontract for experimental, developmental, or research work financed in whole or in part with Federal assistance provided by FTA.

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27. TRANSIT EMPLOYEE PROTECTIVE AGREEMENTS
49 U.S.C. § 5310, § 5311, and § 5333
29 CFR Part 215

Applicability to Contracts
The Transit Employee Protective Provisions apply to each contract for transit operations performed by employees of a Contractor recognized by FTA to be a transit operator. (Because transit operations involve many activities apart from directly driving or operating transit vehicles, FTA determines which activities constitute transit "operations" for purposes of this clause.)

Flow Down
These provisions are applicable to all contracts and subcontracts at every tier.

Model Clause/Language
Since no mandatory language is specified, FTA had developed the following language:

Transit Employee Protective Provisions. (1) The Contractor agrees to the comply with applicable transit employee protective requirements as follows:

(a) General Transit Employee Protective Requirements - To the extent that FTA determines that transit operations are involved, the Contractor agrees to carry out the transit operations work on the underlying contract in compliance with terms and conditions determined by the U.S. Secretary of Labor to be fair and equitable to protect the interests of employees employed under this contract and to meet the employee protective requirements of 49 U.S.C. A 5333(b), and U.S. DOL guidelines at 29 C.F.R. Part 215, and any amendments thereto. These terms and conditions are identified in the letter of certification from the U.S. DOL to FTA applicable to the FTA Recipient's project from which Federal assistance is provided to support work on the underlying contract. The Contractor agrees to carry out that work in compliance with the conditions stated in that U.S. DOL letter. The requirements of this subsection (1), however, do not apply to any contract financed with Federal assistance provided by FTA either for projects for elderly individuals and individuals with disabilities authorized by 49 U.S.C. § 5310(a)(2), or for projects for nonurbanized areas authorized by 49 U.S.C. § 5311. Alternate provisions for those projects are set forth in subsections (b) and (c) of this clause.

(b) Transit Employee Protective Requirements for Projects Authorized by 49 U.S.C. § 5310(a)(2) for Elderly Individuals and Individuals with Disabilities - If the contract involves transit operations financed in whole or in part with Federal assistance authorized by 49 U.S.C. § 5310(a)(2), and if the U.S. Secretary of Transportation has determined or determines in the future that the employee protective requirements of 49 U.S.C. § 5333(b) are necessary or appropriate for the state and the public body subrecipient for which work is performed on the underlying contract, the Contractor agrees to carry out the Project in compliance with the terms and conditions determined by the U.S. Secretary of Labor to meet the requirements of 49 U.S.C. § 5333(b), U.S. DOL guidelines at 29 C.F.R. Part 215, and any amendments thereto. These terms and conditions are identified in the U.S. DOL's letter of certification to FTA, the date of which is set forth Grant Agreement or Cooperative Agreement with the state. The Contractor agrees to perform transit operations in connection with the underlying contract in compliance with the conditions stated in that U.S. DOL letter.

(c) Transit Employee Protective Requirements for Projects Authorized by 49 U.S.C. § 5311 in Nonurbanized Areas - If the contract involves transit operations financed in whole or in part with Federal assistance authorized by 49 U.S.C. § 5311, the Contractor agrees to comply with the terms and conditions of the Special Warranty for the Nonurbanized Area Program agreed to by the U.S. Secretaries of Transportation and Labor, dated May 31, 1979, and the procedures implemented by U.S. DOL or any revision thereto.

(2) The Contractor also agrees to include the any applicable requirements in each subcontract involving transit operations financed in whole or in part with Federal assistance provided by FTA.

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28. DISADVANTAGED BUSINESS ENTERPRISE (DBE)
49 CFR Part 26

Background and Applicability

The newest version on the Department of Transportation's Disadvantaged Business Enterprise (DBE) program became effective July 16, 2003. The rule provides guidance to grantees on the use of overall and contract goals, requirement to include DBE provisions in subcontracts, evaluating DBE participation where specific contract goals have been set, reporting requirements, and replacement of DBE subcontractors. Additionally, the DBE program dictates payment terms and conditions (including limitations on retainage) applicable to all subcontractors regardless of whether they are DBE firms or not.

The DBE program applies to all DOT-assisted contracting activities. A formal clause such as that below must be included in all contracts above the micro-purchase level. The requirements of clause subsection b flow down to subcontracts.

A substantial change to the payment provisions in this newest version of Part 26 concerns retainage (*see* section 26.29). Grantee choices concerning retainage should be reflected in the language choices in clause subsection d.

Clause Language

The following clause language is suggested, not mandatory. It incorporates the payment terms and conditions applicable to all subcontractors based in Part 26 as well as those related only to DBE subcontractors. The suggested language allows for the options available to grantees concerning retainage, specific contract goals, and evaluation of DBE subcontracting participation when specific contract goals have been established.

Disadvantaged Business Enterprises

a. This contract is subject to the requirements of Title 49, Code of Federal Regulations, Part 26, *Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs.* The national goal for participation of Disadvantaged Business Enterprises (DBE) is 10%. The agency's overall goal for DBE participation is **__ %.** A separate contract goal **[of __ % DBE participation has] [has not]** been established for this procurement.

b. The contractor 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 CFR Part 26 in the award and administration of this DOT-assisted contract. 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 **{insert agency name}** deems appropriate. Each subcontract the contractor signs with a subcontractor must include the assurance in this paragraph (*see* 49 CFR 26.13(b)).

c. ***{If a separate contract goal has been established, use the following}*** Bidders/offerors are required to document sufficient DBE participation to meet these goals or, alternatively, document adequate good faith efforts to do so, as provided for in 49 CFR 26.53. Award of this contract is conditioned on submission of the following **[concurrent with and accompanying sealed bid] [concurrent with and accompanying an initial proposal] [prior to award]**:

1. The names and addresses of DBE firms that will participate in this contract;

2. A description of the work each DBE will perform;

3. The dollar amount of the participation of each DBE firm participating;

4. Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet the contract goal;

5. Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and

6. If the contract goal is not met, evidence of good faith efforts to do so.

[Bidders][Offerors] must present the information required above **[as a matter of responsiveness] [with initial proposals] [prior to contract award]** (*see* 49 CFR 26.53(3)). ***{If no separate contract goal has been established, use the following}*** The successful bidder/offeror will be required to report its DBE participation obtained through race-neutral means throughout the period of performance.

d. The contractor is required to pay its subcontractors performing work related to this contract for satisfactory performance of that work no later than 30 days after the contractor's receipt of payment for that work from the **{insert agency name}**. In addition, **[the contractor may not hold retainage from its subcontractors.] [is required to return any retainage payments to those subcontractors within 30 days after the subcontractor's work related to this contract is satisfactorily completed.] [is required to return any retainage payments to those subcontractors within 30 days after incremental acceptance of the subcontractor's work by the {insert agency name} and contractor's receipt of the partial retainage payment related to the subcontractor's work.]**

e. The contractor must promptly notify **{insert agency name}**, whenever a DBE subcontractor performing work related to this contract is terminated or fails to complete its work, and must make good faith efforts to engage another DBE subcontractor to perform at least the same amount of work. The contractor may not terminate any DBE subcontractor and perform that work through its own forces or those of an affiliate without prior written consent of **{insert agency name}**.

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29. [RESERVED]

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30. INCORPORATION OF FEDERAL TRANSIT ADMINISTRATION (FTA) TERMS
FTA Circular 4220.1E

Applicability to Contracts
The incorporation of FTA terms applies to all contracts.

Flow Down
The incorporation of FTA terms has unlimited flow down.

Model Clause/Language
FTA has developed the following incorporation of terms language**:**

Incorporation of Federal Transit Administration (FTA) Terms - The preceding provisions include, in part, certain Standard Terms and Conditions required by DOT, whether or not expressly set forth in the preceding contract provisions. All contractual provisions required by DOT, as set forth in FTA Circular 4220.1E, are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA mandated terms shall be deemed to control in the

event of a conflict with other provisions contained in this Agreement. The Contractor shall not perform any act, fail to perform any act, or refuse to comply with any (name of grantee) requests which would cause (name of grantee) to be in violation of the FTA terms and conditions.

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31. DRUG AND ALCOHOL TESTING
49 U.S.C. §5331
49 CFR Parts 653 and 654

Applicability to Contracts
The Drug and Alcohol testing provisions apply to Operational Service Contracts.

Flow Down Requirements
Anyone who performs a safety-sensitive function for the recipient or subrecipient is required to comply with 49 CFR 653 and 654, with certain exceptions for contracts involving maintenance services. Maintenance contractors for non-urbanized area formula program grantees are not subject to the rules. Also, the rules do not apply to maintenance subcontractors.

Model Clause/Language
Introduction
FTA's drug and alcohol rules, 49 CFR 653 and 654, respectively, 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 Parts 653 and 654. 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.

Therefore, 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
Under 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 CFR 653 and 654. 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 only for those recipients which have a testing program for their employees, and can add the contractor's safety-sensitive employees to that program.

Under Option 2, the recipient relies on the contractor to implement a drug and alcohol testing program that complies with 49 CFR 653 and 654, 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.

Under 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.

Drug and Alcohol Testing
Option 1

The contractor agrees to:

(a) participate in (grantee's or recipient's) drug and alcohol program established in compliance with 49 CFR 653 and 654.

Drug and Alcohol Testing
Option 2

The contractor agrees to establish and implement a drug and alcohol testing program that complies with 49 CFR Parts 653 and 654, produce any documentation necessary to establish its compliance with Parts 653 and 654, 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 the (insert name of grantee), to inspect the facilities and records associated with the implementation of the drug and alcohol testing program as required under 49 CFR Parts 653 and 654 and review the testing process. The contractor agrees further to certify annually its compliance with Parts 653 and 654 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.

Drug and Alcohol Testing
Option 3

The contractor agrees to establish and implement a drug and alcohol testing program that complies with 49 CFR Parts 653 and 654, produce any documentation necessary to establish its compliance with Parts 653 and 654, 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 the (insert name of grantee), to inspect the facilities and records associated with the implementation of the drug and alcohol testing program as required under 49 CFR Parts 653 and 654 and review the testing process. The contractor agrees further to certify annually its compliance with Parts 653 and 654 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 CFR 653 and 654; 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).

FEDERAL TRANSIT ADMINISTRATION

BEST PRACTICES PROCUREMENT MANUAL

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A.2 – Dear Colleague Letters

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1. January 20, 2004: Performance and Payment Bonding Requirements

U.S. Department of Transportation
Federal Transit Administration

Administrator

January 20, 2004

400 Seventh St. S.W.
Washington, D.C. 20590

C-01-04

Dear Colleague:

In working with our grantees and their transit suppliers, we have found some misunderstanding about the Federal Transit Administration (FTA) requirements regarding performance and payment bonds in Federally-assisted procurements, particularly for rolling stock procurements. In short, FTA *does not require* bonding in any amount for rolling stock or any other non-construction contracts. FTA leaves to the good business judgment of our grantees the discretion to determine the appropriate amount of bonding — if any — to incorporate in non-construction contracts.

With APTA's assistance, FTA examined the prices rolling stock manufacturers pay for bonds and how those prices have reacted to changes in the broader bond market. We found wide variation in manufacturers'' experiences overall, but a strong indication that rail car manufacturers have been particularly hard hit in terms of bond pricing and availability. Needless to say, high bond costs and reduced availability directly impact both the grantee's bottom line and competition within the industry. I challenge each of you to carefully assess the risks involved in any given procurement and carefully balance those risks against the cost and competitive impacts of bonding requirements. At FTA, we will continue to work with the industry to identify cost-effective ways to manage risks, and will share that information through our *Best Practices Procurement Manual*. Additionally, we will continue to work with both the public and private sectors to ensure our grantees have access to the information they need to make informed choices as they consider bonds in their procurement practices.

Even in the area of construction contracts (where bonding is an FTA requirement), we remain willing to review and approve sensible alternatives and exceptions to the bonding levels identified as adequate to protect the Federal interest in FTA Circular 4220.1E. The Circular notes that "a Grantee may seek FTA approval of its bonding policy and requirements if they do not comply with these criteria," and FTA has approved exceptions to the circular requirements.

As responsible stewards of our public resources, it is incumbent upon each of us to maximize the benefits generated by every transit dollar. Please review your bonding practices to ensure that

you are prudently utilizing this important tool. I look forward to sharing the sound and innovative practices that the transit industry always generates.

Sincerely,

Jennifer L. Dorn

2. May 29, 2002: Policy Changes and Clarifications re: Procurement Transactions

U.S. Department of Transportation **Federal Transit Administration**	Administrator	400 Seventh St. S.W. Washington, D.C. 20590
	May 29, 2002	C-08-02

Dear Colleague:

I am pleased to announce a number of Federal Transit Administration (FTA) policy changes and clarifications that we believe will simplify your procurement transactions, as well as several initiatives intended to identify and share successful procurement practices. The changes and clarifications involve:

- Rescission of five-year contract term limitations;
- Use of E-commerce for procurements;
- Rules on advance payments; and
- The effect of using of various FTA funding sources for operating and preventive maintenance contracts.

In addition, you will find information on a new Best Practices initiative, as well as the introduction of the Experimental Procurement Laboratory initiative. Through these initiatives, we hope to persuade you to share what works well and encourage new thinking about how procurement practices can be simplified and improved.

This information will also be made available on the FTA public website, and I encourage you to share it with your procurement staff. I also want to thank the many transit agencies that have offered comments on how to improve procurement practices, and particularly those who responded to our recent survey.

POLICY CHANGES AND CLARIFICATIONS

A. FTA C 4220.1D, Paragraph 7(m) -- Contract Term Limitation

The five-year contract term limitation for FTA-funded contracts, including "revenue contracts," awarded by grant recipients is hereby rescinded. Revenue contracts are those that utilize FTA-funded real estate, equipment and facilities to generate revenue. With this rescission, grant recipients no longer need to obtain FTA approval for contract terms exceeding five years. Please

note, however, that contracts for rolling stock and replacement parts are still limited to not more than five years, as required by statute. (49 United States Code Section 5326(b))

Grantees are expected to continue to be judicious in establishing and extending their contract terms. Good procurement practice dictates that grantees enter into contract terms no longer than minimally necessary to accomplish the purpose of the contract.

B. E-Commerce

E-Commerce has been and continues to be an allowable means to conduct procurements. If a grantee chooses to utilize E-Commerce, written procedures must be developed and all requirements for full and open competition must be met.

C. FTA C4220.1D, Paragraph 12.a. -- Advance Payments

There continues to be some confusion about FTA policy with respect to advance payments, stemming from the interpretation of American Public Transportation Association's Standard Bus Procurement Guidelines and subsequent FTA Dear Colleague Letters. The clarification of requirements regarding advance payments provided in the Dear Colleague Letter of June 15, 2001, remains accurate, but is further clarified as follows:

FTA C 4220.1D, Paragraph 12, "Payment Provision in Third Party Contracts," states: "FTA does not authorize and will not participate in funding payments to a contractor prior to the incurrence of costs by the contractor unless prior written concurrence is obtained from FTA." This policy remains unchanged: FTA funds may not be used to make advance payments unless prior written concurrence is obtained from FTA. There is no prohibition on a grant recipient's use of local funds for advance payments. However, advance payments made with local funds before a grant has been awarded, or before the issuance of a letter of no prejudice or other pre-award authority, are ineligible for reimbursement.

D. FTA C 4220.1D, Paragraph 4 – Applicability (Regarding Operating Assistance and Preventive Maintenance)

FTA grant recipients who utilize FTA formula funds for operating assistance are required to follow the requirements of the FTA C 4220.1D for all operating contracts. Since FTA formula funds pay a percentage of the net operating deficit, such contracts cannot be segregated and FTA C 4220.1D must be applied.

Congestion Mitigation and Air Quality (CMAQ) and Job Access/Reverse Commute (JARC) project funds may be used for operations. Grantees must follow the Circular requirements for any specific contracts that utilize CMAQ or JARC funds. However, the use of CMAQ and JARC funds for operations does not trigger the applicability of the Circular to all other operating contracts.

Grantees who utilize formula capital funds for preventive maintenance contracts are subject to the following requirements under the Circular. If the FTA formula funds are allocated to discrete contracts identified in the grant application for preventive maintenance, then FTA C 4220.1D will apply only to those specific contracts. If the FTA formula funds are not allocated to discrete contracts in the grant application, then all preventive maintenance contracts are subject to the requirements of the Circular.

BEST PRACTICES INITIATIVES

A. Best Practices Contest

While the Best Practices Procurement Manual (BPPM) contains some excellent examples of grantee "best practices," we are eager to encourage the sharing of many more of these practical ideas among grantees. Everyone who submits a best practice that is incorporated into the Manual will be publicly recognized at American Public Transit Association's Annual Meeting. In addition, one individual/agency will be recognized at the annual Awards Ceremony, and APTA will waive the conference registration fee for the person who submits the winning "best practice."

B. Experimental Procurement Laboratory

FTA also is creating an experimental "procurement laboratory." The goal of this initiative is to allow and encourage grantees to improve or streamline their contracting processes through innovative approaches. Grantees are invited to propose procurement innovations for consideration and approval by FTA. If the experiment is successful, the practice will be published in the Best Practices Procurement Manual.

More information about the Best Practices Contest and the Experimental Procurement Laboratory initiative will be published soon on the FTA website, the BPPM website, and the APTA website, and will be made available at FTA conferences and National Transit Institute procurement courses.

I appreciate your continued support, and look forward to working with you to further improve procurement practices in the transportation industry. Regional Office.

Sincerely,

Jennifer L. Dorn

3. June 15, 2001: Feedback on the Effectiveness of FTA's Third Party Contracting Requirements and Procurement Assistance Program

U.S. Department
Of Transportation
Federal Transit
Administration

Deputy Administrator

400 Seventh St. S.W.
Washington, D.C. 20590

C-08-01

June 15, 2001

Dear Colleague:

In May 1999, the Federal Transit Administration (FTA) issued a survey inviting feedback on the effectiveness of FTA's Third Party Contracting Requirements and Procurement Assistance Program. Based on comments and suggestions in the survey responses, FTA implemented certain changes to these two areas of our program. These changes include offering an increased number and variety of procurement courses; adding to and refining the "Best Practices Procurement Manual;" and posting procurement questions and answers on the Internet.

During a workshop held on May 9, 200l, at the American Public Transportation Association (APTA) Bus and Paratransit Conference in Calgary, Canada, FTA provided an update on the actions it has undertaken. The participants felt it was necessary to work collaboratively to address the 5-year term limitation issue at a workshop dedicated solely to this topic at the Fall APTA Bus Equipment and Maintenance/Procurement and Materials Management Conference in Ft. Worth, Texas. Both FTA and APTA agreed to this recommendation.

It was also agreed that in the interim, FTA would exempt certain classes of contracts from the requirement to obtain prior FTA approval for periods of performance in excess of a 5-year term, and that FTA would clarify other areas of Circular 4220.1D, "FTA Third Party Contracting Requirements," that the survey revealed were in need of further clarification.

A. FTA Circular 4220.1D, Paragraph 7(m) – Contract Period of Performance Limitation

Paragraph 7(m) states, "grantees shall not enter into either service or supply contracts with a period of performance exceeding five years inclusive of options without prior written FTA approval. A maximum of five years' requirements may be acquired under a single contract without prior FTA approval (including rolling stock), even though delivery may occur beyond five years after the date of contract award. FTA approval is required for contract extensions or renewals beyond a five-year term. This limitation does not apply to construction contracts or to leases of real property for the life of a transit asset to be constructed on such property (which

period will extend beyond five years in order to fulfill the statutory requirements that grantees have ‘satisfactory continuing control.’)"

Further, a blanket waiver is granted to exempt the following class of contracts from the requirement to obtain FTA prior approval for a contract term in excess of five years:

> Non-construction related contracts such as proprietary software maintenance, consulting and other professional services contracts (except contracts for general engineering services) awarded for a discrete, identifiable item, e.g., a particular piece of litigation, a discrete tort claim, and audit of a particular transaction or fiscal year.

This blanket waiver, however, does not cover the following class:

> All contracts for general engineering consultant services are non-exempt. Task order type arrangements for engineering, architectural, legal, accounting, non-proprietary software maintenance or other professional services not tied directly to a related construction contract or a discrete identifiable item, require prior FTA approval for periods of performance in excess of five years.

B. Revenue Contracts – Five-Year Term Limitation

It is FTA’s policy that all persons be afforded an equal opportunity to benefit from business opportunities arising from use of FTA-funded assets. It is also FTA’s policy to encourage FTA recipients to maximize non-farebox revenues through contractual and other appropriate arrangements involving non-interfering uses of such FTA-funded assets. The establishment of a five-year contract term limitation is one means by which FTA seeks to balance these potentially conflicting policies. A review of recent requests for exemption from the 5-year limitation in the area of "revenue contracts," however, suggests that prior FTA approval is not required under certain conditions. Accordingly, prior FTA approval of the following categories of "revenue contracts" in excess of five years is no longer required:

> 1). Non-exclusive revenue contracts: Revenue contracts involving business opportunities, that due to their nature and the capacity of the transit system, are not limited by physical constraints or grantee policy to any specific number of entrants do not require prior FTA approval. For example, if a grantee allows any vendor to install fiber optic cable within the grantee’s right-of-way on reasonable terms and conditions, until such time as the grantee decides to limit the number of entrants due to capacity of the system or other factors, there is no need for prior FTA review. Another example might be allowing multiple vendors to put transmission towers or antennas on grantee property.
>
> 2). Exclusive revenue contracts under certain conditions: Revenue contracts involving business opportunities due to their nature and the capacity of the transit system which are limited to a specific number of entrants, whether due to physical constraints or grantee policy, do not require prior FTA approval where the following conditions exist and are documented in the grantee’s files:

a). Contracts are awarded through a competitive process;
b). Economic analysis shows that a contract term longer than five years is necessary to allow the contractor to recover any required capital investment and a reasonable return on investment taking into account both tax (depreciation) and economic/business considerations.

3). Transit Oriented/Joint Development Revenue Contracts. Transit Oriented Developments and Joint Development projects undertaken in conformance with FTA joint development policies may subsequently give rise to revenue contracts. Prior FTA concurrence in a contract term in excess of five years is governed by the same criteria as described in paragraphs 1) and 2) above. Note that FTA routine oversight and concurrence in transit oriented development and joint development projects remains unchanged by this exemption.

C. FTA Circular 4220.1D, Paragraph 12 - Payment Provisions in Third Party Contracts

The survey results indicated that there is some confusion concerning the use of advance payments. With regard to advance payments, the Circular states, "FTA does not authorize and will not participate in funding payments to a contractor prior to the incurrence of costs by the contractor unless prior written concurrence is obtained from FTA." This policy is unchanged. To clarify, however, there is no prohibition on a Grantee's using local funds for advance payments where a grant has been awarded or the project is covered by a letter of no prejudice, or other pre-award authority. Please note that advance payments made before a grant has been awarded or before the project is covered by a letter of no prejudice or other pre-award authority, will be ineligible for reimbursement.

D. Preventive Maintenance

Preventive maintenance is an eligible expense under FTA's capital and operating assistance programs depending upon the size of the population served by the grantee. Grantees have asked how the requirements of FTA Circular 4220.1D apply when preventive maintenance activities are contracted to third parties under a capital assistance program rather than an operating assistance program. The question arises because of the different treatment of capital and operating contracts by the Circular in accordance with applicable law. There are two options. Under the capital assistance program, the grantee may apply the Circular only to the specific preventive maintenance contracts identified in the grant application, but not others. Alternatively, the grantee may elect to receive preventive maintenance funds as a certain percentage of total maintenance costs. Under this alternative, the requirements of the Circular apply across the board to all of the grantee's maintenance contracts. Please note that under the latter option, grantees may not selectively exclude certain maintenance contracts from the total operations amount on which they base their percentage calculation.

All of the changes reflected in this "Dear Colleague" letter are effective immediately.

FTA does appreciate your feedback. Please continue to give us your suggestions for improving our procurement program.

Sincerely,
Signed
Hiram J. Walker
Acting Deputy Administrator

4. December 21, 1998: Joint Procurements, Y2K Compliance Requirements

U.S. Department
Of Transportation
Federal Transit
Administration

The Administrator

400 Seventh St. S.W.
Washington, D.C. 20590

C-98-39

December 21, 1998

Dear Colleague:

Recently, there have been several requests for more insight and guidance on the Federal Transit Administration's (FTA) policy and philosophy on various aspects of procurement, and specifically on the use of different strategies and approaches in fulfilling Year 2000 (Y2K) compliance requirements. The minimum requirements applicable to FTA funded procurements are set forth in FTA Circular 4220.1D, "Third Party Contracting Guidelines." The Circular has been designed to provide grant recipients maximum flexibility to operate within the framework of the minimum requirements.

In keeping with the discretionary powers and authority which are vested in grant recipients through the Circular, the FTA fully supports the use of creative and innovative procurement techniques and strategies. Grant recipients may utilize these tools to procure their actual needs and for the purpose of leveraging bargaining power, achieving economies-of-scale and/or fulfilling Y2K compliance requirements. Further, recipients are afforded the freedom to collaborate and to partner with each other in order to facilitate and to maximize the use of innovative procurement techniques. This includes, but is not limited to, conducting joint procurements; proceeding with awards that result from proper "piggybacking" transactions; and/or developing standard specifications for consolidated purchases to address common needs for equipment and services such as escalators, Y2K technology, hardware and software. FTA recently clarified its position on "piggybacking" and "tag-one" in a "Dear Colleague" letter dated October 1, 1998, a copy of which is attached. Presently, that policy applies to rolling stock procurements only; however, consideration is being given to expanding the policy to cover other procurements in the near future.

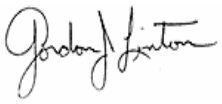
Joint procurements may be conducted on a regional, statewide or national basis pursuant to the needs and applicable regulatory and statutory requirements of the parties to the procurement. The FTA has specifically encouraged the use of joint procurements for rolling stock. Guidance on innovative procurement techniques, such as joint procurements, will be covered in the next issue of the "Best Practices Procurement Manual" (BPPM). Currently, the BPPM contains an example

of a statewide acquisition of buses which was provided by the New York Department of Transportation to facilitate and to assist others in use of the joint procurement concept.

Regardless of the procurement methodology or strategy chosen, the controlling requirement is that FTA funded procurements must conform to the requirements of FTA Circular 4220.ID. The guiding principle of the Circular is that procurements must be conducted in a manner that provides for full and open competition. However, this does not preclude the award of contracts on a non-competitive basis when supported by sound reasons documented in the recipients' files. For example, sound reasons may exist to either conduct a limited competition among a few known sources or to make award to a single source on a noncompetitive basis in order to fulfill the Y2K compliance requirements. Specifically, the award of a noncompetitive contract to address a Y2K problem would be permissible if circumstances existed where time is of the essence to avoid creating a safety hazard in the operation of your transit system.

Should you have questions or desire assistance in addressing procurement issues relating to fulfilling Y2K compliance requirements, please contact your respective FTA Regional Office.

Sincerely,



Gordon J. Linton

5. October 1, 1998: Revenue Contracts, Piggybacking, Tag-ons

U.S. Department
Of Transportation
Federal Transit Administration

The Administrator

400 Seventh St. S.W.
Washington, D.C. 20590

C-98-25

October 1, 1998

Dear Colleague:

I am pleased to announce the procurement initiatives underway in the Federal Transit Administration (FTA) and to provide recent FTA policy on some key areas which will impact your procurement transactions.

First, the FTA has initiated steps to conduct a survey of its customers whose operations and business transactions are impacted by the FTA Circular 4220.lD, Third Party Contracting Requirements. As you may recall, the circular, as amended, was issued on October 1, 1995. The circular was well received, and the feedback has been consistently favorable. However, as we strive to enhance customer satisfaction through the continuous improvement in the delivery of services, the survey will enable us to measure the degree to which the needs of our grantees and industry have been met.

Second, the FTA plans to issue the Third Party Contracting Requirements as a formal rule following a Notice of Proposed Rule Making (NPRM). The NPRM will afford both grantees and industry representatives the opportunity to partner with the FTA through the exchange of ideas and recommendations to influence and shape the final rule.

Third, in response to numerous requests for FTA policy and guidance in some key areas, the following policy-and guidance is effective immediately relating to transactions in the categories identified:

1. "Tag-ons" are not permitted. This term is defined as the adding on to the contracted quantities (base and option) as originally advertised, competed, and awarded, whether for the use of the buyer or for others and then treating the add-on portion as though it met the requirement of competition.

2. The term "piggybacking" is defined as the post-award use of a contractual document/process that allows someone who was not contemplated in the original procurement to purchase the same supplies or equipment through the original document/process.

   Piggybacking is permissible when: (a) the solicitation document and the resultant

contract contain an assignability clause that provides for the assignment of all or part of the specified deliverables as originally advertised, competed, evaluated, and awarded. This includes the base and option quantities. In addition, the original solicitation and resultant contract must contain both a minimum and a maximum quantity, which represent the reasonably foreseeable needs of the parties to the solicitation.

3. Revenue contracts are defined as third party contracts whose primary purpose is to either generate revenues in connection with a transit related activity, or to create business opportunities utilizing an FTA funded asset. FTA requires that these contracts be awarded utilizing competitive selection procedures and principles. The extent of and type of competition required is within the discretionary judgment of the grantee. In addition, FTA requires that the contract term be limited to a period of 5 years, except in those instances where FTA has waived this requirement. Requests for waivers from the term limitation may be submitted to your Regional Office. In those situations where FTA may provide prior approval on a project (e.g., Transit Oriented Development projects, Cross Border leases) the waiver for a revenue contract in excess of five years may be obtained as part of the initial FTA approval of the project.

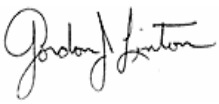
Guidance on each of these procurement categories will be published in the Best Practices Procurement Manual within the next few months.

Finally, the Office of Federal Procurement Policy is currently re-examining the procurement requirements in the Common Grant Rules which form the basis for the requirements contained in 4220.lD. If you wish to suggest ideas or changes to the Common Grant Rules, please contact the Office of Acquisition and Grant Management, Office of the Secretary at the address below or call area code (202) 366-4289.

Mr. Robert G. Taylor
Chief, Grants Management Division, M-60
Office of the Secretary of Transportation
Washington, DC 20590

I look forward to your continued support and invaluable contributions toward these efforts.

Sincerely,



Gordon J. Linton

6. September 4, 1998: APTA's Standard Bus Procurement Guidelines

U.S. Department
Of Transportation
Federal Transit Administration

The Administrator

400 Seventh St. S.W.
Washington, D.C. 20590

C-98-16

September 4, 1998

Dear Colleague:

With the Publication of the Standard Bus Procurement Guidelines (SBPG), I issued a letter pronouncing my support of the collaborative efforts of the American Public Transit Association (APTA) and the Federal Transit Administration (FTA). In that letter I assured APTA members that any FTA funded procurement in conformance with the Phase I guidelines would be deemed to comply with FTA's third party procurement guidelines with respect to the areas addressed.

Recently, it has come to my attention that my letter has created some confusion regarding its application and impact on the requirements of third party contracting set forth in the FTA Circular 4220.lD. To clarify this issue, I wish to reiterate that the requirements for FTA funded procurements are covered in FTA Circular 4220.ID. I strongly urge grantees desiring to conduct FTA funded bus procurements utilizing the SBPG to ensure there are no conflicts with the FTA circular. Should clarification be required, grantees should contact their appropriate FTA regional office for guidance.

In closing, I hope this clarifies any confusion relating to FTA procurement requirements, and I offer my continued support to this effort and those in the future.

Sincerelv.

Gordon J. Linton

7. March 18, 1997: Buy America Requirements of Pre-Award and Post-Delivery

U.S. Department
Of Transportation
Federal Transit Administration

The Administrator

400 Seventh St. S.W.
Washington, D.C. 20590

C-97-03

March 18, 1997

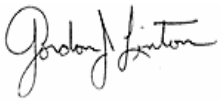
Dear Colleague:

A Buy America problem and follow-up surveys of several Pre-Award and Post-Delivery Reviews of bus procurements indicates that many grantees and their contractors are not conducting adequate reviews of the Buy America requirements. The Pre-Award and Post-Delivery Reviews are designed to ensure that any vehicle purchased with Federal Transit Administration funds has at least a 60 percent domestic content and undergoes final assembly in the United States.

In general, we have found that, particularly in the case of final assembly activities, the grantees surveyed did not provide a description of the manufacturer's final assembly activities and an evaluation of whether Buy America requirements were met. When a grantee receives information from a manufacturer, it must review this information to determine whether it is sufficient to determine if the manufacturer has met the Buy America requirements. If the information is insufficient, the grantee must take whatever steps are necessary to satisfy itself that the manufacturer is complying with the Buy America requirements. This will usually involve seeking additional information from the manufacturer. Otherwise, the grantee certifies compliance with Buy America at its own risk.

In order to assist you in conducting reviews in accordance with the Pre-Award and Post-Delivery Review Regulation, 49 CFR Part 663, I have outlined in the enclosure the procedures a grantee must use to ensure that any vehicles it purchases comply with Buy America. If you have any questions regarding Buy America compliance, please contact your Regional Office.

Sincerely,



Gordon J. Linton

Enclosure

FEDERAL TRANSIT ADMINISTRATION
GUIDANCE ON BUY AMERICA REQUIREMENTS OF THE PRE-AWARD AND POST-DELIVERY REVIEWS

This guidance only addresses the Buy America requirements of the Pre-Award and Post-Delivery Reviews. The Purchaser's Requirements and the Federal Motor Vehicle Safety Standards requirements must still be met.

I. Pre-Award Review (before contract award)

Review data and information on Buy America compliance submitted by the manufacturer, including

Proposed domestic content of vehicle components to determine that the 60 percent United States content requirement is met;

- Proposed final assembly location; and
- Manufacturing activities that will take place during final assembly.

The manufacturer should provide enough detail about these activities to allow for the determination that these activities would constitute adequate final assembly under Buy America requirements. If the manufacturer does not provide sufficient information, the grantee must seek additional information. If the grantee determines that the activities are not adequate, the manufacturer must be asked to submit a revised manufacturing plan. A contract may not be awarded until the grantee is assured that the Buy America requirements will be met.

Final assembly is defined in 49 CFR Part 661 Buy America Requirements; Final Rule as "the creation of the end product from different elements brought together for that purpose through the application of manufacturing processes." In the case of the manufacture of a new rail car, final assembly would typically include, as a minimum, the following operations: installation and interconnection of propulsion control equipment, propulsion cooling equipment, brake equipment, energy sources for auxiliaries and controls, heating and air conditioning, communications equipment, motors, wheels and axles, suspensions and frames; the inspection and verification of all installation and interconnection work; and the in-plant testing of the stationary product to verify all functions. In the case of a new bus, final assembly would typically include, at a minimum, the installation and interconnection of the engine, transmission, axles, including the cooling and braking systems; the installation and interconnection of the heating and air conditioning equipment; the installation of pneumatic and electrical systems, door systems, passenger seats, passenger grab rails, destination signs, wheelchair lifts; and road testing, final inspection, repairs and preparation of the vehicles for delivery.

If a manufacturer's final assembly processes do not include all the activities that are

typically considered the minimum requirements, it can request a Federal Transit Administration (FTA) determination of compliance. FTA will review these requests on a case-by-case basis to determine compliance with Buy America.

The information reviewed supports a Pre-Award Buy America Certification that the proposed procurement meets the domestic content, the final assembly location and final assembly activities requirements.

II. Post-Delivery Review Requirements (during and after manufacturing)

The grantee is required to:

- Review actual component content to ensure that the vehicle meets the 60 percent Buy America domestic content requirement;

- Check that the final assembly location is in the United States and the manufacturer's final assembly activities meet the requirements outlined in paragraph I above; and

- Have an on-site inspector for rail car procurements and bus procurements of greater than 10 vehicles.

The inspector must verify that the actual manufacturing processes are consistent with the information provided by the manufacturer or with the grantee's own assessments. The post-delivery reviews verifies a grantee's Post-Delivery Buy America Certification that the domestic content, final assembly location and final assembly activities requirements are met. Any questions or uncertainties concerning these activities should be referred immediately to FTA.

APPENDIX B.1

EXAMPLE EVALUATION PROCESS

Excerpt from the American Public Transit Association

Standard Bus Procurement Guidelines

Draft as of 9/20/96

1.1.4 PROPOSAL EVALUATION, NEGOTIATION AND SELECTION

Proposals will be evaluated, negotiated, selected and any award made in accordance with the criteria and procedures described below. The approach and procedures are those which are applicable to a competitive negotiated procurement whereby proposals are evaluated to determine which proposals are within a competitive range. Discussions and negotiations may then be carried out with Offerors within the competitive range, after which Best and Final Offers (BAFOs) may be requested. However, the Procuring Agency may select a proposal for award without any discussions or negotiations or request for any BAFO(s). Subject to the Procuring Agency's right to reject any or all proposals, the Offeror will be selected whose proposal is found to be most advantageous to the Procuring Agency, based upon consideration of the criteria of "Qualification Requirements" (Section 1.1.4.3.1) and "Proposal Evaluation Criteria" (Section 1.1.4.3.2) below.

1.1.4.1 Opening of Proposals

Proposals will not be publicly opened. All proposals and evaluations will be kept strictly confidential throughout the evaluation, negotiation and selection process. Only the members of the Selection Committee and Evaluation Team and other Procuring Agency officials, employees and agents having a legitimate interest will be provided access to the proposals and evaluation results during this period.

1.1.4.2 Selection Committee and Evaluation Team

(NOTE: Procuring Agency to specify how it will organize the evaluation and appropriately title this section. The following is provided as an example.)

A Selection Committee will be established. The Committee will make all decisions regarding the evaluations, determination of responsible Offerors and the competitive range, negotiations and the selection of the Offeror, if any, that may be awarded the Contract. The Selection Committee will be assisted by an Evaluation Team which will include officers, employees and agents of the Procuring Agency. The Evaluation Team will carry out the detailed evaluations and report all of its findings to the Selection Committee.

1.1.4.3 Proposal Selection Process

The following describes the process by which proposals will be evaluated and a selection made for a potential award. Any such selection of a proposal by a responsible Offeror shall be made by consideration of only the criteria of "Qualification Requirements" (Section 1.1.4.3.1) and "Proposal Evaluation Criteria" (Section 1.1.4.3.2) below. Section 1.1.4.3.1 specifies the requirements for determining responsible Offerors, all of which must be met by an Offeror to be found qualified. Final determination of an Offeror's qualification will be made based upon all information received during the evaluation process and as a condition for award. Section 1.1.4.3.2 contains all of the evaluation criteria, and their relative order of importance, by which a proposal from a qualified Offeror will be considered for selection. An award, if made, will be to a responsible Offeror for a proposal which is found to be in the Procuring Agency's best interest, price and other evaluation criteria considered.

The procedures to be followed for these evaluations are provided in "Evaluation Procedures" (Section 1.1.4.4) below.

1.1.4.3.1 Qualification Requirements

The following are the requirements for qualifying responsible Offerors. All of these requirements must be met; therefore, they are not listed by any particular order of importance. The Offeror of any proposal that the Selection Committee finds not to meet these requirements, and cannot be made to meet these requirements, may be determined by the Selection Committee not to be responsible and its proposal rejected. The requirements are as follows:

(NOTE: Requirements shown in italics are examples to serve as guidelines. The Procuring Agency is to choose and specify the appropriate requirements.)

I. Sufficient financial strength and resources and capability to finance the work to be performed and complete the Contract in a satisfactory manner as measured by:

   A. Offeror's financial statements prepared in accordance with United States Generally Accepted Accounting Principles (GAAP) and audited by an independent certified public accountant authorized to practice in the jurisdiction of either the Procuring Agency or the Offeror. *(NOTE: Procuring Agency to determine any minimum requirements for equity, working capital, debt, etc. For example where it would be possible to establish some minimum numerical values for equity, debt to assets ratio, etc. as a screening mechanism, this should be done on an approximate basis to avoid having to rule out an otherwise viable Offeror which is just below a rigid minimum. Whatever measures are established should be consistent with what the financial strength needs are for the project. Here it is only important to determine if the Offeror will have sufficient financial strength to pay its bills on time, fund the cash flow, and meet obligations to subcontractors. The evaluation of financial strength should take into account the Offeror's other contractual commitments)*

   B. *(NOTE: If performance bonding is specified as an alternative to or together with other financial qualifications and assurances)* Ability to secure required bond(s)

as evidenced by a letter of commitment from an underwriter confirming that the Offeror can be bonded for the required amount.

C. Willingness of any parent company to provide the required financial guaranty evidenced by a letter of commitment signed by an officer of the parent company having the authority to execute the parent company guaranty. *(NOTE: If the Offeror is a subsidiary(ies) of another company(ies) or is a joint venture, guaranties from the parents and/or corporate members of the joint venture should be required. Language can be stipulated by the Procuring Agency to assure that the guaranty is effective.)*

D. Ability to obtain required insurance with coverage values that meet minimum requirements evidenced by a letter from an underwriter confirming that the Offeror can be insured for the required amount.

II. Evidence that the human and physical resources are sufficient to perform the contract as specified and assure delivery of all equipment within the time specified in the Contract, to include:

A. Engineering, management and service organizations with sufficient personnel and requisite disciplines, licenses, skills, experience, and equipment to complete the Contract as required and satisfy any engineering or service problems that may arise during the warranty period.

B. Adequate manufacturing facilities sufficient to produce and factory-test equipment on schedule.

C. A spare parts procurement and distribution system sufficient to support equipment maintenance without delays and a service organization with skills, experience, and equipment sufficient to perform all warranty and on-site work.

III. Evidence that Offeror is qualified in accordance with Part 4: Quality Assurance Provisions.

IV. Evidence of satisfactory performance and integrity on contracts in making deliveries on time, meeting specifications and warranty provisions, parts availability, and steps Offeror took to resolve any judgments, liens, fleet defects history, and warranty claims. Evidence shall be by client references.

1.1.4.3.2 Proposal Evaluation Criteria

The following are the complete criteria, listed by their relative degree of importance, by which

proposals from responsible Offerors will be evaluated and ranked for the purposes of determining any competitive range and to make any selection of a proposal for a potential award. Any exceptions, conditions, reservations or understandings explicitly, fully and separately stated on the "Form for Proposal Deviation (Section 1.1.6.9) which do not cause the Procuring Agency to consider a proposal to be outside the competitive range, will be evaluated according to the respective evaluation criteria and/or sub-criteria which they affect.

The criteria are listed numerically by their relative order of importance. However, certain criteria may have sub-criteria that are listed by their relative order of importance within the specific criterion they comprise. Also, certain sub-criteria may have sub-criteria that are listed by their relative degree of importance within the specific sub-criterion they comprise.

(NOTE: Procuring Agency to define and insert the evaluation criteria. At the option of the Procuring Agency weights should be assigned to each criterion and sub-criterion and shown in the document. The criteria are to be listed by their order of importance in the evaluation. The following are suggested categories of criteria for Procuring Agency consideration, but not listed in suggested order of importance:

Technical

Qualifications and Resources

Management

Price

Other Financial Impacts

Example evaluation criteria are presented in Appendix at the end of this Section 1.)

1.1.4.4 Evaluation Procedures

All aspects of the evaluations of the proposals and any discussions/negotiations, including documentation, correspondence and meetings, will be kept confidential during the evaluation and negotiation process.

Proposals will be analyzed for conformance with the instructions and requirements of the RFP and Contract documents. Proposals that do not comply with these instructions and do not include the required information may be rejected as insufficient or not be considered for the competitive range. Procuring Agency reserves the right to request an Offeror to provide any missing information and to make corrections. Offerors are advised that the detailed evaluation forms and procedures will follow the same proposal format and organization specified in "Instructions to Offerors" (Section 1.1.3). Therefore, Offerors shall pay close attention to and strictly follow all instructions. Submittal of a proposal will signify that the Offeror has accepted the whole of the Contract documents, except such conditions, exceptions, reservations or understandings explicitly, fully and separately stated on the forms and according to the instructions of "Form for Proposal Deviation." Any such conditions, exceptions, reservations or understandings which do not result in the rejection of the proposal are subject to evaluation under the criteria of "Proposal Evaluation Criteria" (Section 1.1.4.3.2).

Evaluations will be made in strict accordance with all of the evaluation criteria and procedures specified in "Proposal Selection Process" (Section 1.1.4.3). The Procuring Agency will select for any award the highest ranked proposal from a responsible Offeror, qualified under "Qualification Requirements" (Section 1.1.4.3.1) which does not render this procurement financially infeasible and is judged to be most advantageous to the Procuring Agency based on consideration of the evaluation "Proposal Evaluation Criteria" (Section 1.1.4.3.2).

1.1.4.4.1 Evaluations of Competitive Proposals

I. Qualification of Responsible Offerors. Proposals will be evaluated in accordance with requirements of "Qualification Requirements" (Section 1.1.4.3.1) to determine the responsibility of Offerors. Any proposals from Offerors whom the Procuring Agency finds not to be responsible and finds cannot be made to be responsible may not be considered for the competitive range. Final determination of an Offeror's responsibility will be made upon the basis of initial information submitted in the proposal, any information submitted upon request by the Procuring Agency, information submitted in a BAFO and information resulting from Procuring Agency inquiry of Offeror's references and its own knowledge of the Offeror.

II. Detailed Evaluation of Proposals and Determination of Competitive Range. Each proposal will be evaluated in accordance with the requirements and criteria specified in "Proposal Selection Process" (Section 1.1.4.3).

The following are the minimum requirements that must be met for a proposal to be considered for the competitive range. All of these requirements must be met; therefore, they are not listed by any particular order of importance. Any proposal that the Procuring Agency finds not to meet these requirements, and may not be made to meet these requirements, may be determined by the Procuring Agency to not be considered for the competitive range. The requirements are as follows:

A. Offeror is initially evaluated as responsible in accordance with the requirements of "Qualification Requirements" (Section 1.1.4.3.1), or that the Procuring Agency finds it is reasonable that said proposal can be modified to meet said requirements. Final determination of responsibility will be made with final evaluations.

B. Offeror has followed the instructions of the RFP and included sufficient detail information, such that the proposal can be evaluated. Any deficiencies in this regard must be determined by the Procuring Agency to be either a defect that the Procuring Agency will waive in accordance with "Acceptance/Rejection of Proposals" (Section 1.1.5.1) or that the proposal can be sufficiently modified to meet these requirements.

C. Proposal price would not render this procurement financially infeasible, or it is reasonable that such proposal price might be reduced to render the procurement financially feasible.

The Procuring Agency will carry out and document its evaluations in accordance with the criteria and procedures of "Proposal Selection Process" (Section 1.1.4.3). Any extreme proposal deficiencies which may render a proposal unacceptable will be documented. The Procuring Agency will make specific note of questions, issues, concerns and areas requiring clarification by Offerors and to be discussed in any meetings with Offerors which the Procuring Agency finds to be within the competitive range.

Rankings and spreads of the proposals against the evaluation criteria will then be made by the Procuring Agency as a means of judging the overall relative spread between proposals and of determining which proposals are within the competitive range, or may be reasonably made to be within the competitive range.

III. **Proposals not within the Competitive Range.** Offerors of any proposals that have been determined by the Procuring Agency as not in the competitive range, and cannot be reasonably made to be within the competitive range, will be notified in writing, including the shortcomings of their proposals.

IV. **Discussions with Offerors in the Competitive Range.** The Offerors whose proposals are found by the Procuring Agency to be within the competitive range, or may be reasonably made to be within the competitive range, will be notified and any questions and/or requests for clarifications provided to them in writing. Each such Offeror may be invited for a private interview(s) and discussions with the Procuring Agency to discuss answers to written or oral questions, clarifications, and any facet of its proposal.

In the event that a proposal, which has been included in the competitive range, contains conditions, exceptions, reservations or understandings to any Contract requirements as provided in "Form for Proposal Deviation," said conditions, exceptions, reservations or understandings may be negotiated during these meetings. However, the Procuring Agency shall have the right to reject any and all such conditions and/or exceptions, and instruct the Offeror to amend its proposal and remove said conditions and/or exceptions; and any Offeror failing to do so may cause the Procuring Agency to find such proposal to be outside the competitive range.

No information, financial or otherwise, will be provided to any Offeror about any of the proposals from other Offerors. Offerors will not be given a specific price or specific financial requirements they must meet to gain further consideration, except that proposed prices may be considered to be too high with respect to the marketplace or unacceptable. Offerors will not be told of their rankings among the other Offerors.

V. **Factory and Site Visits.** The Procuring Agency reserves the right to conduct factory visits to inspect the Offeror's facilities and/or other transit systems which the Offeror has supplied the same or similar equipment.

VI. **Best and Final Offers (BAFO).** After all interviews have been completed, each of the Offerors in the competitive range will be afforded the opportunity to amend its proposal and make its BAFO. The request for BAFOs shall include:

A. Notice that discussions/negotiations are concluded;

B. Notice that this is the opportunity for submission of a BAFO;

C. A common date and time for submission of written BAFOs, allowing a reasonable opportunity for preparation of the written BAFOs;

D. Notice that if any modification to a BAFO is submitted, it must be received by the date and time specified for the receipt of BAFOs and is subject to the late

submissions, modifications, and withdrawals of proposals provisions of the Request for Proposal;

E. Notice that if Offerors do not submit a BAFO or a notice of withdrawal and another BAFO, their immediate previous Offer will be construed as their BAFO.

Any modifications to the initial proposals made by an Offeror in its BAFO shall be identified in its BAFO. BAFOs will be evaluated by the Procuring Agency according to the same requirements and criteria as the initial proposals "Proposal Selection Process" (Section 1.1.4.3). The Procuring Agency will make appropriate adjustments to the initial scores for any sub-criteria and criteria which have been affected by any proposal modifications made by the BAFOs. These final scores and rankings within each criteria will again be arrayed by the Procuring Agency and considered according to the relative degrees of importance of the criteria defined in "Proposal Evaluation Criteria" (Section 1.1.4.3.2).

The Procuring Agency will then choose that proposal which it finds to be most advantageous to the Procuring Agency based upon the evaluation criteria. The results of the evaluations and the selection of a proposal for any award will be documented in a report.

The Procuring Agency reserves the right to make an award to an Offeror whose proposal it judges to be most advantageous to the Procuring Agency based upon the evaluation criteria, without conducting any written or oral discussions with any Offerors or solicitation of any BAFOs.

APPENDIX A: ILLUSTRATIVE EVALUATION CRITERIA AND SCORING PROCEDURE

Two scoring methods, each including criteria and application of the criteria, are presented below. The first is a completely weighted method, in which all the criteria have a predetermined role and, given the unavoidably subjective assignment of pass/fail or numerical scores to specific criteria, results in a single, certain total score for each proposal. The second method, the narrative/trade-off method, provides more subjectivity in the assignment and combination of technical scores, and in the trade-offs between price and non-price criteria. An infinite number of variations and combinations of these methods could be developed.

I. COMPLETELY WEIGHTED FORMULA METHOD

1.1.4.3.2 Illustrative Evaluation Criteria *(Completely Weighted Formula Illustrative Method)*

I. Affordability (pass or fail). *The price proposals will be assessed for affordability. The Procuring Agency will not make an award for any proposal which proposes prices that would render the procurement infeasible.*

II. Minimum Technical Requirements (pass or fail). *Technical proposals shall meet the following minimum technical requirements for any consideration for selection and award. A proposal not meeting all of these requirements will be rejected.*

(NOTE: Certain requirements of the specification can be selected as absolute requirements, such that where any one is not proposed to be met would be reason to reject a proposal. When doing so, the specific requirements must be identified by detailed references.)

EXAMPLES:

1. *Passenger Capacity specified in _____.*
2. *Overall dimensions specified in _____.*
3. *Performance (speed, acceleration, braking, turning radius) specified in _____.*
4. *Emissions specified in _____.*
5. *Propulsion system requirements of _____.*
6. *Body structural and material requirements of _____.*
7. *Service proven technology*

III. Unacceptable Exceptions, Conditions, Reservations and Understandings (pass or fail). *Exceptions, conditions, reservations or understandings that are explicitly, fully and separately stated on the required form of Section 1.1.6.9 "Form for Proposal Deviation" will be evaluated for their acceptability. A proposal having a preponderance of unacceptable exceptions and conditions may be cause for the proposal to be rejected. Each of any exceptions and/or conditions made in a proposal will be evaluated and the Procuring Agency will determine their individual acceptability. An unacceptable exception, condition, reservation or understanding, if not withdrawn by the Offeror upon the request by the Procuring Agency, would be cause for the proposal to be rejected. For the purposes of determining the competitive range a proposal containing unacceptable exceptions, conditions, reservations or understandings may be included on the basis that the proposal is capable of being made acceptable provided that the Offeror withdraw or modify the unacceptable exceptions, conditions, reservations or understandings. Any exceptions, conditions, reservations or understandings which do not cause the Procuring Agency to consider a proposal to be outside the competitive range, will be evaluated according to the respective evaluation criteria and/or sub-criteria which they affect.*

IV. Technical Proposal Scoring Criteria (weight = _____) *The transit bus offered in the technical proposal will be evaluated for the following factors which are listed in their relative order of importance:*

A. Engine - Operating experience of previous users and test results of proposed engine and subsystems in transit service. The degree to which performance

requirements of Part 3: Technical Specifications, for the engine are proposed to be met. The risk of development tasks (if any) will be assessed. (sub-weight = _____)

B. Transmission - Operating experience of previous users and test results of proposed transmission in transit service. The degree to which performance requirements of Part 3: Technical Specifications, for the transmission are proposed to be met. The risk of development tasks (if any) will be assessed. (sub-weight = _____)

C. Major Subsystems - Operating experience of previous users and test results of proposed major subsystems in transit service. The degree to which performance requirements of Part 3: Technical Specifications, for each major subsystem are proposed to be met. The risk of development tasks (if any) will be assessed. (sub-weight = _____)

D. Quality Assurance - Sufficiency of in-place Quality Assurance Program and procedures to meet requirements. (sub-weight = _____)

E. Spare Parts Availability - Degree to which the required availability of spare parts (Section 2.5.4) are proposed to be met or exceeded. (sub-weight = _____)

F. Standard Warranty - Degree to which the standard warranty of Part 5 is proposed to be met or exceeded. (sub-weight = _____)

G. System Support - Demonstrated ability to meet or exceed reliability and maintainability requirements; suitability of test equipment; quality of manuals; and effectiveness of training programs. (sub-weight = _____)

V. Proposed Price (weight = _____). *The lowest proposal price (among all proposals) will be divided by the proposal price being scored, and the resulting quantity will be multiplied by the weight for the proposed price criterion.*

VI. Qualifications (weight = _____). *Degree to which Offeror exceeds the required qualifications of Section 1.1.4.3.1 above.*

A. Financial Strength and Resources (sub-weight = _____)

B. Human and Physical Resources (sub-weight = _____)

C. Record of Performance on Bus Contracts (sub-weight = _____)

VII. Other Financial Impacts (weight = _____). *This factor will consider the following financial impacts: maintenance costs resulting from parts reliability, parts standardization, warranties, timeframe for Contract performance and final delivery, and the extent to which the Procuring Agency can analyze cost and pricing data.*

1.1.4.3.3 Application of Evaluation Criteria. *(Completely Weighted Formula Illustrative Method)*

(NOTE: This section may or may not be included, dependent upon the specific criteria that are included in Section 1.1.4.3.2.)

Proposals will be evaluated against the pass/fail Criteria Nos. 1, 2 and 3. Any proposal which meets all pass/fail criteria, or fails one or more of these criteria but is susceptible of being made to meet such failed criteria, will be considered within the competitive range. Otherwise, a proposal may not be considered to be within the competitive range.

Sub-criteria of Criteria Nos. 4 and 6 will be scored based on the reviewer's determination of the degree of compliance with Contract requirements, potential risks and benefits, and strengths and weaknesses. The score is reduced in proportion to the extent of non-conformance, discrepancies, errors, omissions, and risks to the Procuring Agency. Scores will be assigned according to the following:

9 - 10 *Exceptional. Fully compliant with Contract requirements and with desirable strengths or betterments; no errors, or risks, or weaknesses or omissions.*

6 - 8 *Good to Superior. Compliant with Contract requirements; some minor errors, or risks, or weaknesses or omissions.*

4 - 5 *Adequate. Minimally compliant with Contract requirements; errors, or risks, or weaknesses or omissions; possible to correct and make acceptable.*

1 - 3 *Poor to Deficient. Non-compliant with Contract requirements; errors, or risks, or weaknesses or omissions; difficult to correct and make acceptable.*

0 *Unacceptable. Totally deficient and not in compliance with Contract requirements; not correctable.*

An estimate of the impact costs to the Procuring Agency will be made for the items listed in Criterion No. 7. Resultant scores for each sub-criterion will be weighed by the appropriate weight factors and a total score for each criterion determined. The scores of Criteria Nos. 4, 5 and 6 will then be weighed by the appropriate weight factors and a total score developed for the proposal. The following table illustrates the procedure.

II. NARRATIVE / TRADE-OFF METHOD

1.1.4.3.2 Evaluation Criteria *(Narrative / Trade-Off Illustrative Method)*

I. Unacceptable Exceptions, Conditions, Reservations and Understandings (pass or fail). *Exceptions, conditions, reservations or understandings that are explicitly, fully and separately stated on the required form of Section 1.1.6.9 "Form for Proposal Deviation" will be evaluated for their acceptability. A proposal having a preponderance of unacceptable*

exceptions and conditions may be cause for the proposal to be rejected. Each of any exceptions and/or conditions made in a proposal will be evaluated and the Procuring Agency will determine their individual acceptability. An unacceptable exception, condition, reservation or understanding, if not withdrawn by the Offeror upon the request by the Procuring Agency, would be cause for the proposal to be rejected. For the purposes of determining the competitive range a proposal containing unacceptable exceptions, conditions, reservations or understandings may be included on the basis that the proposal is capable of being made acceptable provided that the Offeror withdraw or modify the unacceptable exceptions, conditions, reservations or understandings. Any exceptions, conditions, reservations or understandings which do not cause the Procuring Agency to consider a proposal to be outside the competitive range, will be evaluated according to the respective evaluation criteria and/or sub-criteria which they affect.

II. Other Pass/Fail Criteria *- (NOTE: If the procuring agency wishes to impose any other unalterable conditions on the proposals, these may be included as pass/fail criteria. Proposer criteria in addition to those specified in Section 1.1.4.3.1 "Qualification Requirements" (such as financial capability, proof of ability to provide performance bonds, or proven experience record) or essential technical criteria (such as propulsion system or approved equal, or structural requirements) may be either included in this category as pass/fail criteria, or evaluated under the following criteria with extremely low ranking for attributes that are unsatisfactory. The necessary input data should correspond to proposal requirements listed in Sections 1.1.3.2.2 "Technical Proposal" or 1.1.3.2.3 "Management Plan.")*

III. Technical Proposal - *The transit bus and support offered in the technical proposal will be evaluated for the following factors which are listed in their relative order of importance:*

A. Powertrain - Operating experience of previous users and test results of proposed engine, transmission, and subsystems in transit service. The degree to which performance requirements of Part 3: Technical Specifications and the needs of the Procuring Agency, for the engine and transmission are proposed to be met. The risk of development tasks (if any) will be assessed.

B. Structure, Suspension, and Body - Operating experience of previous users and test results of proposed structure, suspension (including braking systems and steering) and body in transit service. The degree to which performance requirements of Part 3: Technical Specifications and the needs of the Procuring Agency, for these systems are proposed to be met. The risk of development tasks (if any) will be assessed.

C. Other Major Subsystems - Operating experience of previous users and test results of proposed major subsystems in transit service. The degree to which performance requirements of Part 3: Technical Specifications and the needs of the Procuring Agency, for each major subsystem are proposed to be met. The risk of development tasks (if any) will be assessed.

D. Quality Assurance - Sufficiency of in-place Quality Assurance Program and procedures to meet requirements.

E. Spare Parts Availability - Degree to which the required availability of spare parts (Section 2.5.4) are proposed to be met or exceeded.

F. Standard Warranty - Degree to which the standard warranty of Part 5 is proposed to be met or exceeded.

G. System Support - Demonstrated ability to meet or exceed reliability and maintainability requirements; suitability of test equipment; quality of manuals; and effectiveness of training programs.

H. Other Financial Impacts - This factor will consider the following financial impacts: maintenance costs resulting from parts reliability, parts standardization, warranties, timeframe for Contract performance and final delivery, and the extent to which the Procuring Agency can analyze cost and pricing data.

I. Qualifications - Degree to which Offeror exceeds the required qualifications of Section 1.1.4.3.1 above.

a) Human and Physical Resources.

b) Financial Strength and Resources.

c) Record of Performance on Bus Contracts.

(NOTE: The necessary input data should correspond to proposal requirements listed in Sections 1.1.3.2.2 "Technical Proposal" or 1.1.3.2.3 "Management Plan.")

***IV. Proposed Price**. The price proposals will be evaluated and appropriate, uniform treatment of unit costs, ancillary products and services, escalators, exchange rates, deviations and options will reduce each proposal to a single price evaluation figure. (NOTE: FTA competitive procurement requirements specify that to preserve the right to exercise options, they should be included in the evaluation).*

***1.1.4.3.3 Application of Evaluation Criteria.** (Narrative / Trade-Off Illustrative Method)*

(NOTE: This section may or may not be included, dependent upon the specific criteria that are included in Section 1.1.4.3.2.)

1. Proposals will be evaluated against the pass/fail Criteria Nos. 1 and 2. Any proposal which meets all pass/fail criteria, or fails one or more of these criteria but is deemed susceptible of being made to meet such failed criteria, will be considered within the competitive range. Otherwise, a proposal may not be considered to be within the competitive range.

Sub-criteria of Criterion No. 3 will be evaluated based on the reviewer's determination of the degree of compliance with Contract requirements, potential risks and benefits, and strengths and weaknesses. One of the following adjectival ratings should be used for each subcriterion:

Excellent	*Significantly exceeds in all respects the minimum requirements; high probability of success; no significant weaknesses.*
Very Good	*Substantial response; meets in all aspects and in some cases exceeds, the critical requirements; no significant weaknesses.*
Good	*Generally meets minimum requirements; good probability of success; weaknesses can be readily corrected.*
Marginal	*Lack of essential information; low probability for success; significant weaknesses, but correctable.*
Unsatisfactory	*Fails to meet minimum requirements; needs major revision to make it acceptable.*

Evaluators are to substantiate each rating with a brief narrative explaining their evaluation. The narrative will be specific in nature, addressing the strengths/weaknesses of the proposal in each area and provide a sound rationale for the conclusion reached. This becomes the basis for the evaluator's overall rating and comparison to other proposals. To arrive at the overall technical rating, the evaluator will develop a summary statement.

Evaluators may utilize an informal weighting scheme as a tool (not to be considered the formal evaluation) to assist them in formulating their evaluation. This may be helpful to individual evaluators in terms of remaining focused on the relationship between criteria and facilitate the evaluation process.

2. The individual evaluators will rank each of the proposals reviewed in descending order and provide a supporting narrative, addressing the specific elements of the proposal that are the determining factors (consistent with step 1 findings) for their position within the ranking.

3. Committee members will review and discuss the individual findings and develop a consensus ranking consistent with the evaluation criteria. The committee ranking must also be supported by a narrative that provides the rationale (specific strengths and weaknesses) for their determination.

4. The rank ordered list of proposals will be arrayed in descending order together with the price evaluation figure for each proposal. As the list is reviewed in descending order, any increase in price as technical merit decreases will cause the elimination of the proposal from the list. If more than one proposal remains, the committee will review the trade-offs between descending technical merit and descending price. The committee will then make a decision regarding which of the proposals is the most advantageous to the Procuring Agency, price and other factors considered.

APPENDIX B.2

SPECIFICATION/SCOPE OF SERVICE GUIDE

Prepared by Office of Procurement

The Metropolitan Transit Authority

of Harris County, Texas

January 1987

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FOREWORD

This document has been prepared to assist Metropolitan Transit Authority (METRO) personnel in the preparation of Equipment Specifications, Data Sheets, Scope of Services and Statements of Work.

INTRODUCTION

This document provides guidelines and recommendations for developing the format and content of a specification, data sheet, Scope of Service or Statement of Work for the following, but not limited to:

- Capital equipment procurement
- Bus modifications
- Maintenance equipment
- Off-the-shelf equipment or hardware
- Services - professional
- Services - personal and non-personal
- Supplies

Statements shown in light type provide instruction and clarification for a specification or Scope of Service paragraph, and statements in bold type are suggested wordings for the content of a paragraph.

Each specification, data sheet or statement of work statement adopted from this document should be carefully reviewed and modified as needed prior to being incorporated into a specification. The scope of service statements are typical examples for services required and should only be used as a guide.

The use of the word Contractor is synonymous with the words vendor, supplier, seller or bidder.

Commercial-type requirements such as warranty provisions, cost information, delivery information and method of payments should not appear in a technical specification or scope of service since they will be specified in other documents provided by the Office of Procurement.

OBJECTIVE OF A SPECIFICATION OR A SCOPE OF SERVICE

The objective of a specification, data sheet or scope of service is to communicate to Contractors and Procurement personnel what is required and also provide the basis for quality assurance to determine if the Contractor has met the requirements of the contract or purchase order. The specification or scope of service must be written in clear, unambiguous and precise language to communicate effectively what is required. Remember, the Contractor has total responsibility for the work after receipt of order.

WHICH TYPE OF SPECIFICATION OR SCOPE OF SERVICE TO USE

The following is an example of which type of specification or scope of service may be used, but not necessarily limited to:

Six-Section Equipment Specification
- Capital equipment procurement
- Bus modifications
- Maintenance equipment

Scope of Service
- Services - professional
- Services - personal and non-personal

Brand Name or Equal Equipment Specification/Data Sheet
- Capital equipment procurement
- Maintenance equipment
- Off-the-shelf equipment or hardware (complex)

Statement of Work/Purchase Description
- Off-the-shelf equipment or hardware (routine)
- Services - personal and non-personal
- Supplies

DO'S AND DON'TS OF A SPECIFICATION OR SCOPE OF SERVICE

The following is a list of do's and don'ts that should be reviewed prior to starting the first draft of a Specification or Scope of Service:

DO'S

- Develop the correct mental attitude. Be positive.
- Learn the content and format of a six-section specification. (Once you have done this and adopted the proper specification writing attitude, you will be able to write any type or format of Specification or Scope of Services. This will hold true whether you require equipment, supplies, or services.)
- Write the Specification or Scope of Service to be precise and perfectly clear.
- Write the Specification or Scope of Service in short, concise sentences in the simplest form possible.
- Determine and separate your essential requirements from desirables or "nice to have" needs.
- Whenever possible, write specifications that allow open competition.
- Specify requirements within the state-of-the-art of the industry.
- Obtain technical information from sources such as:

  - publications
  - industry releases
  - manufacturers
  - contractors
  - fellow workers

- In the process of obtaining technical information, do not commit METRO in any way.
- Include Quality Assurance Provisions that mesh with the stated requirements.
- Clearly communicate your technical knowledge in the Specification.
- Use decimals in preference of fractions.
- After you have written what you feel is a perfectly clear and brief statement of requirement, ask yourself, "Is there any way that anyone could misconstrue this statement?"

DON'TS

- "Re-invent the wheel" when an existing Specification or Scope of Service is available.
- Make ambiguous statements, i.e.; the highest quality, in accordance with industry practices, acceptance per industry practices.
- Specify unrealistic or unnecessarily restrictive requirements.
- Provide information to one bidder that will give an advantage over another bidder.
- Allow manufacturer's or manufacturer's representatives to write the Specification or Scope of Service.
- Use unfamiliar words, colloquialisms and words having more than one meaning.
- Use open-ended requirements such as:

  - As directed
  - Subject to approval
  - Satisfactory to

- Use "Bidder to do at no additional cost" (Leave any addresses to money out of the Specification or Scope of Service.)
- Use the term "and/or" in the Specification or Scope of Service.
- Dictate to the Contractor how to accomplish the requirements.

PROJECT MANAGER/USER RESPONSIBILITY TO PROCUREMENT

Upon preparing an Invitation for Bid (IFB), Procurement with assistance from the Project Manager or user has total responsibility for preparing the following sections:

- Bidding Requirements
- Forms for Bidding
- Proposed Contract

The Project Manager or user should input to Procurement any information that does not apply to the Specification or Scope of Service via memorandum and the information will be included in the appropriate document. Examples of this type of information are as follows:

- Requirements that must be provided to METRO with bids or prior to award
- Requirements that must be completed prior to Notice to Proceed of the Contract
- Cost Information
- Delivery Information
- Warranty Provisions
- Methods of Payments
- Liquidated Damages
- Instructions on Reworking Rejected Items
- Availability of Equipment for Retrofit, Modifications, Service or Repair
- Inspection/Acceptance Provisions

This shall also be true for Request for Proposals (RFP) or Purchase Orders.

The Specification or Scope of Service of the IFB, is the total responsibility of the Project Manager or user with the assistance of Contracts. The Specification or Scope of Service should be provided to Procurement double-spaced and in the final format. To be consistent with the typing of the entire contract, the specification or scope of service should be typed with a 10 pitch courier print wheel and margins of 8 and 77.

The ultimate goal is for the Project Manager or user to furnish to Contracts a specification or scope of service that can be utilized in a bid package without discussions with the Project Manager or user.

PART I SIX-SECTION EQUIPMENT SPECIFICATION

The six-section specification, sometimes called a detail specification, is used where there is a need to purchase the same product or equipment repeatedly.

The section numbers and headings shown below should be used on all specifications when the headings are applicable.

Number	Section
1.0	Scope
2.0	Reference Documents
3.0	Requirements
4.0	Contractor Quality Assurance Program
5.0	Preparation for Shipment
6.0	Contract Data Requirements List

The recommended content for each section is shown below.

1.0 Scope

Provide a brief description of the product or item of equipment to be purchased and a general description of the contents of the specification. Also, state where the equipment is to be used and if installation is required.

> This specification shall govern the materials, fabrication, assembly, testing, and other requirements for (Example: centrifugal pumps) for use (Example: in METRO's Kashmere Maintenance Facility).

2.0 Reference Documents

List governmental regulations, major codes, industry standards, and other similar documents which are utilized in the specification to define the design, materials, fabrication, testing, installation, services, and other similar requirements. Every reference document listed here should be addressed at the appropriate point in the body of the specification.

The introductory wording given below for this paragraph establishes the date of inquiry issue as the control data for applicable editions of standards, codes and addenda referenced within a specification. The responsible individual should verify that a control data is established for reference standards at the time of use.

> In addition to the requirements designated elsewhere in this specification, the design, materials, fabrication, and testing of the equipment, materials, and services shall be, to the extent specified

herein, in accordance with the latest issues and addenda, in effect at the date of inquiry issue, of the following industry codes and standards.

Reference standards employed by this outline are listed below to provide an example of formatting for industry references.

Document Identification	**Title**
American Institute of Steel Construction (AISC)	
AISC S326	Specification for the Design, Fabrication, and Erection of Structural Steel for Buildings.
American National Standards Institute (ANSI)	
ANSI A58.1	Minimum Design Loads for Building and Other Structures
American Society for Testing and Materials (ASTM)	
ASTM A36	Specification for Structural Steel
American Welding Society (AWS)	
AWS D1.1	Structural Welding Code, Steel
National Fire Protection Association (NFPA)	
NFPA 70	National Electrical Code (NEC)
Occupational Safety and Health Standards of the U.S. Department of Labor, Part 1910 (OSHA)	
Section 1910.95	Occupational Noise Exposure
Subpart D	Walking-Working Surfaces

3.0 Requirements

3.1 General

Include statements of those requirements that are common to all components of the equipment of system being specified.

3.2 Performance

Provide a definition of the performance requirements for rating the equipment.

3.3 System Description

Provide a brief but inclusive system description for a specification written for a mechanical system or equipment package. Single equipment items usually will not require a system description.

3.4 Mechanical Design

3.4.1 Component

Describe requirements for the individual components that make up the piece of equipment under this series of headings. This would include such things as a listing of design requirements for the components that make up an equipment item (e.g., shaft, seals, coupling, impeller).

3.5 Electrical

A reference should be provided here for invoking the National Electrical Code and for identifying the required hazardous area classification for electrical components that are to be provided. This reference should be a statement such as:

3.5.1 Electrical equipment furnished under this specification shall be in compliance with NFPA Bulletin No. 70, "National Electrical Code," (NEC) and shall comply with NEC requirements for the hazardous and non-hazardous area classifications specified on the data sheets.

3.6 Structural

Specify the structural requirements for the item of equipment under this heading. This section should include a reference to appropriate AISC and ASTM standards and requirements of a general nature. Specific requirements such as design criteria or a basis for handling wind loads, transportation and other specific details should be incorporated by line entries on the equipment data sheets.

The following wording is suggested for general structural requirements in an equipment specification:

3.6.1 All structural steel shall be new and damage-free. Each structural steel member for skids, bases or other assembly shall be a hot-rolled structural shape, plate or bar meeting the requirements of ASTM a 36.

3.6.2 Anchor bolt details and design shall be provided by the contractor. Anchor bolts will be furnished by METRO.

3.6.3 Ladders and platforms with handrails shall be furnished for access to all service and inspection openings for equipment requiring inspection and servicing.

3.6.4 Stair treads, platforms, walking and work surfaces, and access ways shall be provided with steel grating walking surfaces.

3.7 Exceptions

Specifications that are written around a code or industry standard such as ASME or API should list exceptions or clarifications to those standards. The following is an example of how this would be done:

3.7.1 Requirements

Each centrifugal pump shall be in accordance with API 610 except for the additions, modifications, deletions, or further clarifications stated below:

API 610 Para. No.	Buyer Exc. No.	Description
		SECTION 2 - BASIC DESIGN
		General
2.1.21	1	Add the following new paragraph: Single-stage process pumps are to have a double volute casing when the pump has a 3-inch (76 mm) discharge or larger and a 10.5-inch (267 mm) maximum allowable impeller diameter, or larger.
2.1.22	2	Add the following new paragraph: Mechanical equipment and components of centrifugal pumps quoted in accordance with this specification must be proven in service for at least one year in not less than two similar applications.

4.0 Contractor Quality Assurance Program

4.1 Inspection And Testing

For specifications written for a product, material, service, equipment or bus modifications/retrofit with a standard level of quality the following wording is suggested:

> The responsibility for Quality Assurance shall be with the Contractor subject to verification by METRO.

4.2 Contractor Surveillance

The purpose of this section is to initiate METRO surveillance of Contractor manufacturing operations and document certification requirements. Paragraphs included in this section should define where to find the specific requirements. The following wording is suggested:

4.2.1 Product surveillance and document certification shall be as specified in the procurement documents, e.g., specification, data sheets, contractor data requirements list.

5.0 Preparation for Shipment

5.1 Cleaning (suggested wording)

All dirt, grime, grease, and shop residue shall be removed from surfaces of furnished equipment prior to packaging and shipping from the Contractor's facility.

5.2 Lubrication (suggested wording)

All bearings and other similar parts of furnished equipment shall be suitably lubricated prior to shipment in accordance with the Contractor's recommended lubrication instructions.

5.3 Painting (suggested wording)

The items provided under this specification shall be painted in accordance with the painting requirements specified on the data sheets.

5.4 Preservation and Packaging

The following wording may be used in specifications for items where the Contractor's standard preservation and packaging methods are considered to be acceptable and preservation and packaging requirements are not defined by a national standard.

5.4.1 Machined and interior surfaces of furnished equipment shall be coated with a preservative material capable of preventing corrosion damage for a minimum of 6 months in covered storage.

5.4.2 Contractor's standard preservation and packaging methods will be acceptable if such comply with applicable requirements of governing freight classifications and provide adequate protection from all anticipated shipping exposures.

5.5 Equipment Identification (Suggested Wording)

Equipment identification requirements are specified on the attached data sheets.

6.0 Contract Data Requirements (suggested wording)

6.1 Contract data requirements shall be as specified on the attached Contract Data Requirements List (CDRL).

DATA SHEET FOR SIX-SECTIONS SPECIFICATIONS		
The data sheet is used to describe specific requirements of a product or equipment item. The originator shall complete the description and requirements column of the data sheet.		
DATA SHEET		
		Identification No._____
Description: _____		
Quantity:_____	IFB No.: _____	
Location: _____		
UTILITY	AVAILABLE	CONTRACTOR'S REQUIREMENTS
Volts	120/460	_____
Phase	1/3	_____
System	60 Hz	_____
Air	90 psi	_____

INSTRUCTION TO CONTRACTOR

This data sheet will also be used as a part of the technical bid tabulation. Contractor shall complete the right hand column of this data sheet to identify the equipment that is to be furnished. Contractor shall print the Contractor's company name and proposal number on the top line of each such right hand column. The following legend is used to define the Requirement Class (Reqmt Cl):

R - Mandatory Requirement
A - METRO Engineering Preference
B - As Specified or Equal
* - Seller to Specify

All data sheet items noted by a bullet (o) in the right hand margin shall be completed with the Contractor's bid.
Contractor shall comply with all R (mandatory requirement) class requirements to be considered technically acceptable.

DESCRIPTION	REQUIREMENTS	REQMT Cl	REMARKS

CONTRACT DATA REQUIREMENTS LIST
FOR
SIX-SECTION SPECIFICATION OR EQUIPMENT SPECIFICATION/DATA SHEET

The Contract Data Requirements List (CDRL) is used by METRO to convey to the Contractor the required contract data documents, type of document and the time span that each type of document must be submitted to METRO. The following list is an example of the types of required Contractor data. Each individual specification should be reviewed for the specific required types of Contractor data.

Description: _____
_____

Location: _____

IFB/RFP No.: _____
_____

Contract/P.O. No.:_____

Contractor: _____

The Contractor's bid shall state his intended compliance with this listing, as regards to the type of data required and schedule for data submittal, as well as the Quantity and Data Form (reproducible, prints, etc.) indicated in the IFB and Contract. The Contractor shall confirm responsibility for similar compliance by his subcontractors as a part of the Contractor's bid. Deviation(s) from the Data Submittal Schedule shall be shown in the comments column.

All data submitted shall be identified as a minimum with identification number, description and Contract number.

When an "X" has been indicated in the "B" (with bid) column on the following list, _____ copies of the required data shall accompany the bid.

After notice of award, the Contractor shall furnish quantities of reproducibles and copies of all data to be submitted as follows:

- For Approval _____ reproducibles, _____ copies
- Certified _____ reproducibles, _____ copies
- Record _____ reproducibles, _____ copies

The above quantities are to be submitted to the Project Manager with a copy of the transmittal to Contracts.
Drawing prints may be folded, but reproducibles shall be rolled. Where the Contractor's originals are multicolored or halftone "slick paper" brochures, bulletins, instruction books, and other similar preprinted documents, the Contractor shall furnish originals for the quantity of copies required.

After notice of award, unless otherwise noted in the comments column, the following data submittal schedule shall apply:

FOR APPROVAL DATA DUE ____ WEEKS AFTER CONTRACT NOTICE OF AWARD,

CERTIFIED CORRECT DATA DUE ____ WEEKS AFTER METRO'S APPROVAL,

RECORD DATA DUE ____ WEEKS AFTER CONTRACT NOTICE OF AWARD.

ABBREVIATIONS: B - With Bid, A - Approval, C - Certified, R - Record (information only)

	DATA REQUIRED				
DATA DESCRIPTION/DEFINITION	**B**	**A**	**C**	**R**	**COMMENTS**
OUTLINE DRAWINGS Plan/elevation drawings with overall dimensions, connection dimensions, and required clearances for assembly, operation, and maintenance access.	X	X	X	__	
EQUIPMENT ARRANGEMENT DRAWINGS Relative dimensioned location of Contractor supplied components.	X	X	X	__	
ASSEMBLY DRAWINGS Relative location and dimensions of components and subassemblies required for installation.	X	X	__	__	
ONE-LINE ELECTRICAL DIAGRAM One-line representation of an electrical power and/or control circuit.	__	X	X	__	
FABRICATION OR PRODUCTION SCHEDULE Calendar-dated schedule for manufacture of Contractor supplied equipment/ components, including schedule or inquiry Purchase Order, and delivery of subcontractor items with subcontractor names.	__	__	__	X	
EQUIPMENT WEIGHTS Empty, operating and shipping weight.	X	__	__	X	
COMPLETED METRO'S DATA SHEETS	X	__	__	__	
CATALOG DATA	X	__	__	__	
LIST OF EXCEPTIONS TO SPECIFICATION	X	__	__	__	
OPERATING INSTRUCTIONS	__	__	__	X	
MAINTENANCE AND LUBRICATION RECOMMENDATIONS	__	__	__	X	

	DATA REQUIRED				
DATA DESCRIPTION/DEFINITION	**B**	**A**	**C**	**R**	**COMMENTS**
Recommend maintenance procedures and intervals, with lubricant descriptions, grades, and alternate supplier designations.					
MASTER PARTS LIST List parts, part numbers, serial numbers, and interchangeability information.	__	__	__	X	
SPECIAL MAINTENANCE TOOL REQUIREMENTS	X	__	__	__	
SHIPPING, HANDLING AND STORAGE PROCEDURES	__	__	__	X	
INSTALLATION/ERECTION PROCEDURE	__	__	__	X	
DBE/WBE ASSURANCE STATEMENT	X	__	__	__	
DBE/WBE UNAVAILABILITY CERTIFICATE	X	__	__	__	
CONTRACTOR AND FIRST TIER SUBCONTRACTOR PARTICIPATION	X	__	__	X	
DBE/WBE UTILIZATION REPORT	__	__	__	X	

CHECKLIST FOR SIX-SECTION SPECIFICATION (PART I)

1. Review Section 1 for:
   Accurate statement of scope

2. Review the references in Section 2 for:
   a. Necessity

   b. Availability

3. Review the requirements of Section 3 to determine that:
   a. Referenced documents are necessary and applicable

   b. Requirements are predominantly design or performance and that the same requirement is not covered both ways

   c. No requirement is

      Unrealistic
      Indefinite
      Restrictive

   d. The requirements meet the needs of METRO

   e. The requirements are within industry's capability

   f. Each requirement is capable of being inspected or otherwise verified

4. Review Section 4 to determine that:
   The Contractor's standard quality assurance program will be suitable to METRO

5. Review Section 5 to insure that:
   Preservation, packaging, and packing are realistic

6. Review Section 6 to insure that:
   a. Delivery of adequate data, i.e., drawings, calculations, catalogs, reports, etc., is identified on the CDRL to accomplish a project.

   b. Requested data will meet the needs of an installation contractor.

PART II SCOPE OF SERVICE

The Scope of Service is the contractual document for expressing exactly what services or product you require and for evaluating the service or product of the contractor.

The suggested section headings shown below should be used in all scope of services when the heading is applicable. Appropriate headings should be added as required.

Section Headings

Background
Primary Work Task
Other Work Tasks/Services
Ordering Procedure
Contractor Quality Assurance
Technical Reports

BACKGROUND

Provide a description of the services/product to be contracted for and a general description of the contents of the scope of service. Provide any special background information available.

PRIMARY WORK TASKS

Include statements under this heading to thoroughly describe the primary work task expected under the scope of service.

OTHER WORK TASKS/SERVICES

Include statements under this heading to describe additional work tasks or services that may be required under the scope of service.

CONTRACTOR QUALITY ASSURANCE

Include statements to describe any special quality reliability or quality assurance requirements.

TECHNICAL REPORTS

Include statements to include any and all technical reports that will be required during the term of the contract.

SCHEDULE OF ITEMS AND PRICING

The following is a suggested format to list items and request unit pricing for pay items referenced in the Scope of Services. The Schedule of Items and Price should be an attachment to the Scope of Services.

SCHEDULE OF ITEMS AND PRICES

The Contractor shall complete the following price schedule based on the annual estimated quantities of the services required:

Item	Description	Estimated Quantity	Unit Price

PART III BRAND NAME OR EQUAL EQUIPMENT SPECIFICATION/DATA SHEET

The brand name or equal equipment specification/data sheet format is used for the procurement of items such as machine tools, fabrication equipment, cleaning equipment, mobile equipment, and standard off-the-shelf equipment.

The following is an example of a specification/data sheet for a 19" x 78" engine lathe that can be used as a guide for the procurement of any of the above listed items:

SPECIFICATION/DATA SHEET
ENGINE LATHE
19" X 78"

GENERAL DESCRIPTION

This Data Sheet covers the requirements for a rigid base, floor mounted, metal cutting, electric motor driven engine lathe suitable for general purpose metal turning, facing, boring, drilling and threading operations in a General Purpose Maintenance Shop for a Transit Authority. The machine shall consist of a floor mounted base and bed with ways, head stock, tail stock, carriage and other specified components.

The lathe shall be a Monarch Dean Smith & Grace Limited Model #1910 or equivalent.

DESIGN FEATURES

GROUNDING

The point of connections for METRO's power supply is to include a grounding point for the electrical grounding of the machine frame. Contractor to provide a grounding stud.

NAMEPLATE

A corrosion resistant metal nameplate shall be attached to the Machine with removable corrosion resistant screws. The nameplate shall contain at least the following information:

Manufacturer's name
Model number of Machine
Serial number of Machine
METRO's contract number
METRO's equipment tag number
Date of manufacture

LUBRICATION

A means of positive lubrication shall be provided for all components of the Machine that require lubrication.

ENGLISH/METRIC

When applicable, machines with thread cutting capabilities must have the capability in both English and Metric.

SIZES AND CAPACITIES		
The Engine Lathe must comply with the following sizes and capacities. The Contractor must furnish brochures, information requested and fill in the blank spaces.		
SIZES/CAPACITIES	**REQUIREMENT**	**CONTRACTOR'S SPECIFICATION**
The following are suggested major headings with an example of each from a brochure of a Monarch Dean Smith & Grace Limited Model #1910:		
WORKING CAPACITY		
Swing Over Bed (Min)	19.5"	_____
SPEEDS & FEEDS		
Head stock		
Forward & Reverse Speeds (Min)	16	_____
Universal Gearbox		
Longitudinal Feeds (Min)	30	_____
SIZES		
Head stock		
Camlock Spindle Nose	D1-8"	_____
SCREW CUTTING		
Thread Per Inch	45 from 2 to 56 tpi	no exception
TAIL STOCK		
Spindle Diameter (Min)	3.5"	_____
SADDLE AND APRON		
Length of Saddle Guide	Mfr. Std.	_____

OPTIONS AND ACCESSORIES		
The Contractor must furnish manufacturer and descriptive literature of the following listed options and accessories.		
OPTION/ACCESSORY	**REQUIREMENT**	**CONTRACTOR'S SPECIFICATION**
Gap Bed w/Removable Piece	1 ea.	_____
Traveling Steady .625" to 4.5"	1 ea.	_____
Stationary Steady 1" - 7"	1 ea.	_____
4 - Jaw Chuck 18"	1 ea.	_____

TOOLING		
The Contractor must furnish manufacturer and descriptive literature of the following listed tooling.		
TOOLING	**REQUIREMENT**	**CONTRACTOR'S SPECIFICATION**
Jacobs Rubberflex Collet Chucks (Specify Capacity)	1 set	_____
Jacobs Rubberflex Collets for use with above Collet Chucks	1 set	_____
Revolving Live Center for Tail stock	1 ea.	_____
Face Plate - 16"	1 ea.	_____

UTILITIES		
The following utilities are available at the maintenance facility. The Contractor must furnish the required utility consumption.		
UTILITY	**AVAILABLE**	**CONTRACTOR'S REQUIREMENTS**
Volts	120/460	_____
Phase	1/3	_____
System	60 Hz	_____
AMPS	N/A	_____

CONTRACTOR INFORMATION REQUIRED (MUST BE FILLED IN BY BIDDER)	
MACHINE SIZE AND WEIGHT	
Weight with Standard Equipment including Motors	_____ lbs.
Shipping Weight of Completed Machine	_____ lbs.
Overall Dimensions of Machine (L x W x H)	___" x ___" x___"
MANUFACTURER OF MACHINE	_____
COUNTRY OF ORIGIN OF MACHINE	_____
COUNTRY OF ORIGIN OF OPTIONS AND ACCESSORIES	_____
COUNTRY OF ORIGIN OF TOOLING	_____
TECHNICAL DATA ON MACHINE ATTACHED	Yes ____ No ____
EQUIPMENT I.D. NUMBER	_____

PART IV STATEMENT OF WORK/PURCHASE DESCRIPTION

The Statement of Work (SOW) is a special category of a specification that is used when contracting for services and equipment. The SOW outlines the nature of the work, the level of effort required and the anticipated results of the work, rather than detailed technical specifications of a particular item. For services and equipment that can be adequately described with less data than that contained in the Six-Section Equipment Specification, Scope of Services or Brand Name or Equal Equipment Specification/Data Sheet Format, you can write a short SOW. This approach is usually reserved for Off-the-Shelf hardware or commonly available services.

When writing a SOW, you must utilize you special knowledge of the subject in deciding the content of the SOW. The key elements are the same as those for any Specification or Scope of Service, with the added requirement that you must state when and where the work is to be performed. The SOW must deal with the following basic questions:

What needs to be done?
Where should it be done?
When should it be done?
What should the final output consist of?

When the SOW has answered the above questions, it is essentially complete.

APPENDIX B.3

LIQUIDATED DAMAGES CHECK LIST BART PROJECT NO. _____ CONTRACT TITLE: _____ ESTIMATED CONTRACT VALUE: General _____Mechanical _____ Electrical _____Other _____			
Item	**Project Manager's Determination**		**If Applicable, Dollar Amount**
	Applicable	**Non-Applicable**	
1. Costs reflecting the relative importance of completion of this contract to the completion of other directly associated activities, e.g., if a $10 million dollar substation is being procured and requires construction of a building, the cost to BART of delays upon the completion of the building on the substation procurement should be considered.			
2. Rental costs for each day of facilities and equipment necessitated by the delays in contract completion.			
3. Cost(s) for additional maintenance required on equipment or structures being replaced for each day of delay in completion of the project.			
4. Additional operating costs to BART for each day of delay in completion, including but not limited to cashier, operator and supervisory costs resulting from contract completion delays. Costs of route detours or substitution of one transit mode for another shall be considered.			
5. Loss of revenue to BART's operations for each day due to delay in contract completion.			
6. Any other damages for each day of delay in completion which BART may anticipate, e.g., is there a high potential for delay of one prime contract with resulting costs to BART for the other prime contracts.			
7. Estimated costs of inspection.			
8. Actual damages (Project Manager to indicate whether actual types of damages should be excluded from the calculations).			

SIGNED _____
PROJECT MANAGER

APPENDIX B.5

BART PURCHASE CARD SYSTEM

1.0 PURPOSE AND CONTENT

The BART purchase card system provides a means for using credit cards for small purchases.

The regulations governing the use of the BART purchase cards are set forth in the District's Procurement Manual, Chapter V, Section [.] Micropurchase procedures and other related sections.

The system contains specific procedures for use by procurement personnel as well as a wide range of individuals who participate in the purchase card program. These procedures integrate diverse regulatory and operational information from numerous sources in a user-oriented document.

The Supervisor, Procurement Administration has been designated by the Department Manager, Procurement as the focal point for applications, issuance and destruction of cards, establishment of reports, and administrative training for this Program.

2.0 INTRODUCTION

The State of California ("State") has awarded a contract for statewide commercial credit card services to Rocky Mountain BankCard System, Inc. ("contractor"). The contract was intended to provide, at the request of state ordering agencies, state-wide commercial purchase cards and associated services to state employees for the purpose of paying for purchases made for official state purposes.

In 1995, the State made these services available to any of its political subdivisions of which BART as a public utility district qualifies for participation in the program. On July 1, 1996, the District commenced its program and issued these procedures.

These procedures are designed to supplement the District's Procurement Manual and any "Instructions for the Use of the District Purchase Card" distributed to the cardholder and "Approving Official Instructions for the Use of the District Purchase Card" distributed to the approving official at the time the card is issued. In the event these procedures conflict with any instructions provided by the contractor, these procedures take precedent.

ALL PURCHASES THAT WILL BE PAID FOR USING THE CARD SHALL COMPLY WITH BART'S PROCUREMENT MANUAL AND THESE PROCEDURES UNLESS OTHERWISE APPROVED BY BART'S PROCUREMENT DEPARTMENT.

3.0 DEFINITIONS

"Approving Official" means the person who reviews and approves the cardholder's monthly statement of purchases.

"Cardholder" means the District employee to whom a card is issued. The card bears this cardholder's name and may only be used by this individual to pay for authorized District purchases.

"Contractor" means the organization that will maintain all accounts as required by the State contract.

"Oral procedure" means a procedure where an order is placed or a purchase is made through an oral agreement which is made in person or by telephone by providing the card for imprint by the Merchant or the card number to the Merchant. No written purchase order or contract is issued by the District. The supplies or services are provided by the Merchant and payment is made using the District Purchase card.

"Statement of Account" is a monthly listing of all payments authorized for purchase and credits made by the cardholder and billed by the merchant.

4.0 RESPONSIBILITIES

4.1 As approved by the Procurement Department, the contractor will issue cards to designated cardholders and send out monthly statements to cardholders, approving officials, and the District Controller's office. The contractor will pay merchants in a timely manner and will receive reimbursement from BART.

4.2 The Supervisor, Procurement Administration will serve as the liaison between the District and the contractor and subject to the direction of the Department Manager, Procurement, shall oversee the program and establish District guidelines. This individual shall establish authorization codes for controlling purchases as well as approve changes to dollar limitations or authorized merchant codes.

4.3 Each cardholder is to reconcile his/her monthly statement and forward the reconciled statement to his/her approving official consistent with instruction issued by Procurement Administration.

4.4 The approving official will review the cardholder's monthly statement and serve as liaison with Procurement Administration and the Controller's Office. Each approving official shall establish, after coordination with Procurement Administration, a budgetary limit for each cardholder's monthly purchases.

THE SPONSORING DEPARTMENT'S CONTINUING PARTICIPATION IN THIS PROGRAM IS PREDICATED UPON MAINTAINING EXPENDITURES WITHIN OPERATING BUDGET LIMITS.

FAILURE TO DO SO WILL CAUSE THIS MICROPURCHASE AUTHORITY TO BE REVOKED BY THE PROCUREMENT DEPARTMENT.

The approving official will certify the cardholder's monthly statements and ensure that payments are for purchases which are authorized and made in accordance with the District's Procurement Manual and these procedures.

The approving official will also assist the cardholder in resolving disputed payments.

Either the approving official or the Department Manager, Procurement has authority to direct Procurement Administration to instruct the contractor to cancel a card at any time.

4.4.1 This approving authority nominally rests with the Sponsoring or Using Department Manager and may not be further redelegated other than for temporary absences without the concurrence of the Department Manager, Procurement.

Generally, this authority should be redelegated where the Division Manager function oversees 50 employees or more. Any such redelegation on a standing basis such as mentioned above, must be reviewed at least semi-annually by the supervisor as part of employees performance evaluation. Any pertinent information coming out of these reviews should be separately summarized and transmitted to the Procurement Department for their review.

4.5 Procurement Administration shall establish a budgetary limit for each office that does not exceed the sum of the approving official's cardholders' monthly purchase limits. This should be reviewed quarterly and adjusted if necessary to reflect the cardholders' actual spending patterns and minimize the risk to the District of a spending overrun in the fourth quarter of the then current fiscal year.

Procurement Administration shall also coordinate, process and monitor resolution of all disputed purchases, credits or billing errors, unless the Department Manager, Procurement designates another individual or office to perform this function.

4.6 District Controller's Office shall answer the contractor's questions about payment of monthly statements as well as make payments under this program.

5.0 USE OF THE DISTRICT PURCHASE CARD

5.1 The Purchase card may be used to pay for small purchases made in accordance with Chapter V of the District's Procurement Manual and these procedures. It may also be used to pay for orders placed against established requirements contracts or with established sources of supply, when authorized by the contract or regulation requiring use of the source. However, District inventories should be checked for availability prior to making a purchase using the card.

5.2 The Purchase card can be used to pay for supplies or services acquired using oral solicitation procedures. It may also be used to pay for supplies or services that are acquired through a purchase order or an individual order under a requirements contract where the contract specifically allows such payment method.

5.3 Without exception, the Purchase card may only be used to pay for authorized District purchases.

5.4 Under no circumstances, will the Purchase card be used for cash advances.

6.0 SETTING UP THE PURCHASE CARD ACCOUNT

The contractor will provide Procurement Administration with all the necessary application forms (cardholder, approving official, disputes, destruction notice etc.).

The Sponsoring Department will request that Procurement issue purchase card(s) to named District employee(s) and assure funding of such purchases by using the Bulk funding procedure in BART's Procurement Manual, Chapter V.

Subject to the procurement authority delegation procedures in the Procurement Manual, Chapter I, Procurement Administration will distribute the forms to selected cardholders and approving officials for completion.

The Cardholder(s) and Approving Official will complete the forms indicating they understand the terms of its use and will agree to abide by these procedures. The cards are issued for a one year period and will be subject to review by the Procurement Department each year prior to renewal. (Other organizational functions at BART, such as Internal Audit or Civil Rights, may review usage of the purchase card by the Sponsoring Department.)

Upon completion, Procurement Administration shall process and forward the forms to the contractor and then issue the cards to the sponsoring department when received.

The contractor is capable of providing various reports to meet management and administrative needs. During the account setup process, Procurement Administration will discuss the various reports available with Sponsoring Department management personnel.

7.0 SIGNATURE CARDS

When the account information is submitted to Procurement Administration, a signature card must be completed by each approving official that states the approving official may approve the accuracy of the Statement of Account for payment. The signature card will be forwarded to the Controller's office by Procurement Administration after completion.

Sponsoring departments are responsible for delegating Approving Official authority as necessary to avoid statement processing delays and late payment penalties.

8.0 DOLLAR LIMITS ASSOCIATED WITH THE PURCHASE CARD

Use of the purchase card by a cardholder is subject to a single purchase limit and a monthly cardholder limit. The purpose of these dollar limits is as follows
"Single Purchase Limit" is a limitation on the procurement authority ("micropurchase authority") delegated to the cardholder by the Department Manager, Procurement consistent with the requirements of the District's Procurement Manual, Chapter I. This limit cannot be exceeded unless a revised delegation of authority is issued by the Department Manager, Procurement or his or her designee, raising the limit.

(A "single purchase" using the card may include multiple items. However, no single purchases may exceed the authorized single purchase limit established for each cardholder.)

"Monthly Cardholder Limit" is a budgetary limit assigned by the approving official and may be modified if necessary by the Procurement Department. The approving official shall coordinate with Procurement Administration when determining a monthly limit and should reflect spending history as well as budgetary trends. The total dollar value of purchases when using the card for any single month may not exceed the monthly purchase limit set by the approving official subject to concurrence by the Procurement Department.

9.0 AUTHORIZED USE OF THE CARD

9.1 The unique Purchase card VISA card that the cardholder receives, may be used only by that cardholder.

9.2 No other person is authorized to use the card and the card may only be issued to District employees. The card was specially designed showing the District logo imprinted upon it to avoid being mistaken for a personal purchase card.

9.3 When issuing this card to an employee, authorization codes will be established by Procurement Administration and will be incorporated in the card. Under normal circumstances, merchants are required to obtain authorization from the contractor for purchases over $50.00. However, many merchants now use electronic authorization methods allowing them to obtain authorization for all purchases regardless of amount.

When authorization is sought for a purchase by the merchant, the contractor authorization system will electronically check each individual cardholder's single purchase and monthly limits, the monthly office limit, and the type of merchant where the cardholder is making the purchase before authorization for the transaction will be granted.

9.4 Use of the card must meet the following conditions:

(1) The total of a single purchase to be paid for using the card may be comprised of multiple items and cannot exceed the authorized single purchase limit. Purchases will be denied if the authorized single purchase limit is exceeded. Payment for purchases may not be split in order to stay within the single purchase limit.

(2) All items purchased over the counter to be paid for using the card must be immediately available. No back ordering is allowed as well as deposits for special orders.

(3) All items purchased by a telephone order that will not be confirmed with a written order and be paid for using the card should generally be delivered by the merchant within the 30-day billing cycle. However, a longer period (up to 120 days for delivery) may be utilized by Sponsoring Departments. If the longer period is elected, procedures need to be established by the Sponsoring Department for proper reconciliation of the monthly bills, allowing for the carrying forward of items ordered but not received.

(4) All items purchased during one telephone transaction that will not be confirmed by a written order should generally be delivered in a single delivery. If a Sponsoring Department elects to allow partial deliveries, Sponsoring Department procedures must be implemented to ensure proper reconciliation of all such orders.

(5)The Purchase card may not be used to purchase personal property items over $1,000 in value unless purchased with the Controller's office concurrence prior to purchase; so the proper tagging can be done and the required accountability established.

(6) When purchasing items by phone or over the counter, the cardholder should inform the merchant that the purchase is subject to state and local tax. Contact the Controller's office for questions in this area.

(7) At the beginning of each District fiscal year and prior to the use of the purchase cards, the Sponsoring Department shall certify that funds as available using the bulk funding procedures in the District's Procurement Manual, Chapter V.

10.0 UNAUTHORIZED USE OF THE CARD

Unless otherwise approved in writing by the Department Manager, Procurement, the card must not be used for the following:

(1) Cash advances;

(2) Rental or lease of motor vehicles;

(3) Rental or lease of land or buildings;

(4) Purchase of airline, bus, train, or other travel related tickets;

(5) Purchase of meals, drinks, lodging, or other travel or subsistence costs;

(6) Purchase of gasoline or oil for District automotive vehicles;

(7) Repair of District automotive vehicles; and

(8) Telephone calls

11.0 ACQUISITION PROCEDURES FOR USE WHEN PAYING WITH THE PURCHASE CARD

11.1 When making purchases that will be paid for using the Purchase card, all the applicable acquisition regulations apply. Regardless of whether the open market purchase is made using oral procedures or using a written purchase order or contract, the cardholder must:

(1) Ensure that funds are available and certified to pay for the items being purchased. A funded Purchase Request (PR) shall support each credit card purchase. The PR may be bulk funded.

(2) Be aware of the District's commitment to DBE firms and they will be held accountable for their DBE participation during the fiscal year.

(3) Solicit competition for purchases

11.2.1 Users should be aware that it is common commercial practice for banks to charge merchants for their participation in purchase card programs by "discounting" their payment by 2 to as much as 15% of the total charge. A $100 bill to the customer and paid to the bank in a monthly statement may only represent $98 to $85 in actual revenue to the merchant from the bank. Merchants are aware of this and restrained only by competition, will adjust their pricing to reflect these costs; or they will offer their customers a cash discount.

11.2.2 It is against District policy to pay any type of a "surcharge" to a Merchant, offsetting the bank discount. Likewise, users should not agree to a Merchant's request to revise the price above what the general public pays for an item in order to make up for the bank's discount.

11.3.1 Users should also be aware that proper functioning of this program rests upon timely payments to the Contractor. Disputes should be handled through the Merchant, not the Contractor. Users must know the refund, exchange and warranty terms offered by the Merchant prior to making the purchase. Adjustment of purchases of defective materials from merchants is the responsibility of the sponsoring department and not the Procurement Department, or the Contractor.

11.3.2 It is District policy to purchase goods, materials, or equipment only from those Merchants that offer the District full refund or exchange rights at the District's discretion. Such rights shall be in writing, either transmitted to the District employee, or otherwise publicly noticed.

11.4 Oral solicitations should be used whenever possible within the local trade area. "Local trade area" is defined as the three county area that encompasses the District.

11.5 Written solicitations are recommended to be used when (I) a large number of line items are included in a single proposed acquisition, (ii) obtaining oral quotations is not considered economical or practical, (iii) special specifications are required because items or services cannot be easily explained or (iv) Merchants are located outside the local trade area

11.6 Purchases not in excess of $2,500 may be accomplished without securing competition if the cardholder (functioning as the contracting officer) considers the prices to be reasonable.

11.6.1 Generally speaking, the District's pricing objective in making micropurchases, is to obtain the same price that the general public would pay for the item if they were buying such an item in similar circumstances and quantities.

If the item is not a broadly distributed commercial product, then the District's pricing objective is to achieve the same terms as that of the Merchant's most favored customer if possible.

11.6.2 These purchases are to be distributed equitably among qualified Merchants by means of Merchant rotation. If practical, other than the previous Merchant should be solicited when placing repeat orders.

11.7 A reasonable number of sources must be solicited (at least three) for purchases over $2,500. If practical, two of these sources shall not have been previously solicited. If merchants furnish standing price quotations or catalog prices on a recurring basis, verifying the quotations or prices for individual purchases is not necessary, but the prices should be periodically confirmed as current. When determining the number of sources to solicit, consider (I) the nature of the item or service to be purchased and whether it is highly competitive, (ii) information from recent purchases of the same or similar item or service, (iii) the urgency of the purchase, (iv) the dollar value of the purchase, and (v) past experience concerning merchants' prices.

11.8 Cardholders are not required to document their purchases under $2,500 with respect to competition or reasonableness of price unless (1) The District employee has reasonable basis to suspect or has other information to indicate the price may not be reasonable or (2) it is the purchase of an item for which no comparable pricing information is available.

The monthly invoice approval package transmitted to the approving official must contain an explanation of how price reasonableness was determined in those instances.

11.9 Oral Purchase Procedures

Oral procedures may be used to acquire supplies or services that can be described in sufficient detail so that the parties to the agreement have a clear understanding of what is being acquired; and a purchase order or contract is not required by either the Merchant or the District.

When placing a telephone order to be paid using the Purchase card, the cardholder will:

(1) Notify the Merchant that the purchase is subject to state and local taxes.

(2) Confirm that the Merchant is aware of all required District terms and conditions.

(3) Confirm that the Merchant agrees to charge the purchase card when shipment is made so that receipt of the supplies may be certified on the monthly Statement of Account.

(4) Instruct the Merchant to include the following information with the shipping documents or packing slip:

(i) Cardholder name and mail code;

(ii) Building number, room number, street address, city and state;

(iii) Cardholder telephone number;

(iv) The term: Purchase card;

(v) Purchase Request or Purchase Order Number.

This information will alert the receiving offices and the requisitioner that the supplies have been purchased with the purchase card.

A log should be used to document or record telephone purchase card orders of $2,500 or less when competitive quotes are not solicited. If competitive quotes are solicited for purchases of $2,500 or less, or if the purchase exceeds $2,500 and therefore requires competition (Procurement staff only), the record shall be documented.

The documentation should be held until the monthly billing statement is received and then attached to the statement when it is submitted to the approving official.

11.10 Purchases Requiring the Issuance of a Written Order or Contract

If the Purchase card is used to pay for a purchase made by using one of the purchase order or contract forms, the Merchant should be provided the necessary information from the card orally, either in person or by telephone, and the statement "Payment to be made by purchase card" should be inserted on the form. Do not include specific information from the card on the purchase order. If the Merchant requires an order, an authorized Sponsoring Department form may be used. The Merchant is given its copy of the purchase order and the cardholder maintains a copy.

12.0 DOCUMENTATION, RECONCILIATION AND PAYMENT PROCEDURES:

12.1 Any time a purchase is made that will be paid using the card, whether it is done over the counter or by telephone, a document must be retained as proof of purchase. These documents will later be used to verify the purchases shown on the cardholder monthly statement.

(1) When a purchase is made over the counter, the cardholder is to obtain a customer copy of the charge slip, which will become the accountable document (make sure all carbons are destroyed).

(2) When making purchases by phone, the cardholder is to document the transaction on a log, annotate the PR, and attach any shipping documents associated with the order.

12.2 The contractor will provide and distribute three monthly statements within five working days after the end of the 30-day billing cycle.

(1) Cardholder - will receive a statement showing all purchases, credits and other data on transactions the cardholder has made in the 30-day billing cycle.

(2) Approving official - will receive a copy of all cardholder statements for which he/she has approving authority and a summary sheet for these statements.

(3) Controller's Office - will receive a statement providing summary data by cardholder and approving official.

12.3 At the end of each monthly billing cycle, the cardholder must reconcile the information on his/her statement. The cardholder must fill in the appropriate accounting classification in the accounting code block, if not the same as the Master Accounting Code, the organization or individual for whom the purchase was made, and a description, if not provided, for each purchase. The cardholder must then sign the statement, attach all supporting documentation and forward it to the approving official or designated alternate.

It is important that the cardholder check each purchase on the statement to verify the accuracy. If an item has been returned and a credit voucher received, the cardholder will verify that the credit is reflected on the statement. If purchased items and credits are not on the next monthly statement, the transaction documentation will be retained by the cardholder until the purchase or credit appears on the statement. If the purchase or credit does not appear on the next monthly statement, the cardholder or approving official must notify the Administrative Office Contact to resolve and reconcile the statement.

12.4 If for some reason the cardholder does not have documentation of the transaction to send with the statement, he/she must attach an explanation that includes a description of the item, date of purchase, merchant's name and why there is not supporting documentation.

12.5 The cardholder must sign the monthly statement and forward it to the approving official within five working days of receipt. If the cardholder cannot review the statement at the time that it is received, the approving official is responsible for reviewing and certifying the cardholder's statement. The approving official will go over the cardholder's statement with the cardholder upon his/her return.

12.6 The approving official is responsible for the following:

(1) Supplying the appropriate financial management office with the date services provided by the contractor were received and the date services were accepted. The date services were received will be the last day of the monthly billing cycle for the contractor. The date services were accepted will be the date the approving official signs the reverse side of the statement of account. If the approving official takes more than seven calendar days to accept the services, acceptance (for determining payment due date for compliance with prompt payment regulations only) will be deemed to occur seven calendar days after receipt of the services. If any purchased items have not been received or accepted by the time the statement is received, the items should be disputed using the procedures in paragraph 13, in order to prevent payment delays. It is critical that this information be supplied in order to avoid late payment penalties.

(2) Certifying and signing monthly cardholder-signed statements and summary statements;

(3) Forwarding signed cardholder statements and finance copies of receiving reports and supporting documents to the District's Controller's office for payment.

(4) Forwarding monthly summary statements, and the cardholder statements to the District Controller's office in time to be received within 15 working days of receipt by the approving official to avoid late payment penalties;

(5) Retaining copies of summary statements and fund certification, solicitation and award documentation as supporting documentation on purchases. Records retention and disposition procedures in BART's Procurement Manual, Chapter V, should be followed for documentation of purchases paid for using the purchase card.

13.0 BILLING ERRORS AND DISPUTES:

13.1 If a cardholder receives a statement that lists a transaction for merchandise that has not been received, the cardholder (or the approving official) must first attempt to resolve the issue with the Merchant Generally speaking, this will mean that the bill gets paid in full, including the disputed charge and the merchant credit will clear in the following billing cycle This is somewhat of a departure from the normal business practices of the District. The reason is the administrative effort required on the part of the Contractor, Procurement department and Controller's office to track disputed items. (See also 11.3.1 and 11.3.2 of this Procedure requiring Sponsoring departments to conduct business only with those merchants that offer full refunds or exchanges.)

In those instances where these procedures are not effective, Sponsoring Departments will notify Procurement Administration and complete the Cardholder Questioned item form. The contractor will credit the transaction until the dispute is resolved. In addition, a copy of the form must be attached to the cardholder's monthly statement and sent to the Controller's office.

13.2 If items purchased with the card are found to be defective, the cardholder has the responsibility to obtain replacement or correction of the item as soon as possible using the same procedures in Section 13.1 above. (See also 11.3.1 and 11.3.2 of this Procedure requiring Sponsoring departments to conduct business only with those merchants that offer full refunds or exchanges.)

If the merchant refuses to replace or correct the faulty item, then the purchase of the item will be considered in dispute. Items in dispute are handled in the same manner as billing errors.

13.3 If items purchased with the card don't include the appropriate amount of sales tax, the Sponsoring Department will communicate to the Controller's office with the monthly billing that the sales tax needs to be accrued for this item.

14.0 CONTACT WITH THE CONTRACTOR

The contractor should be contacted only to report a LOST OR STOLEN card using the telephone numbers given below in Section 15.0. All other questions should be directed to either Procurement Administration or the Controller's office.

15.0 LOST OR STOLEN CARDS

15.1 If the card is lost or stolen, it is important that the cardholder immediately notify Rocky Mountain BankCard System, Inc., at the following numbers:

(1) 24 hours a day, 7 days a week (Ask for I.M.P.A.C. customer service)

(A) 1-800-227-6736

(2) Automated authorization service number for use by merchants only

(A) 1 - 800 - 525 - 5093

15.2 The cardholder must also notify the approving official of the lost or stolen card within one workday after discovering the card missing. The approving official must also notify BART Police at the same time they receive notice.

15.3 The approving official shall submit a written report to Procurement Administration within five workdays. The report will include:

(1) the card number

(2) the cardholder's complete name

(3) the date and location of the loss

(4) the date reported to BART police

(5) date and time the contractor was notified

(6) any purchase(s) made on the day the card was lost/stolen

(7) any other pertinent information

15.4 A card that is subsequently found by the cardholder after being reported lost or stolen will be cut in half and given to his/her approving official. The approving official will complete the destruction notice and forward the notice to Procurement Administration and BART Police.

16.0 CARD SECURITY

It is the cardholder's responsibility to safeguard the purchase card and account number at all times. The cardholder must not allow anyone to use his/her card or account number. A violation of this trust will require that the card be withdrawn from the cardholder with the possibility of subsequent disciplinary action.

17.0 SEPARATION OF CARDHOLDER

Upon separation of a cardholder, the cardholder must surrender the card to his/her approving official who will complete the destruction notice and forward the notice to Procurement Administration.

18.0 TRANSFER OF CARDHOLDER TO ANOTHER APPROVING OFFICIAL

If a cardholder is transferred to another Department or Division with a different approving official, the new approving official must determine if the employee will continue to be a cardholder within his/her Department or Division. If it is determined that the card should be kept by the cardholder, the master file can be changed by requesting, in writing, that Procurement Administration have the contractor add the cardholder to the new approving official's responsibility and delete him/her from the old file without issuing a new card.

19.0 UNAUTHORIZED PURCHASES OR CARELESS USE OF THE PURCHASE CARD

A cardholder who makes unauthorized purchases or carelessly uses the card may be liable to BART for the total dollar amount of unauthorized purchases made in connection with the misuse or negligence. Also, the cardholder may be subjected to disciplinary action for unauthorized or careless use.

BART will be liable for the use of Purchase cards by authorized users (cardholders)

APPENDIX B.6

PRENEGOTIATION POSITION

PROFESSIONAL ARCHITECTURAL/ENGINEERING DESIGN SERVICES
ADDICKS PARK & RIDE LOT SECOND EXPANSION
REQUEST FOR PROPOSAL 94A072P

Date Prepared: July 28, 1994

Purpose and Background: The purpose of this document is to establish a Prenegotiation Position with respect to the Consultant's proposal for design of the Addicks Park and Ride Lot Second Expansion. On December 20, 1993, METRO Board Resolution No. 93-213 was passed authorizing and directing the General Manager to negotiate, execute and deliver a Contract with _____ for architectural/ engineering design of the Addicks Park and Ride Lot Second Expansion.

Scope of Services: The proposed Consultant shall perform preliminary architectural-engineering design (Phase I) and final architectural-engineering design of the Second Expansion of the Addicks Park & Ride (Phase II) and design support services during construction. It is currently intended that a firm fixed price Contract be negotiated for providing the required design services and that a not-to-exceed amount and unit rates be negotiated for the required design support services during construction.

Request for Proposal: A Request For Proposal No. 94A072P was subsequently issued to _____ On January 14, 1994. During the proposal period,_____ was requested to consider three (3) alternatives for the pedestrian crossing from the expansion facility to the existing facility: an at-grade crossing, an overhead crossing, and an underground crossing. Their initial proposal was received January 31, 1994. Subsequent to receipt of the Consultant's initial proposal, it was decided that the Consultant would ultimately be directed to perform to the "Underground Crossing" Alternative, and therefore, only this alternative was considered in the computation of this Prenegotiation Position. Additional information was required and was requested with respect to their proposal for an underground crossing and this was received on March 21, 1994.

Proposal: The Consultant's firm fixed price proposal for design of the facility with an underground pedestrian crossing was $302,095.00 plus a Not-to-Exceed allowance of $45,000.00 for design support services during construction, for a total Not-to-Exceed $347,095.00. Please see Attachment "A" for a summary breakdown of the Consultant's proposal for this alternative.

METRO Estimate: The Contract Acquisition Request (CAR) contained the Project Manager's initial estimate based on an at-grade or overhead crossing. The Project Manager subsequently prepared an estimate of $289,000.00 for design of the facility with an underground pedestrian crossing plus a Not-to-Exceed allowance of $45,000.00 for design support services during construction, for a total Not-to-Exceed $334,000.00. For a Discipline comparison of the Project Manager's revised estimate with the Consultant's proposal, please see Attachment "B".

Audit: On February 1, 1994, an audit of the Consultant's payroll and overhead rates was requested. The verbal audit results were received on February 21, 1994, as requested. The Audit-supported overhead rate for the Consultant was determined to be 133.68% versus the Consultant's proposed rate of 171%. Audit disallowed that portion of the overhead attributable to _____'s corporate headquarters. The audit of the Consultant's payroll determined that the majority of the Consultant's actual direct labor rates were equal to or greater than those proposed.

An audit was also requested for _____, the structural design subconsultant. _____ has performed almost $200,000 of work for METRO without an audit. The verbal audit results were received on or about February 25, 1994. Audit determined that 's proposed overhead rate of 172.7% was not substantiated by any documentation and that therefore an approximate industry average overhead rate of 150% was used by the Contract Administrator to develop his position. Audit also determined that _____'s Civil Engineer was a contract employee, for which, in accordance with Audit's interpretation, is not entitled to overhead and profit.

_____, the Civil subconsultant; _____, the Landscaping subconsultant; _____, the Geotechnical subconsultant; and _____, the Surveying subconsultant, have all been audited in the recent past in conjunction with other contracts and therefore they were not audited for this procurement. For the most part, each of these subconsultants' proposals conformed to available audit information, with the exception of the base design profit margin proposed by _____, which exceeded Audit allowable profit of 10% by an additional 5%. This, as well as a portion of _____'s reimbursables, were regarded as unallowable or excessive, respectively, by the Contract Administrator.

Please see Attachment "C" for a Summary breakdown reflecting all Audit/Contract Administrator derived disallowances with respect to the Consultant's proposal. For a Discipline comparison of the Contract Administrator's computations with respect to the Consultant's proposal please see Attachment "D".

METRO'S Prenegotiation Position: The METRO Project Manager and Contract Administrator met to discuss their two (2) positions of from $289,000.00 to $279,472.00, respectively, for design, when compared with the Consultant's proposal of $302,593.00. Both were agreed that the Not-to-Exceed figure of $45,000.00 for design support services during construction, as proposed by the Consultant, was adequate and appropriate for the Project. They ultimately agreed to a position totaling $282,920.00 for design.

This position represents a slight reduction in the Contract Administrator's position with respect to _____'s proposal for their own services, to allow for somewhat excessive reimbursables and ultimately conform to the Project Manager's revised estimate; a compromise position with respect to _____'s proposal for Civil Services; a compromise position with respect to _____'s proposal for Structural Services; to allow for additional man hours deemed necessary by the Project Manager; and a slight reduction in both positions with regard to _____'s proposal for Landscaping, to make their figure more appropriately comparative

with that of the other participants. Both agreed to accept ' proposal for Geotechnical Services and _____'s proposal for Surveying exactly as submitted. For a Discipline comparison of the Negotiation Position agreed to by the Project Manager and Contract Administrator, as compared with the Consultant's proposal, please see Attachment "E".

Conclusion: Based on the information provided above, the METRO negotiation position of $282,920.00 for the design of the Addicks Park & Ride Lot Second Expansion plus a Not-to-Exceed allowance of $45,000.00 for design support services during construction, for a Not-to-Exceed total of $327,920.00 is deemed to be fair and reasonable. Negotiations will commence immediately upon approval of this plan.

_____
Contracts Administrator

_____
Project Manager

_____
Division Director

_____
Manager of Contracts

APPENDIX B.7
OFFER AND ACCEPTANCE FORM

1.2 OFFER

The following is an example Offer/Award form to be modified as appropriate by the Procuring Agency and included in the RFP.

Offeror shall complete the following form and include same in the price proposal.

OFFER

By execution below Offeror hereby offers to furnish equipment and services as specified in (*Procuring Agency insert name*) Request for Proposals No. (*Procuring Agency insert RFP Number*) including the General Provisions (Section 2), Quality Assurance Provisions (Section 3), Warranty Provisions (Section 4) and Technical Specifications (Section 5), therein.

Offeror: _____

Name

_____

Street Address

_____

City, State, Zip

_____

Signature of Authorized Signer

_____

Title

_____

Phone

1.3 AWARD

NOTICE OF AWARD

By execution below, Procuring Agency accepts Offer as indicated above.

Contracting Officer: _____

Signature

Date of Award: _____

APPENDIX B.9

MEMORANDUM OF NEGOTIATIONS

Date Prepared: July 28, 1994

Consultant: DEB Architects

Contract No.: A30678C

Project Title: Final Design Services for the Central Control Facility

Project Description: Provide final architectural/engineering design services and design support services during construction of the Central Control Facility in accordance with METRO's Scope of Services.

Contract Value:	Lump Sum (L.S.) Facility Design	$484,023
	L.S. Furnishings	$ 22,452
	Total L.S. Final Design	$506,475
	Design Support Services (NTE)	$115,000
	Total NTE	$621,475

CAR Amount: $490,000 (Order of Magnitude)

Source of Funds: 50% Federal/50% METRO

Contract Type: Firm Fixed Lump Sum Price (FFLSP) for final architectural/engineering design services, with Firm Fixed Unit Prices (FFUP) for design support services during construction, for a total Contract Not-to-exceed (NTE) Price.

Performance Period: The final architectural/engineering design schedule is for a total of one hundred twenty (120) calendar days from the Notice-to-proceed, not counting METRO review time. Design support services during construction will begin upon receipt of another separate Notice-to-proceed and continue throughout construction, as required by the METRO Project Manager.

Insurance: See Proposed Contract Article 23, "Consultant's Insurance".

DBE Participation: The Request for Proposal (RFP) specified 21% in accordance with the Contract Acquisition Request (CAR). Consultant currently intends to utilize D.E.F. Associates, Inc. (BF) for structural design, at 9.63% of the total estimated not-to-exceed price; TAB Engineering Company (AM) for civil engineering and survey, at 9.34%; and CDE Associates, Inc. (CF) for landscaping, at 2.92%; for a total of 21.89% of the total estimated not-to-exceed price for DBE participation.

Selection Process and Criteria: A-E Qualifications. See Summary of Procurement dated for information regarding Consultant selection.

Authorization: The authorization for this Contract is Contract Acquisition Request (CAR) AG2141R93172 and METRO Board Authorization 92-90, dated June 25, 1993, which authorizes design of the Central Control Facility. Preliminary architectural/engineering design for this project was accomplished under Contract No. A30132C. The authorization for that Contract was CAR AL0213P92101 and the METRO Board Authorization referenced above.

Cost/Price Analysis-Negotiation Results:

Subsequent to the Board Action described above and receipt of a CAR and Scope of Services for final architectural/engineering design of this project on June 18, 1993, Request for Proposal (RFP) No. 93A390P for these services was prepared and transmitted to the Consultant on June 29, 1993, with a due date of July 12, 1993. The Consultant's initial proposal (attached) was received on July 15, 1993. The proposal was for a firm lump sum of $629,151 (10,299 man-hours) for facility design and $22,484 (438 man-hours) for furnishings design, for a total firm lump sum of $651,635 (10,737 man-hours) for final design, and apparently did not address itself to design support services during construction (See Attachment "A" for a Summary of this Proposal, as well as Attachment "A.1" for a Detailed Summary of the Consultant's Proposal).

Prior to being furnished the Consultant's initial proposal for final architectural/ engineering design, the Project Manager furnished Contracts a project management man-hour estimate. The Project Manager's man-hour estimate (attached) was received on August 2, 1993. The Project Manager's (and resident staff specialists') estimate was for a firm lump sum of $683,514 (12,896 man-hours) for facility design and $22,640 (424 man-hours) for furnishings design, for a total firm lump sum of $706,154 (13,320 man-hours) for final design, with a Not-to-Exceed (NTE) total of $45,000 (800 man-hours) for design support services during construction, for a total NTE of $751,154 (14,120 man-hours) (See Attachment "B" for a Summary of this Project Manager's Estimate, as well as Attachment "B.1" for a Detailed Summary of the Project Manager's Estimate). Upon receipt of the proposal, a METRO prenegotiation position of NTE $635,000.00 was developed (See Attachment B.2).

Upon review, the Consultant's proposal for furnishings design was accepted as submitted, subject to audit disallowances, inasmuch as it conformed so closely to the Project Manager's Estimate. However, there was some concern that some of the Consultant's subconsultants had not included all required services in their respective proposals for facility design (See Attachment "C" for a Summary Comparison of the Consultant's initial proposal for facility design with the Project Manager's estimate for facility design) and there was also the question of design support services during construction, which had not been specifically addressed in the Consultant's proposal, but which appeared to be included in certain subconsultant proposals. It was decided that a Scoping meeting should be held to discuss the Consultant's proposal for facility design. The Scoping meeting was held in the AGM for Capital and Long Range Planning's Conference Room on the

21st floor at 1201 Louisiana on Thursday, August 5, 1993, at 10:00 a.m., with the following participants in attendance:

(Full Time)	
ABC	METRO
R. Case	Ed Fanning Jim Schmid
(Part Time)	
TVC	
Petula Clark S. Caminski	Michael Williams
D.I.Y.	
D. Morry	David Lentz
TSC	
Tony Change Roy Canoe	Hameed Merchant
TSY	
Swimming Pool	Joe Misrahi Sol Abdulla

At this meeting, all of the participants were advised that METRO intended to alter the Scope of Services to provide for drawings at 20th scale in lieu of 40th scale, so that the half sized drawings required for the project would be readable. All of the participants agreed that this would not be a problem, inasmuch as all drawings were being produced on CADD. At this meeting, Project Management satisfied itself that all major participants in the project, with the possible exception of the Civil/Traffic subconsultant, had properly estimated their work scopes (It was suggested that the Civil/Traffic subconsultant reduce their survey time and increase their traffic design time slightly and the need for some additional geotechnical borings were suggested to the Prime Architect and Civil/Traffic subconsultant). However, it was also determined that the Prime Architect, Structural subconsultant, and Landscaping subconsultant (as per their proposal), had included design support services during construction into their proposals for design of the facility. They were advised that the RFP had requested a separate NTE proposal for such services to be performed on an "as required" time and material basis, and were requested to submit such an NTE Proposal and reduce their design proposals accordingly. While ABC and XYZ had not included any such Design Support Services monies or time in their original proposals, ABC was asked to review and revise their proposal to reflect the revisions referenced

above, and XYZ was advised that, because of the risks associated with a lump sum proposal, they were entitled to a profit factor of 10%, in lieu of the 5% factor they initially proposed. ABC and XYZ had been limited to a 5% profit factor in the original Cost Plus Fixed Fee (CPFF) Contract for Preliminary Engineering, in light of their limited risk in the project, and XYZ had assumed that METRO simply would not accept a higher factor under any circumstances. DEB was also advised that their method of applying a 10% profit factor to their subconsultants, as well as themselves, constituted fee on top of fee, and as such was unacceptable to METRO. They were advised that METRO would, however, consider the addition of a reasonable number of appropriate man-hours for contract administration as an acceptable substitution for computation of fee in this fashion, and Morris agreed to restructure their Proposal accordingly. DEB ultimately agreed to revise and resubmit their entire proposal in accordance with the understandings reached at this meeting.

Their revised proposal for facility design and design support services during construction (attached) was received on August 11, 1993. This revised proposal was for a firm lump sum of $500,129 (8,736 man-hours) for facility design, with an NTE total of $150,304 (2,944 man-hours) for design support services during construction (See Attachment "D" for a Summary of the Consultant's revised proposal for facility design as well as Attachment "E" for a Summary Comparison of their initial proposal for facility design with their revised proposal for facility design; and Attachment "F" for a Summary of their NTE proposal for design support services during construction as well as Attachment "G" for a Summary Comparison of their NTE proposal for design support services during construction with the Project Manager's NTE estimate, as alluded to above).

Upon review, the Consultant's revised proposal for facility design was accepted as submitted, subject to audit disallowances, but the design support services NTE and man-hours were still significantly more than that originally estimated by the Project Manager. The Project Manager reevaluated design support service requirements for the project, and came up with a revised estimate (attached) NTE $113,043 (1,708 man-hours); this figure was adopted as a negotiation position for such services; and DEB was advised of this position.

DEB's acceptable revised man-hour proposal for facility design was then subjected to METRO Audit and Contract Administrator disallowances. While no audits were requested for this particular procurement, the major participants, DEB, XYZ & Associates and ABC Engineering had already recently been audited by METRO in conjunction with the preliminary engineering contract referenced above, and those audit reports (attached) were utilized for computation of these disallowances. DEB's initial proposal had contained a 145% overhead factor, in lieu of their METRO audited overhead of 140.89%, and this had been questioned by Mr. Schmid during the Scoping Meeting referenced above. Mr. Case had replied that he had essentially employed it as a salary escalator, and inasmuch as its employment here rather than at the direct salary level would certainly net much less of an actual increase, this matter was not pursued further. However, other disallowances netted reductions in DEB's proposal and that of their Civil/Traffic subconsultant, XYZ, as well their Accessibility Consultant's computation of profit, for a total reduction of $20,141, or 4.03%, from the Consultant's revised proposal of $500,129, for a negotiation position of $479,988 for facility design (See Attachment "H" for a Summary of the

Consultant's revised proposal for facility design, less Audit and Contract Administrator disallowances as well as Attachment "I" for a Summary Comparison of their revised proposal for facility design with their revised proposal with Audit and Contract Administrator disallowance applied.

DEB's original man-hour proposal for furnishings design was also subjected to METRO Audit and Contract Administrator disallowances, for a reduction of $108, or 8.08%, from the Consultant's initial proposal of $22,484, for a negotiation position of $22,276 for furnishings design (See Attachment "I.1").

A negotiation meeting was held with DEB in the Real Estate Conference Room on the 19th floor at 1201 Louisiana on Monday, August 23, 1993, at 11:00 a.m., with the following participants in attendance:

DEB	**METRO**
_____	Ed Fanning
	Jim Schmid

At that meeting, DEB furnished a revised proposal NTE $115,000 for design support services during construction, and this was accepted as submitted, inasmuch as it conformed closely to the Project Manager's revised estimate of $113,043, as alluded to above.

DEB accepted the majority of METRO's Audit disallowances with regard to their revised proposal for facility design and furnishings design, with the exception of METRO's actual direct rate computation for DEB's principals. Mr. _____ advised that DEB's principals had had their pay rates restored to their 1992 rates (the principals had taken a voluntary pay cut effective January 1, 1993) subsequent to the audits referenced above, and therefore METRO's computations in that regard were incorrect. Mr. Schmid recomputed disallowances using the principals' original direct rates, and METRO and DEB ultimately agreed to the resultant reductions in their proposal, as well as that applied to the two (2) subconsultants under facility design. The resultant firm lump sum for facility design was $484,023, a reduction of $16,106, or 3.22%, from the Consultant's revised proposal of $500,129 (See Attachment "K" , for a Summary of the Consultant's final proposal for facility design, as ultimately negotiated, as well as Attachment "K" for a Summary Comparison of their revised proposal for facility design with their final proposal, as ultimately negotiated). The resultant firm lump sum for furnishings design was $22,452, a reduction of $32, or .14%, from the Consultant's original furnishings design proposal (See Attachment "K.1").

The only items that remained to be negotiated were the rates for design support services during construction, inasmuch as Morris had not included any such proposed rates in their proposal(s). Mr. Schmid furnished Mr. _____ a "Proposed Contract Attachment "B," based upon DEB's and ABC's audited rates, as well as existing design support service rates for the remaining participants, and Mr. _____ accepted these, with the exception of the rate for DEB's

Principals, which were revised to take the aforementioned salary reinstatements into consideration.

Contract Articles (Terms and Conditions): The Consultant took no exception to the Contract Articles, and therefore the Proposed Contract Terms contained in the RFP have been incorporated into the Contract verbatim.

Summary and Recommendations: Based on cost/price analysis and negotiations, as called out in the Memorandum of Negotiations, the firm lump sum prices of $484,023 for facility design and $22,452 for furnishings design, for a total firm lump sum of $506,475 for all final architectural-engineering design services; and an NTE of $115,000 for design support services during Construction, for an overall Not-to-exceed price of $621,475 for this proposed Contract are considered fair and reasonable.

Approval of this Contract with DEB Architects for the total lump sum price of $506,475 for final design and an overall amount Not-to-exceed $621,475 is therefore recommended.

Contracts Administrator

Project Manager

Division Director

Affirmative Action

Manager of Contracts

APPENDIX B.10
DISCLOSURE OF CONFLICTS OF INTEREST
(OCT 1994)

It is the Department of Transportation's (DOT) policy to award contracts to only those offerors whose objectivity is not impaired because of any related past, present, or planned interest, financial or otherwise, in organizations regulated by DOT or in organizations whose interests may be substantially affected by Departmental activities. Based on this policy:

(a) The offeror shall provide a statement in its proposal which describes in a concise manner all past, present or planned organizational, financial, contractual or other interest(s) with an organization regulated by DOT, or with an organization whose interests may be substantially affected by Departmental activities, and which is related to the work under this solicitation. The interest(s) described shall include those of the proposer, its affiliates, proposed consultants, proposed subcontractors and key personnel of any of the above. Past interest shall be limited to within one year of the date of the offeror's technical proposal. Key personnel shall include any person owning more than 20% interest in the offeror, and the offeror's corporate officers, its senior managers and any employee who is responsible for making a decision or taking an action on this contract where the decision or action can have an economic or other impact on the interests of a regulated or affected organization.

(b) The offeror shall describe in detail why it believes, in light of the interest(s) identified in (a) above, that performance of the proposed contract can be accomplished in an impartial and objective manner.

(c) In the absence of any relevant interest identified in (a) above, the offeror shall submit in its proposal a statement certifying that to its best knowledge and belief no affiliation exists relevant to possible conflicts of interest. The offeror must obtain the same information from potential subcontractors prior to award of a subcontract.

(d) The Contracting Officer will review the statement submitted and may require additional relevant information from the offeror. All such information, and any other relevant information known to DOT, will be used to determine whether an award to the offeror may create a conflict of interest. If any such conflict of interest is found to exist, the Contracting Officer may (1) disqualify the offeror, or (2) determine that it is otherwise in the best interest of the United States to contract with the offeror and include appropriate provisions to mitigate or avoid such conflict in the contract awarded.

(e) The refusal to provide the disclosure or representation, or any additional information required, may result in disqualification of the offeror for award. If nondisclosure or misrepresentation is discovered after award, the resulting contract may be terminated. If after award the Contractor discovers a conflict of interest with respect to the contract awarded as a result of this solicitation, which could not reasonably have been know prior to award, an immediate and full disclosure shall be made in writing to the Contracting Officer. The disclosure shall include a full description of the conflict, a description of the action the contractor has taken, or proposes to take, to avoid or mitigate such conflict. The Contracting Officer may, however, terminate the contract for convenience if he or she deems that termination is in the best interest of the Government.

APPENDIX B.11

NEW YORK CITY TRANSIT AUTHORITY

Division of Materiel

Procurement Sub-Division

Schedule J

BIDDER'S QUALIFICATION QUESTIONNAIRE

PART I - INSTRUCTIONS

1 a. All Bidders/Proposers submitting a Bid/Proposal for public work contracts (IFB & RFP); personal service (including Architectural and Engineering) contracts (RFP); RFPs for supply, material, equipment (including transit vehicles and rolling stock); RFPs for miscellaneous procurement and service contracts; non-competitive/sole source contracts (including preferred source and existing public contracts) equal to or in excess of $10,000 are to complete and submit Parts I, II, III, IV and VIII with their Bid or Proposal.

b. PUBLIC WORK CONTRACTS (IFB & RFP)

If this Questionnaire is submitted in response to an Information for Bidders (IFB), the apparent low bidder will receive written notification requesting submission of Parts V, VI and VII. If this Questionnaire is submitted in response to a Request for Proposal (RFP), and the proposal submitted equals or exceeds $25,000 all Proposers are to complete and submit all Parts of the Questionnaire with their Proposal.

c. PERSONAL SERVICE INCLUDING ARCHITECTURAL AND ENGINEERING CONTRACTS (RFP)

Where the proposal submitted equals or exceeds $20,000 for a personal service (consultant) contract, all Proposers are to complete and submit all Parts of the questionnaire with their Proposal.

d. RFPs FOR SUPPLY, MATERIAL, OR EQUIPMENT (INCLUDING TRANSIT VEHICLES AND ROLLING STOCK), AND MISCELLANEOUS PROCUREMENT AND SERVICE CONTRACTS

Where the proposal submitted equals or exceeds $250,000 for supplies, materials, or equipment (including transit vehicles and rolling stock), and miscellaneous procurement and service contracts all Proposers are to complete and submit all Parts of the questionnaire with their Proposal.

e. NON-COMPETITIVE/SOLE SOURCE CONTRACTS (INCLUDING PREFERRED SOURCE AND EXISTING PUBLIC CONTRACTS

Where the proposal submitted equals or exceeds $25,000 for non-competitive public work contracts, $20,000 for non-competitive personal service (Consultant) contracts, and $250,000 for all other non-competitive contracts, all Proposers are to complete and submit all Parts of the questionnaire with their Proposal.

2. Please state "not applicable" in questions clearly not applicable to Bidder/Proposer in connection with this solicitation. Do not omit any question. If any representation is not

accurate and complete at the time Bidder/Proposer signs this Questionnaire, Bidder/Proposer must, as part of its Bid/Proposal, identify the provision and explain the reason in detail in the space provided below. If additional space is needed, add additional sheet(s) to this Questionnaire. If this space is left blank, Bidder/Proposer shall be deemed to have represented and warranted the accuracy and completeness of the representations on this Questionnaire:

_____
_____
_____
_____
_____
_____

3. All information must be legible.

4. Completed Questionnaire must be sworn to by a partner (if partnership), a duly authorized officer or individual (if a corporation), or a principal (if a sole proprietorship).

5. The term "Proposer" includes the term "Bidder" and also refers to the firm awarded the Contract. The term "Proposal" includes the term "Bid".

6. If during the performance of this Contract, either of the following occurs, Bidder shall promptly give notice in writing of the situation to the Authority's Chief Procurement Officer, and therefore cooperate with the Authority's review and investigation of such information.

   i) Proposer has reason to believe that any representation or answer to any question contained in this Questionnaire was not accurate or complete at the time this Questionnaire was signed; or

   ii) events occur or circumstances changes so that an answer to any question in Part IV is no longer accurate or complete.

   In the Authority's sole discretion, the following shall constitute grounds for the Authority to take remedial action up to and including immediate termination of the Contract for convenience without payment for profit and overhead for work not performed if: i) Proposer fails to notify the Chief Procurement Officer as required by "6" above: ii) Proposer fails to cooperate with the Authority's request for additional information as required by "6" above.

7. The Authority reserves the right to inquire further with respect to Proposer's responses; and Proposer consents to such further inquiry and agrees to furnish all relevant documents and information as requested by the Authority. Any response to this document prior or subsequent to Proposer's Proposal which is or may be construed as unfavorable to Proposer will not necessarily automatically result in a negative finding on the question of

Proposer's responsibility or a decision to terminate the Contract if it is awarded to Proposer.

PART II - IDENTITY OF PROPOSER

1. Proposer's Full Legal Name: _____
_____
_____

2. The Proposer represents that it operates as the following form of legal entity: (Check whichever applies and fill in any appropriate blanks.)

☐ an individual or sole proprietorship

☐ a general partnership

☐ a limited partnership

☐ a joint venture consisting of: _____
and _____
(List all joint venturers on a separate sheet if this space is inadequate.)

☐ a non-profit organization

☐ a corporation organized or incorporated under the laws of the following state or country:

_____ on the following date: _____

3. Proposer's federal taxpayer identification number: _____

4. Proposer's legal address: _____
_____

Telephone Number: (____) _____ Fax Number: (____) _____

5. Proposer's local or authorized point of contract address:
Name: _____ Title: _____

Address: _____

_____

Telephone Number: (____) _____ Fax Number: (____) _____

6. a. If Proposer is a corporation, has a Certificate of Incorporation been previously filed with the New York City Transit Authority?

YES ☐ NO ☐ If answer is "NO," attach a certified copy.

b. Attach a certified copy of the By-Laws and Resolution of the Corporation giving the names and titles of the corporate officers other than President, as well as non-officer employees, who are authorized to sign contracts, bonds, bills of sale and other legal instruments in connection with the Contract, if the same have not been previously filed.

c. If a foreign corporation, has proof of authority to transact business in the State of New York been previously filed with the New York City Transit Authority?

YES ☐ NO ☐ If answer is "NO," attach a certified copy.

In the event that any of Proposer's previous submissions to the Transit Authority in response to the above (questions a-c) no longer represent the Proposer's current corporate status, Proposer must attach a certified copy of any documents amending its previous submissions.

7. a. How long has the Proposer been in business?

b. Have Proposer's major shareholders, officers or principals been in business under another name? If so, identify name and dates used.

c. How many years experience as a prime contractor/consultant?

_____

d. How many years experience as a subcontractor/subconsultant?

_____

8. List below the names, business addresses, titles, and telephone numbers of the following people: if a corporation, identify the president, executive officers, and any other officers directly responsible for this Proposal; if a partnership, identify the partners directly responsible for this Proposal; or, if another form of business entity, identify the principals directly responsible for this Proposal.

Name	Address	Title	Telephone No.

9. If your firm considers itself to be an MBE, WBE or DBE, then within the past three years has the Proposer had any MBE, WBE, or DBE certification (or application for such certification) revoked or, if you made application for such certification during such period was same denied?

YES ☐ NO ☐ If answer is "NO," attach a certified copy.

_____

_____

_____

_____

PART III-PROPOSER'S REPRESENTATIONS

1. By submission of this Proposal, the undersigned and each person signing on behalf of the undersigned certifies, and in the case of a joint proposal each party thereto certifies, as to its own organization, as required by Section 2878 of the Public Authorities Law of the State of New York, under penalty of perjury, that to the best of its knowledge and belief:

   a. the prices in this Proposal have been arrived at independently without collusion, consultation, communication, or agreement for the purpose of restricting competition, as to any matter relating to such prices with any other proposer or with any competitor;

   b. unless otherwise required by law, the prices which have been quoted in this Proposal have not been knowingly disclosed by the Proposer arid will not knowingly be disclosed by the undersigned prior to opening, directly or indirectly, to any other proposer or to any competitor prior to the closing date for proposals;

   c. no attempt has been or will be made by the Proposer to induce any other person, partnership or corporation to submit or not to submit a proposal for the purpose of restricting competition;

A Proposal shall not be considered for award nor shall any award be made where a, b, and c, above, have not been complied with provided, however, that if in any case the Proposer cannot make the foregoing certification, the Proposer shall so state and shall furnish with the Proposal a signed and notarized statement which sets forth in detail the reasons therefor. Where a, b, and c, above, have not been complied with, the Proposal shall not be considered for award nor shall any award be made unless the Vice President, Division of Materiel of the Authority, or his/her designee, determines that such disclosure was not made for the purpose of restricting competition.

The fact that a Proposer (i) has published price lists, rates, or tariffs covering items being procured; (ii) has informed prospective customers of proposed or pending publication of new or revised price lists for such items; or (iii) has sold the same items to other customers at the same prices being proposed, does not constitute, without more, a disclosure within the meaning of a, b, and c above

2. Statement of no-conflict of interest

   a. No appointed or elected official, member or other officer or employee of the City or State of New York, or of the Metropolitan Transportation Authority ("MTA"), or MTA's affiliates arid subsidiaries which consist of the New York City Transit Authority, Manhattan & Bronx Surface Transit Operating Authority, Staten Island Rapid Transit Operating Authority, Metro-North Commuter Railroad, Long Island Rail Road, Triborough Bridge and Tunnel Authority, Metropolitan Suburban Bus Authority, and Metropolitan Transportation Authority Card Company: i) is interested directly or indirectly, in any manner whatsoever in or in the performance of the Contract or in the supplies, work or business to which it relates or in any portion of the profits thereof; or ii) has been or will be offered or given any tangible consideration in connection with this Proposal/Contract.

   b. Proposer covenants that neither Proposer nor, to the best of the Proposer's knowledge after diligent inquiry, any director, officer, owner or employee of the Proposer has any interest nor shall they acquire any interest, directly or indirectly, which would conflict in any manner or degree with the faithful performance of the Contract hereunder.

   c. In the event Proposer has no prior knowledge of a conflict of interest as set forth in "a" and "b" above and hereafter acquires information which indicates that there may be an actual or apparent violation of any of the above, Proposer shall promptly bring such information to the attention of the Authority's Chief Procurement Officer, Proposer shall thereafter cooperate with the Authority's review and investigation of such information, and comply with any instruction it receives from the Chief Procurement Officer in regard to remedying the situation.

3. The following statements apply to any proposal or contract between Proposer and the City or State of New York, any other state, any public authority or other public entity, the United States government, the Metropolitan Transportation Authority ("MTA"), and MTA's affiliates and subsidiaries which are the New York City Transit Authority, Manhattan & Bronx Surface Transit Operating Authority, Staten Island Rapid Transit Operating Authority, Metro-North Commuter Railroad, Long Island Rail Road, Triborough Bridge and Tunnel Authority, Metropolitan Suburban Bus Authority, and Metropolitan Transportation Authority Card Company.

   a. Statements b, c, d. e, f and g below also apply to i) Proposer's parent, subsidiaries and affiliates (if any), ii) any joint venture (including its individual members and any other form of partnership (including its individual members) which includes Proposer or Proposer's parent, subsidiaries, or affiliates; iii) Proposer's directors, officers, principals, and managerial employees and any person or entity with a 10% or more interest in Proposer; iv) any legal entity controlled, or 10% or more of which is owned, by Proposer, or by any director, officer, principal or managerial employee of Proposer, or by any person or entity with a 10% or more interest in Proposer; or v) any parent, subsidiary or affiliate of any legal entity controlled, or 10% or more of which is owned, by Proposer, or by any director, officer, principal or managerial employee of Proposer, or any person or entity with a 10 % or more interest in Proposer.

   b. Has the Proposer been declared not responsible. (Check "YES" or "NO," as appropriate.)

      YES ☐ NO ☐

   c. Has the Proposer been debarred, suspended, proposed for debarment, declared ineligible, voluntarily excluded, or otherwise disqualified from bidding, proposing, or contracting. (Check "YES" or "NO," as appropriate.)

      YES ☐ NO ☐

   d. Has the Proposer been a defaulter, as principal, surety or otherwise. (Check "YES" or "NO," as appropriate.)

      YES ☐ NO ☐

e. Has the government or other public entity requested or required enforcement of any of its rights under a surety agreement on the basis of a Proposer default or in lieu of declaring Proposer in default. (Check "YES" or "NO," as appropriate.)

YES ☐ NO ☐

f. Is the Proposer in arrears upon a contract or debt. (Check "YES" or "NO," as appropriate

YES ☐ NO ☐

g. Are there any proceedings pending relating to Proposer's responsibility, debarment, suspension, voluntarily exclusion or qualification to receive a public contract. (Check "YES" or "NO". as appropriate.)

YES ☐ NO ☐

h. List the name and business address of each person or legal entity which has a 10% or more ownership or control interest in Proposer (attach additional pages as needed).

_____

_____

_____

_____

i. Explain any "YES" answers to b, c, d, e, f and g in the space provided below (attach additional pages as needed).

_____

_____

_____

_____

PART IV - QUESTIONS WHICH MUST BE ANSWERED "YES" OR "NO"
(In the event of a "YES," the Authority reserves the right to inquire further with respect thereto.)

To the best of your knowledge after diligent inquiry, in connection with the business of proposer or any other firm which is related to Proposer by any degree of common ownership, control, or otherwise, do any of the following statements apply to: i) Proposer; ii) Proposer's parent; iii) any Proposer subsidiary or affiliate; iv) any joint venture (including its individual members) or any other partnership (including its individual members) which includes Proposer or Proposer's parent, subsidiaries, or affiliates, v) any legal entity, or parent, subsidiary or affiliate of any legal entity, controlled. or 10% or more of which is owned, by Proposer, or by any director, officer, principal or managerial employee of Proposer, or by any person or entity with a 10% or more interest in Proposer. or vi) any person who is a director, officer, principal, or, managerial employee, or person or entity with a 10% or more interest in any of the aforesaid:

1. Has been convicted by a plea or verdict of guiltily of, or pleaded nolo contendere to, a misdemeanor or felony in any federal, state or local court. (Check "YES" or "NO," as appropriate.)

   YES ☐ NO ☐

2. Have pending any state or federal grand jury or court an indictment or information for the commission of a crime which has riot been favorably,' terminated. (Check "YES" or "NO," as appropriate.)

   YES ☐ NO ☐

3. Is the subject of any pending investigation by any grand jury, commission, committee or other entity or agency or authority of any state or the federal government in connection with the commission of a crime. (Check "YES" or "No," as appropriate.)

   YES ☐ NO ☐

4. Is currently disqualified from selling or submitting bids/proposals to or receiving awards from or entering into any contracts with any federal, state or local governmental entity, any public authority or any public entity (Check "YES" or "NO," as appropriate.)

   YES ☐ NO ☐

5. Within the past five years, has refused to testify or to answer any question concerning a bid or contract with any federal, state, or local governmental entity, any public authority or other public entity when called before a grand jury or other committee, agency or forum which is empowered to compel the attendance of witnesses and examine them under oath, upon being advised that neither the person's statement nor any information or evidence derived from such statement will be used against that person in any subsequent criminal proceeding. (Check "YES" or "NO" as appropriate.)

YES ☐ NO ☐

6. Is currently disqualified from selling or submitting a bid to, or receiving an award from, or entering into any contract with any public entity or public authority within the State of New York because, within the past five years, such entity or person refused to testify or to answer any relevant question concerning a transaction or contract with the State of New York, any political subdivision of the State of New York, or a public authority or a public department, agency or official of the State of New York or of a political subdivision of the State of New York, when called before a grand jury or other state or local department, commission or agency which is empowered to compel the attendance of witnesses and examine them under oath. upon being advised that neither that person's statement nor any information or evidence derived from such statement will be used against that person in any subsequent criminal proceeding, (Check "YES" or "NO," as appropriate.)

YES ☐ NO ☐

7. Has within a three year period preceding this Proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain. or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property. (Check "YES" or "NO," as appropriate.)

YES ☐ NO ☐

8. Explain any "YES" answers to 1, 2, 3, 4, 5, 6 or 7, in the space provided below (attach additional pages as needed).

PART V-TECHNICAL

1. List the name, title and business address of each director and principal officer of Proposer.

_____

_____

_____

_____

2. Number of employees: _____ including _____ employees in the Greater New York Metropolitan Area.

3. Does the Proposer have any outstanding bids or proposals for contracts (i.e., bids or proposals pending where no contract has yet been awarded) with the State or City of New York, or any other public authority of the State of New York, or the Metropolitan Transportation Authority ("MTA"), and MTA's affiliates and subsidiaries which are the New York City Transit Authority, Manhattan & Bronx Surface Transit Operating Authority, Staten Island Rapid Transit Operating Authority, Metro-North Commuter Railroad, Long Island Rail Road, Triborough Bridge and Tunnel Authority, Metropolitan Suburban Bus Authority, and Metropolitan Transportation Authority Card Company? If none, state "None". If yes, please list them and provide the name of the requesting agency, the contract number, a brief description of the work effort and the status of the bid or proposal. Indicate if the bid/proposal was submitted by the Bidder as prime contractor or joint venture.

_____

_____

_____

_____

4. Has the Proposer been awarded any contracts within the last three years by the State or City of New York, or any other public authority of the State of New York, or the Metropolitan Transportation Authority ("MTA"), and MTA's affiliates and subsidiaries which are the New York City Transit Authority, Manhattan & Bronx Surface Transit Operating Authority, Staten Island Rapid Transit Operating Authority, Metro-North Commuter Railroad, Long Island Rail Road, Triborough Bridge and Tunnel Authority, Metropolitan Suburban Bus Authority, and Metropolitan Transportation Authority Card Company? If none, state "None". If yes, describe those contracts beginning with the

most recent. State the name of the contracting entity; give a brief description of the contract and the contract number; state the contract period, the status of the contract, and the name, address, and telephone number of a contact person at the agency. Indicate if award was made to Proposer as prime contractor or joint venture. Proposer need not provide more than six such descriptions.

_____

_____

_____

_____

5. Does the Proposer have any current private sector projects? If none, state "None." If yes, provide name and address of owner, a brief description of work, status of contracts and name, address and telephone number of contact person as to each, beginning with the most recent. Indicate if Proposer is acting as prime contractor or joint venture. Proposers need not provide more than six such descriptions.

_____

_____

_____

_____

6. For each of the following contracts, provide a brief description of the work performed, the contract number, the dollar amount at award and at completion, date completed, and the name and telephone number of the owner's representative.

   a. Each contract completed during the last three years or, if less than three contracts have been completed during the last three years, list the last three contracts completed.

   _____

   _____

   _____

   _____

   _____

   b. Each contract completed during the last three years or, if less than three contracts have been completed during the last three years, list the last three contracts completed, for which liquidated damages or penalty provisions were assessed against you for failure to complete the work on time or for any other reason.

   _____

_____
_____
_____
_____

7. List each contract which, during the last three years, the person/entity contracting with you: i) terminated for default; ii) sued to compel performance; iii) sued to recover damages, including, without limitation, upon alleged breach of contract, misfeasance, error or omission or other alleged failure on your part to perform as required by your contract; or iv) called upon a surety to perform the work.

_____
_____
_____
_____

8. Describe whether any present or anticipated commitments and/or contractual obligations might have an influence on the capabilities of the Proposer to perform the work called for by this Contract. Any apparent conflicts as between the requirements/commitments for this Contract and the matters listed in items 3, 4, 5 or 6, above, with respect to the use of Proposer's resources, such as management or technical expertise or financing, should be explained. If none, state "None".

_____
_____
_____
_____

9. Describe any litigation in which the Proposer is involved, which:

   a. has or may have an impact on the Proposer's ability to perform any work called for by this solicitation; or

   b. the demand or potential exposure is for more than $250,000, exclusive of personal injury litigation where the liability is covered by insurance.

   If none, state "None."

_____
_____
_____

_____

10. During the past three years, has the Proposer's firm ever been a party to a bankruptcy or reorganization proceeding?

YES ☐ NO ☐ If answer is "YES," explain below.

11. a. If any professional or other licenses, permits, or certifications are required to perform the work/services called for by this solicitation, list the license, permit, or certification that the Proposer or Proposer's employees or agents possess. If none, state "None".

License or Permit or Certification	Name of Holder	Issuing State or Entity

b. Have any of the Proposer's officers, partners, owners, managers or employees had any project related licenses, permits or certifications revoked or suspended in the past three years.

YES ☐ NO ☐ If answer is "YES," explain details below.

12. Does the Proposer's firm share office space, staff or equipment (including telephone exchanges) with any other business or organization?

YES ☐ NO ☐ If answer is "YES," list firm name, address and nature of shared facilities.

_____

_____

_____

_____

_____

13. Has Proposer's safety practices/procedures been evaluated or rated as less then satisfactory by the City or State of New York, any other state, any public authority or other public entity, the United States government, the Metropolitan Transportation Authority ("MTA"), and MTA's affiliates and subsidiaries which are the New York City Transit Authority, Manhattan & Bronx Surface Transit Operating Authority, Staten Island Rapid Transit Operating Authority, Metro-North Commuter Railroad, Long Island Rail Road, Triborough Bridge and Tunnel Authority, Metropolitan Suburban Bus Authority, and Metropolitan Transportation Authority Card Company within the past five years?

YES ☐ NO ☐ If answer is "YES," explain details below.

_____

_____

_____

_____

_____

14. Is your firm's Workers Compensation Experience Rating 1.2 or greater?

YES ☐ NO ☐ If answer is "YES," explain details below.

_____

_____

_____

_____

_____

15. Does Proposer have either a history of claims loss or any substantial individual claim loss within the past five years due to general liability or workers compensation claims?

YES ☐ NO ☐ If answer is "YES," explain details below.

_____

_____

_____

_____

_____

16. List the names, titles and attach resumes which indicate the record of skill and experience of your proposed project management team. (See Specifications or the Scope - of - Work for the functions of the project management team, as applicable, and other requirements in regard to project management.)

_____

_____

_____

_____

_____

17. Which of the individuals named in item 16, above, will be utilized exclusively on this Contract on a full-time basis? (The Specification or the Scope - of - Work may indicate requirements for certain dedicated staff.)

_____

_____

_____

_____

_____

18. Which of the individuals named in item 16, above, are not presently officers, partners, owners or employees of the firm?

_____

_____

_____

_____

_____

19. Attach an outline of your proposed Quality Control program (see appropriate section of the Specifications or the Scope-of-Work) for this Contract. Where the Specifications or the Scope-of-Work set out required elements for the program, such outline must cover each element.

PART VI - ADDITIONAL QUESTIONS

1. List all Proposer's employees:

   a. who are currently employees of the Metropolitan Transportation Authority ("MTA"), or any MTA subsidiary or affiliate (New York City Transit Authority, Manhattan & Bronx Surface Transit Operating Authority, Staten Island Rapid Transit Operating Authority, Metro-North Commuter Railroad, Long Island Rail Road, Triborough Bridge and Tunnel Authority, Metropolitan Suburban Bus Authority, and Metropolitan Transportation Authority Card Company).

   _____

   _____

   _____

   _____

   _____

   b. who within the past two years have been MTA or MTA subsidiary or affiliate employees who were involved on behalf of Proposer with the preparation of this Proposal or would be involved in the performance of the Contract if it is awarded to Proposer.

   _____

   _____

   _____

   _____

2. Does Proposer have a subsidiary or affiliate?

   YES ☐ NO ☐ If answer is "YES," list firm name, address and affiliation

   _____

   _____

   _____

   _____

   _____

3. Is Proposer a subsidiary of another entity?

YES ☐ NO ☐ If answer is "YES," list firm name, address and affiliation

_____

_____

4. Does Proposer, any director, officer, principal or managerial employee of Proposer, or any other person or entity with a 10% or more interest in Proposer have an interest of 10% or more in any other firm or legal entity?

YES ☐ NO ☐ If answer is "YES," list individuals name and firm or entity

_____

5. If the answer to 2, 3 or 4 is "YES," would Proposer's answers pertaining to Parts III and IV be the same for each such parent, subsidiary, affiliate, firm or legal entity?

YES ☐ NO ☐ If answer is "NO," explain below

_____

_____

_____

_____

_____

PART VII – FINANCIAL

1. Provide certified financial statements for the last three fiscal years. If certified financial statements are not available, provide financial statements sworn to by the firm's Chief Financial Officer.

2. The Proposer may submit its prior 3 years' financial statements in lieu of completing Section 1 (Balance Sheet), Section 2 (Comparative Statement of Income & Retained Earnings), and Section 3 (Comparative Statements of Cash Flows). However, Section 1, Schedules A, B, C, D, E and F and Sections 4, 6 and 7 must be completed. If the Proposer is required to submit a performance bond, Section 5 must also be completed.

SECTION 1

COMPARATIVE BALANCE SHEET
as of_____

	($000)	19___	19___	19___
		$	$	$
I.	CURRENT ASSETS:			
	Cash _____	_____	_____	_____
	Marketable Securities _____	_____	_____	_____
	Notes Receivable (Schedule A) _____	_____	_____	_____
	Accounts Receivable (Schedule B) ____	_____	_____	_____
	Bid Deposits (Schedule C) _____	_____	_____	_____
	Inventories _____	_____	_____	_____
	Prepaid Expenses _____	_____	_____	_____
	Other Current Assets:			
	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____
	TOTAL CURRENT ASSETS	$_____	$_____	$_____
II.	OTHER ASSETS:			
	Investment in Affiliates _____	$_____	$_____	$_____
	Other Non-Current Assets:			
	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____
	TOTAL OTHER ASSETS	$_____	$_____	$_____
III.	PROPERTY, PLANT & EQUIPMENT:			
	NET PROPERTY, PLANT & EQUIPMENT (Net of Depreciation)	$_____	$_____	$_____
	TOTAL ASSETS	$_____	$_____	$_____

LIABILITIES

	($000)	19___	19___	19___
		$	$	$
I.	CURRENT LIABILITIES			
	Notes Payable (Schedule D) _____	_____	_____	_____
	Accounts Payable (Schedule E) _____	_____	_____	_____
	Loans Payable (Schedule F) _____	_____	_____	_____
	Taxes Payable _____	_____	_____	_____
	Current Portion of Long Term Debt __	_____	_____	_____
	Accrued Liabilities _____	_____	_____	_____
	Other Current Liabilities:			
	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____
	TOTAL CURRENT LIABILITIES	$_____	$_____	$_____
II.	NON-CURRENT LIABILITIES			
	Long Term Debt _____	_____	_____	_____
	Other:			
	_____	_____	_____	_____
	_____	_____	_____	_____
	_____	_____	_____	_____
	TOTAL NON-CURRENT LIABILITIES	$_____	$_____	$_____
	TOTAL LIABILITIES	$_____	$_____	$_____
III.	EQUITY			
	Capital Stock Paid Up:			
	Common _____	$_____	$_____	$_____
	Preferred _____	$_____	$_____	$_____
	Surplus (net worth) _____	$_____	$_____	$_____
	TOTAL EQUITY	$_____	$_____	$_____
	TOTAL LIABILITIES AND EQUITY	**$_____**	**$_____**	**$_____**

DETAILS RELATIVE TO ASSETS

SCHEDULE A

Notes Receivable

(a) due within 90 days _____$_____
(b) due after 90 days _____$_____
(c) past due _____$_____

Receivable From: Name	Purpose	Date of Maturity	How Secured	Amount
				$
			TOTAL	$

SCHEDULE B

Aging of Accounts Receivable			**P A S T D U E**		
Current	1 to 30 days	31 to 60 days	61 to 90 days	Over 90 Days	Total
Trade $	$	$	$	$	$
Other $	$	$	$	$	$
Total $	$	$	$	$	$

SCHEDULE C

Bid Deposit Holder of Deposit: Name	Description	Amount
		$
	TOTAL	$

DETAILS RELATIVE TO LIABILITIES

SCHEDULE D

Notes Payable	(a) Not Past Due _____	$
	(b) Past Due _____	$

To Whom: Name	Purpose	When Due	Amount
			$
		TOTAL	$

SCHEDULE E

Accounts Payable	(a) Not Past Due _____	$
	(b) Past Due _____	$

To Whom: Name	Purpose	Date Payable	Amount
			$
		TOTAL	$

SCHEDULE F

Loans Payable	(a) Not Past Due _____	$
	(b) Past Due _____	$

To Whom: Name	Purpose	Date Payable	Amount
			$
		TOTAL	$

SECTION 2

COMPARATIVE STATEMENT OF INCOME & RETAINED EARNINGS
STATEMENT FOR PERIODS ENDED_____

	19___	19___	19___
SALES_____	$_____	$_____	$_____
Less:			
COST OF SALES:			
Labor _____	_____	_____	_____
Material _____	_____	_____	_____
Depreciation _____	_____	_____	_____
Other Overhead _____	_____	_____	_____
GROSS MARGIN	$_____	$_____	$_____
Less: Selling, General and Administrative Expenses _____	_____	_____	_____
Income Before Taxes _____	_____	_____	_____
Less: Income Taxes _____	_____	_____	_____
NET INCOME	$_____	$_____	$_____
Retained Earnings Beginning of Period _____	$_____	$_____	$_____
Less: Cash Dividends Paid ____	$_____	$_____	$_____
Other:_____	$_____	$_____	$_____
Net Retained Earnings End of Period _____	**$_____**	**$_____**	**$_____**

SECTION 3

COMPARATIVE STATEMENTS OF CASH FLOWS
FOR THE YEARS ENDED_____
Increase (Decrease) in Cash

	19___	19___	19___
Cash flows from operating activities:_____	$_____	$_____	$_____
Cash received from customers _____	_____	_____	_____
Cash paid to suppliers & employees _____	_____	_____	_____
Interest Paid _____	_____	_____	_____
Income Taxes Paid _____	_____	_____	_____
Miscellaneous receipts (payments) _____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
Net cash provided by operating. activities ___	$_____	$_____	$_____
Cash flows from investing activities:	_____	_____	_____
Proceeds from sale of equipment:_____	_____	_____	_____
Payments for purchase of equipment:_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
Net Cash Used in Investing activities:_____	$_____	$_____	$_____
Cash flows from financing activities:	_____	_____	_____
Net increase in short-term debt:	_____	_____	_____
Proceeds from issuance of long-term debt ___	_____	_____	_____
Repayment of long-term debt _____	_____	_____	_____
Payment of Dividends _____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
Net Cash provided by (used in) financing activities	$_____	$_____	$_____
Net increase (decrease) in cash _____	$_____	$_____	$_____
Cash at beginning of year _____	$_____	$_____	$_____
Cash at end of year _____	$_____	$_____	$_____

SECTION 4 - IDENTITY OF OWNERS

Who are the principal owners or shareholders of the business enterprise and approximately what percentage does each own?

Name	Percent Owned

SECTION 5 - PERFORMANCE BOND INFORMATION

Section 5 is only applicable to solicitations in which the Proposer is required to provide a performance bond.

Names and addresses of bonding company or companies that have agreed to furnish the performance bond required by the Contract.

Name	Address	Amount	Expiration Date
		$	

SECTION 6 - SUBCONTRACTS

What parts of this Contract, if any, does Proposer expect to subcontract?

Portion of Work	Name and Address of Proposed Subcontractor, if known

SECTION 7 - CERTIFICATION

I certify that the attached financial statements for this Proposal properly reflect the financial position of the company for the periods indicated on the financials.

_____ _____
Chief Financial Officer Date

PART VIII -VERIFICATION AND ACKNOWLEDGMENT

STATE OF _____

COUNTY OF _____

On the _____ day of _____ 199__, before me personally came and appeared.

_____ by me known to be said person, who swore under oath as follows:

1. He/she is _____ of _____
(Print title) (Print name of firm)

2. He/she is duly authorizes to sign this Questionnaire on behalf of said firm and duly signed this document pursuant to said authorization.

3. The answers to the questions set forth in this Questionnaire are true, accurate and complete.

4. He/she acknowledged and understands that the Questionnaire includes provisions which are deemed included in the Contract if awarded to the firm.

Sworn to before me this _____ day of _____, 199__

_____
(Notary Public)

APPENDIX B.12

NEGOTIATION MEMORANDUM SAMPLE FORMAT

Where the price was established based on an evaluation of cost elements and fee in the offeror's proposal, the negotiation memorandum should clearly set forth the various amounts as they were proposed, evaluated, and negotiated. For example:

Cost Elements:	**Proposed**	**Independent Cost Est.**	**Pre-Neg. Plan**	**Negotiated**
Direct Labor:	$	$	$	$
Engr.				
Mfg.				
Overhead:				
Engr.				
Mfg.				
Materials				
G&A				
Total Costs	_____	_____	_____	_____
Fee	_____	_____	_____	_____
Total Price	$	$	$	$

*Note***:** your narrative should discuss each of the cost elements and the fee/profit, describing how the final negotiated amount for each element and profit was determined. You should reference the Pre-Negotiation Plan objectives (if one was prepared), or the Independent Cost Estimate, in your narrative.

APPENDIX B.13

WARRANTY & GUARANTEE REGISTER

MARTA

CPB – Senoia Intermodal Facility Date: 7/10/97

Item Number	Spec Section	Warranty/Grantee Description	Providing Company	Expiration Date	Company Address
1	XXX	General Construction	Beers Construction	6/15/97	70 Ellis Street, N.E. Atlanta, GA 30303
2	7180	Water Repellant Coatings	Metro Waterproofing, Inc.	6/15/01	2935 Alcove Drive Scottdale, GA 30079
3	7411	Performed Metal Roofing	Installer: Yancey & Jamison	6/15/16	470 Bakers Ferry Road Atlanta, GA 30362
3	7411	Metal Roofing	Manufacturer: Fabral	6/15/16	3449 Hempland Road Lancaster, PA 17601
4	7532	Loose Laid Membrane Roofing	Installer: Standard Roofing	6/14/16	Post Office Box 48124 Atlanta, GA 30362
4	7532	Membrane Roofing	Manufacturer: TAMKO	6/14/16	Post Office Box 1404 Joplin, Miss 64802
5	7525	Modified Bituminous Sheet Roofing	Installer: Standard Roofing	6/14/16	Post Office 48124 Atlanta, GA 30362
5	7252	Bituminous Sheet Roofing	Manufacturer: TAMKO	6/14/16	Post Office 1404 Joplin, Miss 64802
6	7920	Sealants	Metro Waterproofing, Inc.	6/15/97	2935 Alcove Drive Scottdale, GA 30079
7	8311	Sliding Steel Door	Overhead Door Company	6/15/97	511 Stephens Road Atlanta, GA 30310
8	8331	Counter Fire Door	Overhead Door Company	6/15/97	511 Stephens Road Atlanta, GA 30310
9	8332	Insulated Sectional Doors	Overhead Door Company	6/15/97	511 Stephens Road Atlanta, GA 30310
10	8710	Hardware	Atlantic Hardware & Supply Company	6/15/97	5695 Oakbrook Parkway Norcross, GA 30093
11	8000	Installing Glazing	Glasstream	6/15/01	884 Kurtz Road Marietta, GA 30066

APPENDIX B.14
CONTRACT CLOSEOUT CHECK LIST

Memorandum

Date: **3-Jan-98**

To: **Director of Construction and Contract Administration**

From: **Resident Engineer**

Subject: **Contract CF720, North Point Station and Parking Deck Contract Closeout**

This is to advise that Contract CF720, North Point Station and Parking Deck, is ready for formal closeout by the ARTA Board. The Contract completion date was December 7, 1997. The final Contract amount is $42,657,320.00, leaving a Contingency balance of $226,181.00.

The tabulation below is a complete checklist of closeout actions, reflecting their current status.

ITEM	STATUS	
1. Certificates of Beneficial Occupancy/Substantial Completion	Complete	6/2/97
2. Punch List	Complete	7/17/97
3. Liquidated Damages	N/A	N/A
4. Temporary Construction Easement Signoffs	Complete	5/20/97
5. Change Orders Issued	Complete	6/18/97
6. Claims	Closed	4/6/97
7. Final Quantities	Agreed	5/2/97
8. Equipment/System Testing	Accepted	7/8/97
9. Spare Parts/Spare Materials	Received	8/14/97
10. Operation & Maintenance Manuals	Received	7/27/97
11. Warranties	Accepted	8/24/97
12. Project Record Documents	Accepted	9/2/97
13. Final Corrected Shop Drawings	Accepted	10/12/97
14. Product Data Book	Accepted	10/12/97
15. Final Labor Summary	Received	11/14/97
16. List of Subcontractors	Received	11/14/97
17. Affidavit of Final Payment	Received	12/7/97
18. Final Payment	Processed	12/20/97
19. Final Marta Audit	Complete	11/21/97
20. Certificate of Completion	Complete	12/7/97
21. Sign Offs by County & State	County Pending	
22. Contract Files & Closeout Book	Forecast Comp.	1/15/98

EXHIBIT A

APPENDIX B.15
REQUEST FOR PROPOSAL NO. 89964
FLEET VEHICLE SERVICES
SPECIAL TERMS AND CONDITIONS

I. BACKGROUND

A. Vanpool Incentive Program (VIP) Fleet

The Pace Vanpool Incentive Program (VIP) officially launched in November 1991 is a subsidized program available within the suburban six county Northeastern Illinois area. VIP trips can either originate or terminate within the Pace service area. Through October 1999 the VIP service fleet size was approximately 375 vans with a total of 320 vans in operation. Vans are utilized primarily to take employees to and from work.

Pace anticipates a minimum annual growth rate of 40 vans per year, which would place the fleet size at approximately 500 vans with a total of 440 vans in operation by the end of 2002. However, Pace is not committed to having any minimum number of vans in operation.

B. Pace Non-Revenue Fleet

Pace's non-revenue fleet consists of approximately 130 owned and leased passenger sedans and service vehicles that are located and operated at various Pace-owned facilities within the six county Northeastern Illinois area. The majority of vehicles are utilized by Pace staff to conduct Pace related business activities.

II. SCOPE OF WORK

Pace, the Suburban Bus Division of the Regional Transportation Authority, is seeking proposals from qualified companies to provide fleet vehicle services for its Vanpool fleet and non-revenue fleet. These services will include vehicle leasing, fleet vehicle management, fuel credit card and accident management/subrogation services. All firms wishing to submit proposals may do so for any or all of the services required.

Pace will evaluate each completed proposal submitted and select either a total package or select elements of a particular proposal which provide Pace with the most cost effective and efficient means of operating its vanpool and non-revenue fleet vehicle program.

The elements of the scope of work are:

- Vehicle Leasing Services
- Management Services
- Fuel Credit Card Services
- Accident Management/Subrogation Administration

III. PROPOSAL FORMAT AND VENDOR RESPONSE

Responses to this RFP must correlate with the alpha numeric characters in the RFP. Each item in the RFP should be addressed in the proposal.

IV. COMPANY INFORMATION

All information requested in this section must be addressed in the offeror's proposal with the exception of vendors submitting a proposal for vehicle leasing services only. Please limit your responses to two or three pages. Offerors must provide information on the following:

A. A history and overview of your firm to include number and location of offices in the U.S., list the total number of customers, list the number of customers with a fleet size greater than 500 vehicles and your average fleet size. The legal name of your company, if doing business under some name other than that by which the company is commonly recognized. If the company is owned or controlled by a parent organization, offerors are requested to provide the name of that organization, its address and the name and title of the person responsible for your business unit.

B. Provide three current contacts with telephone numbers and addresses from clients for each of the elements listed in Scope of Work that closely reflects Pace's fleet management requirements. Include one contact from each of the following categories: oldest, largest and newest.

C. A description of the firm's experience and a description of the experience and training of all key individuals associated with the project. Proposals should detail all firm and individual experience relevant to the types of service described in this RFP.

D. An organizational chart with job descriptions of key individuals assigned to the project. Job descriptions should be specific to the project.

E. Identify the unique strengths of your company and how they can provide the best fleet vehicle services for Pace.

F. Discuss the top three (3) distinctions between your company and its competitors.

G. Identify the number of customers and average fleet size that each of your salesman/representative oversees. How many calls per day does he/she average and response time.

H. Provide the company name, contact, phone number and fleet size of at least two (2) accounts that have left your company within the past two years.

I. Describe how your company performs quarterly, semi or annual fleet reviews with your clients and the process of how these reviews are conducted.

J. Describe in detail all charges, administrative fees, processing fees, mark-ups, etc. in a "fee schedule". This should include, as examples, subrogation fees, accident report fees, etc.

K. Describe the mediation procedure for a customer complaint about one of your employees or vendors.

L. Identify how many of your clients use each of the following services:

- Preventative Maintenance
- Vehicle Maintenance Assistance
- Emergency Roadside Assistance
- Accident Management/Subrogation Service
- Fuel Service

V. VEHICLE LEASING

All companies submitting proposals for this portion of the current RFP must comply with the specifications listed below in their proposal to assure an accurate and fair evaluation:

Quantity and Term

X The number of vehicles to be considered as part of the leasing portion of this RFP will be a minimum of 41 vehicles up to a maximum of 45 vehicles for the 2000 model year (up to 5 of which may be station wagons) and up to an additional 8 vehicles for the 2001 model year). Vehicles may be leased up to the end of the two year contract with complete two year lease periods guaranteed at the proposed pricing.

X Vehicle lease terms shall be for a base period of 24 months with an option to extend the lease period for an additional 12 months if Pace chooses to do so and informs the leasing agent at least three months prior to the end of the current lease period.

Pricing

X Pricing quoted in the proposal shall be for the duration of the contract period and for the length of any lease entered into during the contract period. It shall include all costs associated with the preparation of all paperwork necessary to procure and the actual procurement of all vehicle titles, licenses, and any other miscellaneous fees.

X The lease pricing will be based on an annual usage of 15,000 miles. The proposal will specify any additional per mile charges should this mileage be exceeded.

Specifications

X Leased vehicles shall be those of the current model year as determined by the date on which the vehicles are formally requested.

X Vehicle warranty will be bumper to bumper for a minimum of 3 years or 36,000 miles and a 24 hour/7 day roadside driver assistance program will be provided.

X All pre-delivery vehicle servicing will be performed in accordance with accepted new car delivery preparation standards.

X Vehicle specifications listed below are for a mid-size, 5 passenger, 4 door sedan, (or station wagon) front wheel drive, gasoline powered, automobile that fully complies with the Clean Fuel Fleet Program Requirements of the Illinois Environmental Protection Agency. **Specifically, the engine must be certified by the United States Environmental Protection Agency (EPA) to be a gasoline powered, Low Emission Vehicle (LEV) to comply with required clean air specifications**.

- All standard equipment with no deletions
- Engine will be LEV compliant, gasoline powered
- Transmission: 4 speed automatic
- Steering: power
- Brakes: power disc
- Air Conditioning: To include factory installed air conditioning , complete tinted glass, and all heavy duty equipment normally required as part of a manufacturer's air conditioning installation.
- Cruise control
- Rear window defroster, electric
- Mirrors: interior rearview (day/night), exterior LH & RH remote
  Seating: cloth, front buckets with console, rear full width bench
- Full interior carpeting with floor mats
- Radio: AM / FM stereo

- Tires: new all season, steel belted radials (BSW) with standard wheels / covers and a space saver spare
- Body side molding
- Multi speed windshield washers with intermittent and washers
- Tilt steering wheel
- Power windows
- Power door locks
- Air bags: driver and front passenger
- Color of interior and exterior to be selected at time of order from manufacturer's standard selections

This element will be awarded on the lowest responsive and responsible total price of all items listed in Exhibit C for (Vehicle Leasing).

VI. VEHICLE MAINTENANCE AND MANAGEMENT SERVICES

Firms are to submit monthly per vehicle cost quotations and identify any discounts that they can offer associated with providing Fleet Maintenance and Fleet Administration for approximately 580 revenue and non-revenue passenger type vehicles and service vans. (See the attached schedule of vehicles.) Firms are to submit pricing based on services listed below and may list additional services that they are capable of providing along with per unit pricing for each additional service in Exhibit C. Pace may choose to select additional proposed services, but will not be required to do so.

The scope of services Pace is seeking under this section include the following:

A. Driver support to coordinate repairs and minimize vehicle downtime
B. Cost and quality controls for vehicle repairs
C. Fleet management support and recommendations
D. Driver DMV reviews/checks
E. Emergency roadside assistance
F. Quarterly metrics for costs and services

Services listed below will be considered minimum and must be identified and addressed in your proposal:

A. VEHICLE RELATED

Vendor will assume oversight responsibility for all scheduled and unscheduled maintenance of Pace owned and leased revenue and non-revenue passenger and service vehicles.

1. Preventive Maintenance (PM)
   a. How is the PM schedule determined and documented?
   b. How would PM exceptions be handled and at what point would Pace be notified?
   c. Does your firm issue PM coupons?
   d. How are these coupons issued?
   e. How is a customer notified when a PM is due?
   f. What controls do you have in place to preclude unauthorized use of services, such as a lost maintenance coupon?
   g. How is PM service documented (PMA, PMB)?
   h. Describe the support process for a repair discovery during a PM service. (Who contacts your company - the vendor or the customer, what if another vendor is required to do the service - how is this accomplished/handled?)
   i. Describe the process of documenting the PM from initiation to closure.
   j. Describe in detail your firm's procedure on how you would monitor maintenance work being performed on a vehicle without the use of the maintenance coupon book. Describe how your firm identifies that the work was performed so it will not appear, via the exception report, that the driver did not have the work done.

2. Maintenance and Repair
   a. Include service providers for various types of repair and maintenance work and any applicable discounts that Pace would realize when using these vendors.
   b. Describe your firm's capabilities for providing 24 / 7 driver's aide with regards to emergency roadside assistance. How do you handle after normal business hour maintenance problems?
   c. Furnish a description of how your vehicle maintenance procedures work and what types of services are included in your firm's maintenance program: (loaner vehicle service, rental vehicle service, vehicle drop off, driver pick up, etc.).
   d. Describe your firm's criteria for evaluating suggested repairs, verifying the fairness of pricing, and authorizing unscheduled repairs.
   e. Describe what a driver should do if there is not a dealership or repair facility that is an authorized facility under your program. What steps are necessary to add a dealership or repair facility as an authorized facility under your program.
   f. Describe your billing procedures for non-approved participating repair facilities.
   g. Describe how a repair facility used by Pace which is not a national account or approved by your company become approved and direct bill your company.
   h. Describe how you track services provided for reporting services and describe the billing for any maintenance markups.

i. Describe the process for documenting the vehicle repair service from initiation to closure.
j. How do you insure the quality of your program and services?
k. Do you screen companies in your body shop network? If so, describe the process.
l. Describe what controls you have in place to ensure that only necessary maintenance is performed on Pace's vehicles.
m. Describe your firm's strategies for minimizing repair times and driver downtime.
n. Describe your firm's process for monitoring the repair process (time, labor rates, parts used, quality of repair and driver satisfaction).
o. Describe the support process in the event that a vehicle requires repair service but is under a manufacturer or repair facility warranty.
p. Describe what government pricing you can provide for tires through your fleet vendors.
q. The company selected is required to provide the following maintenance and repair related information/reports for Pace:
   - Monthly Reports
     Summary cost reports (body repairs, mechanical repairs, glass, car rentals, etc.)
   - Custom Reports as Requested
   - Information Processing
     Accept weekly download of driver information from Pace.
     Accept monthly download of vehicle odometer readings from Pace.
   - Quarterly Metrics
     Pace trends (average cost of repairs, average number of days for repairs, etc.)
     Pace performance vs. other accounts.
     Vendor performance vs. Industry (average cost of repairs, average number of days for repairs, etc.).
   - Semi-Annual Review
     Pace trends.
     Industry trends.
     Pace opportunities.

3. Warranty Related
   a. Describe your firm's warranty monitoring and management warranty claim
   b. service. How does your firm secure extended warranty (out of warranty) non-warranty items?
   c. Describe your recovery rate for the above? Identify how many warranty claims were submitted, and the number returned and amount received.

4. Sales Related
   a. Describe your firm's ability to provide vehicle disposal and your firms remarketing procedures. Is it done geographically?
   b. How do you compare to AMR clean regarding sale of vehicles.
   c. Describe what percentage of vehicles sold are sent to auction for resale.

d. Provide your process for insuring that Pace's liability for bodily injury and property damage ends once a vehicle is released to your firm's auto salvager or disposal vendor. Describe when Pace's liability ends on the sale of vehicle and provide any existing contract language which describes this process.

B. BILLING

1. Describe your firm's billing procedures along with any reserve deposits or initial fee requirements.
2. Describe your firm's ability to provide tax-exempt billing for Pace, or to provide reports to Pace that will show all taxes paid in a format that will aid Pace in retrieving these taxes from the taxing agencies.
3. Describe your service level regarding vendor payment of national chains and independent vendors.
4. Describe your process of billing Pace on a monthly basis.
5. Describe in detail your billing format. Is your firm able to provide summary billing? And is your summary billing Pace-defined or canned?
6. Describe how your company provides electronic auditing and payment of maintenance billing to your vendors in detail.
7. Pace requires that all monthly charges appearing on the monthly billing statement are fully explained, either within the bill or in a supplementary schedule. Describe how your firm is able to address this concern.

C. COMPUTER SOFTWARE/REPORTS AND INFORMATION PROCESSING

1. Vendor will maintain detailed, computerized maintenance records on each vehicle and current data on the entire fleet.
2. Describe the various types of service and management reports available through your company, as well as your ability to provide customized report. Identify any additional cost for customized reports.
3. Describe your firm's ability to perform maintenance analysis identifying excessive consumption or repair volumes (exception reports). Identify their frequency, what percentage of the fleet is sampled, and the ability to provide personalized reports. Does your system allow Pace to be immediately notified as soon as a vehicle is outside the acceptable standard/range established by Pace? If so, how is it done?
4. Describe your firm's ability to provide information to and collect information from clients via the Internet: i.e. on-line report generation, account access, inputting of client vehicle information such as mileage or extra vehicle services.
5. Describe your firm's ability to accept reports from different companies, i.e. fuel card programs, prior maintenance services etc. into your system for the purpose of generating accurate and complete vehicle history reports.

6. Describe the type and number of maintenance/management reports available and their frequency. Describe and provide samples of the type of "standard" fleet reports available on your system.
7. Describe how your firm would handle the transition of Pace fleet information from Pace's present fleet management provider into your program? Describe your company's strategy to ensure a seamless transition if your company is selected.
8. Describe how the computer system you provide will operate as a standalone system to support all fleet operations activity regardless of the programs utilized by your company.
9. Describe in detail how your computer system you provide to Pace accepts data downloads from other sources other than your own?

D. CUSTOMER SERVICE RELATED

1. Explain your company's toll free number for customers to access repair service.
2. Explain what hours and days these services are in operation.
3. Describe the qualifications and experience of your employees regarding these services.
4. Identify what other responsibilities your maintenance personnel has other than handling maintenance related calls in detail.
5. Describe the average number of calls your maintenance management department receives each day and each week.
6. Describe the service levels regarding:
   When calls are answered?
   Response time?
   Both national chains and independent vendors
7. Describe if your company performs quarterly, semi or annual fleet reviews with your clients.
8. Describe what type of documentation is presented at these reviews. Who conducts these reviews? Please provide samples of these reports.
9. Describe your capabilities in providing in-house reports to Pace on a monthly, quarterly, semi or annual basis.
10. Describe the mediation procedure for a customer complaint about one of your employees or one of your vendors.

E. ADMINISTRATION

1. Pace prefers that the selected vendor's staff (not a third party) handle the initial call from Pace VIP drivers, even after normal business hours . Describe your call center.
2. Describe your capabilities in providing Pace with a dedicated toll-free number for its VIP drivers.
3. Describe your firm's capabilities in providing Internet capabilities for retrieving fleet related information, sending driver/fleet related information, etc.

4. Describe your customers' data retrieval capabilities on fleet related costs, services, information, etc.. How long does it take for maintenance and/or fuel related purchases to become available (12 hours, 24 hours, 2 days, etc.). Do you have modem based on-line informational retrieval capabilities?
5. Describe information contained in your vehicle maintenance coupon booklet. Can it be customized, specific to a vehicle, etc.
6. Describe how you survey your customers to determine satisfaction with staff, fleet vendor services, etc.
7. Describe your firm's ability to offer Visa or Mastercard type charge capabilities for Pace. A card would not be issued to Pace but would be available via your firm for certain services; rental car, limo service, repair facility requires immediate payment, etc. A Pace staff person would be contacted by your firm to authorize a charge for a Pace driver via this mechanism.
8. Describe your firm's process in providing base monthly per vehicle cost and schedule of discounts based on incremental volume associated with fleet management
9. Describe your firm's emergency roadside assistance program. How do you evaluate and/or grade vendors utilized in your companies emergency roadside assistance program?
10. Describe whether your firm offers more than one maintenance or gas card program, and identify them and their associated costs in Exhibit C.
11. Describe all controls built into your program(s) and the nature of your review process.
12. Describe the process to remove a vehicle from service.
13. Describe how Pace's fleet information (fuel consumption/cost, maintenance repair history/costs, accident history, etc.) can be integrated into other industry fleet software management systems (i.e., E:Track).

This element of the RFP as part of the overall evaluation, technical factors will be worth 60% and price is worth 40%.

VII. FUEL CARD MANAGEMENT SERVICES

Firms submitting proposals for this portion of the RFP should be certain to provide information concerning their ability to comply with all of the requirements listed below as well as any other information regarding their ability to initiate and maintain a program that will satisfy Pace's needs. The fuel cards which are provided by your firm must be vehicle specific with the vehicle license number and/or Pace assigned number appearing on the card. In addition, Pace requires that the card be tax (federal motor fuel, state and county) exempt and minimally, have the ability to purchase fuel at two (2) different oil company service stations.

1. Describe your ability to offer a single/universal fueling charge card that is tax exempt and accepted at a variety of name brand stations throughout Pace's six county service area. List the different companies that will accept your card.
2. Describe your companies ability to provide assistance to drivers that may experience problems with your card through a 24 / 7 customer service 1-800 help line.
3. Describe your companies identification and verification capabilities for drivers who will be using your fuel card, i.e., ID#, single card multiple PIN #, etc.
4. Describe your billing procedures with respect to the types of information you are capable of providing and your ability to provide Pace with billing that will exclude sale tax.
5. Describe your selection of reports and your ability to custom design reports should Pace require a different format.
6. Describe your tracking program that would highlight excessive fuel purchases on any card and your method of notifying your client.
7. Describe your ability to forward information concerning fuel purchases and related reports to a third party fleet administration vendor for the purpose of maintaining all vehicle information at a central location for comprehensive reporting purposes.
8. If your company is notified to cancel a fuel card, how long does it take before the card is shut-off with the fuel card company provider? Describe the steps required to cancel fuel cards. When does Pace's liability end and what is the maximum dollar amount that Pace is responsible for during that period.
9. Describe procedures you have in place to prevent as ell as detect abuse/misuse of fuel cards.
10. From the time your company is notified to order a fuel card for a vehicle, how long does it take to receive the card?
11. List all fuel cards (including tax exempt) your company is able to interface and receive data from.
12. List all data you are able to receive and formats needed to receive it.
13. Describe your company's ability to provide real-time card usage information via Internet or software driven electronic communications.

This element of the RFP as part of the overall evaluation, price is worth 60% and technical factors are worth 40%.

VIII. ACCIDENT/SUBROGATION SERVICES

Furnish a description of how you firm would manage all administrative details for all accident reports/repairs and subrogation processes including:

1. Towing arrangements
2. Car/van rental arrangements
3. Appraisals and photographs
4. Salvage
5. Claims recovery assistance
6. Coordination of subrogation and loss recovery

7. Third party physical damage claims
8. Reporting associated with accident, repair, subrogation claims, recoveries and legal proceedings
9. Accident activity reports

Included in the description should be an estimate of expenses for a complete year, including fees, subrogation recoveries etc., based on the "applicable fee schedule" and 100 accidents/incidents per year. As part of the accident administration, the vendor will be required to receive telephonic reports of all accidents involving property damage. The associated costs for this service must be identified in Exhibit C. Pace prefers that the selected vendor have the capability of providing immediate on-line access to all information, including accident damage photographs.

Minimally, the selected vendor will be required to provide the following information:

1. Monthly listing of all accidents that have been reported with an indication of liability.
2. Set-up sheet for each subrogation file that is opened.
3. Quarterly subrogation activity report showing the current status of each file.
4. Monthly report showing damages recovered for the reporting period and the cost of repairs for each vehicle. Funds recovered should accompany this report.
5. Semi-annual report to include total cost of repairs and total of recovered damages.
6. Semi-annual report showing Pace trends, industry trends, and Pace opportunities.

For this phase of the RFP as part of the overall evaluation, price is worth 50% and technical factors are worth 50%.

IX. PROPOSAL EVALUATION

Pace staff will evaluate the proposals and develop a list of firms to interview on the basis of the following criteria, listed in descending order of importance, however, for each of the services to be provided as identified in the scope of work. As noted on the previous pages Vehicle Leasing will be determined on 100% price. Vehicle Maintenance and Management Services will be evaluated 60% technical and 40% cost, Fuel Card Management Services will be evaluated 60% cost and 40% technical and Accident/Subrogation Services will be evaluated 50% cost and 50% technical.

A. The quality and comprehensiveness of each element, i.e., Vehicle Leasing Services, Vehicle Maintenance and Management Services, etc. that your firm is addressing in this proposal.

B The firm's experience and history on comparable projects, client relationship records, and references on similar projects.

C. The firm's understanding of the requirements, deliverables, technical approach and an explanation of what services your firm will provide to meet Pace's needs.

D. Procedures describing firm's monitoring controls, reporting methods, report detail and documentation and electronic data interchange capabilities between Pace, and service vendors and your firm or other firms.

E. Quality of your firm's surveys, procedures, past practices in monitoring customer needs and providing quality and responsive customer service (including problem intervention, resolution, follow-up, satisfaction, etc).

F. Price (Factors vary for type of services to be provided as identified in the proposal).

X. AWARD OF CONTRACT

Pace reserves the right to award one contract or multiple contracts without discussion. Offerors should take this into consideration and provide their best proposal at their most competitive price. Proposals can be submitted for individual elements of this procurement.

XI. DURATION OF CONTRACT

The contract term with the exception of the Vehicle Leasing element will be for three (3) years from the date of award and include two one (1) year options.

XII. PROPOSAL SUBMITTAL REQUIREMENTS

Please limit your responses to three or four pages for each element proposed.

A. Price proposal to be filled in and submitted separately but concurrently in the #10 envelope marked "Price Proposal".

B. FTA/IDOT/RTA requirements must be submitted with proposal (Pages 13-18 in Exhibit B).

C. Non-Collusion Affidavit and Contractor Certification must be signed and notarized as indicated.

D. Submit four (4) copies of your proposal These copies will be distributed to the evaluation team. DO NOT INCLUDE YOUR PRICING INFORMATION with your technical proposal.

E. Only one copy of the contract, affidavits, compliance requirements and price proposal are needed.

XIII. CONTRACT DOCUMENTS

Exhibit A: Special Terms and Conditions.

Exhibit B: Instructions to Contractors & General Contract Provisions.

Exhibit C: Price Proposal Page.

Exhibit D: Insurance Requirements.

APPENDIX B.16

PIGGYBACKING WORKSHEET

Definition: *Piggybacking is the post-award use of a contractual document/process that allows someone who was not contemplated in the original procurement to purchase the same supplies/equipment through that original document/process.* ("FTA Dear Colleague" letter, October 1, 1998).

In order to assist in the performance of your review, to determine if a situation exists where you may be able to participate in the piggybacking (assignment) of an existing agreement, the following considerations are provided. Ensure that your final file includes documentation substantiating your determination.

WORKSHEET	YES	NO
1. Have you obtained a copy of the contract and the solicitation document, including the specifications and any Buy America Pre-award or Post-Delivery audits?		
2. Does the solicitation and contract contain an express “assignability” clause that provides for the assignment of all or part of the specified deliverables?		
3. Did the Contractor submit the “certifications’ required by Federal regulations? See BPPM Section 4.3.3.2.		
4. Does the contract contain the clauses required by Federal regulations? See BPPM Appendix A1.		
5. Were the piggybacking quantities included in the original solicitation; i.e., were they in the original bid and were they evaluated as part of the contract award decision?		
6. If this is an indefinite quantity contract, did the original solicitation and resultant contract contain both a minimum and maximum quantity, and did these represent the reasonably foreseeable needs of the parties to the contract?		
7. If this piggybacking action represents the exercise of an option in the contract, is the option provision still valid or has it expired?		
8. Does your State law allow for the procedures used by the original contracting agency: e.g., negotiations vs. sealed bids?		

WORKSHEET	YES	NO
9. Was a cost or price analysis performed by the original contracting agency documenting the reasonableness of the price? Obtain a copy for your files.		
10. Does the contract term comply with the five-year term limit established by FTA?		
11. Was there a proper evaluation of the bids or proposals? Include a copy of the analysis in your files.		
12. If you will require changes to the vehicles (deliverables), are they "within the scope" of the contract or are they "cardinal changes"? See BPPM Section 9.2.1.		

Note: This worksheet is based upon the policies and guidance expressed in (a) the FTA Administrator's "Dear Colleague" letter of October 1, 1998, (b) the *Best Practices Procurement Manual*, Section 6.3.3—*Joint Procurements of Rolling Stock and "Piggybacking,"* and (c) FTA Circular 4220.1E.

APPENDIX B.17

EXAMPLE OF STATEMENT OF QUALIFICATION OF SUBCONTRACTOR

FROM NEW YORK CITY TRANSIT AUTHORITY – ENGINEERING AND CONSTRUCTION DEPARTMENT

The statements herein are confidential and made solely for the information of the New York City Transit Authority in connection with the proposed subcontract with

_____
Name of General Contractor

_____
Address City State Zip Code

Under its general Contract No. _____with the New York City Transit Authority.

GENERAL INFORMATION

1. Name of proposed subcontractor: _____

2. Address: _____
(principal office) Address City State Zip Code

3. **If a corporation:**
When Incorporated _____
Vice-President's name _____
Secretary's name _____
Treasurer's name _____

If a partnership:
Date of Organization _____
Names and addresses of partners _____
_____
_____

4. Description of work to be done under proposed subcontract. Indicate clearly whether work involves labor only or labor and material. List principal items of materials, if any to be furnished.

_____

_____

_____

5. Total amount of proposed subcontract: $ _____

EXPERIENCE

6. How many years of experience? _____

7. Give, briefly, previous experience of directing officers including chief engineer and general superintendent on similar work.

NAME	PRESENT POSITION	YRS. OF CONSTRUCTION EXPERIENCE	MAGNITUDE AND TYPE OF WORK	WHAT CAPACITY

8. List principal contracts completed by present organization.

LOCATION	CONTRACT PRICE	CLASS OF WORK	PERCENT COMPLETED	NAME AND ADDRESS OF AWARDING PARTY

9. List contracts, if any, that present organization has on hand.

LOCATION	CONTRACT PRICE	CLASS OF WORK	PERCENT COMPLETED	NAME AND ADDRESS OF AWARDING PARTY

10. Give references of at least two engineers or architects for whom present organization has done similar work.

NAME	TELEPHONE NUMBER	ADDRESS	POSITION

11. Labor employed through _____

12. Give any supplemental information that the undersigned desires to submit.

_____

_____

The undersigned agrees to furnish the New York City Transit Authority additional or supplemental information concerning its financial and/or technical qualifications, when and as required.

_____ _____

Name Date

APPENDIX B.18
HIAWATHA LINE PUBLIC ART & DESIGN BUDGET

	Description of Commission	Design Phase Allocation	Estimated Additional Allocation for Construction Drawings	Fabrication and Installation Phase Max Allocation	Maximum Total Commission
1	System-Wide Interactive Artwork	$45,000	$5,000	Not Applicable	$50,000
2	Design Platform Surface Patterns	$23,500	$5,000	Not Applicable	$28,500
3	System-Wide Lighting Elements Color Scheme for Platform & Skyway Restoration of “Franklin” Marquee	$76,500	$8,500	Not Applicable	$85,000
4	Sequential Gateway	$31,500	$8,500	Not Applicable	$40,000
5	Landmark	$15,000	$5,000	$110,000	$130,000
6	Masonry Icons	$3,500	$1,500	$10,000	$15,000
7	Special Platform Surface Treatment Glass Windscreen Treatment Landmark	$16,000	$4,000	$90,000	$110,000
8	Community Tiles	$12,500	$2,500	$30,000	$45,000
9	Integrated Artwork	$10,000	$2,000	$68,000	$80,000
10	Translucent Photo Images Etched Glass for Towers and Windscreens	$17,000	$3,000	$100,000	$120,000
11	Metal Objects/Text in Canopy Joist Structure Canopy & Bus Shelter Pergola Sculpture	$17,000	$3,000	$90,000	$110,000
12	Metal Tree Grates Utility Access Covers Design Platform Surface Pattern Metal Paver Inserts & Inlay Imagery	$10,000	$2,000	$35,000	$47,000
13	Design Platform Surface Pattern Metal Paver Inserts & Inlay Imagery Canopy Drain Scuppers and Grills	$12,000	$3,000	$68,500	$83,500
14	Metal Railing Augmentation Metal Windscreen Overlay	$17,000	$3,000	$142,000	$162,000
15	Landmark	$10,000	$2,000	$68,000	$80,000
16	Bas-Relief or Ti1e Murals	$26,000	$4,000	$190,000	$220,000

APPENDIX B.19

MANDATORY PROCUREMENT STANDARDS WORKSHEET

No.	Element	FTA Circular 4220.1E Paragraph No.	Grantee Procurement Policy/Procedure Reference
1)	Written Standards of Conduct	7.c.	
2)	Contract Administration System	7.b.	
3)	Written Protest Procedures	7.l.	
4)	Prequalification System	8.d.	
5)	System for Ensuring Most Efficient and Economic Purchase	7.d.	
6)	Procurement Policies and Procedures	7.a.	
7)	Independent Cost Estimate	10.	
8)	A&E Geographic Preference	8.b.	
9)	Unreasonable Qualification Requirements	8.a.(1)	
10)	Unnecessary Experience and Excessive Bonding	8.a.(2)	
11)	Organizational Conflict of Interest	8.a.(5)	
12)	Arbitrary Action	8.a.(7)	
13)	Brand Name Restrictions	8.a.(6) and 8.c.	
14)	Geographic Preferences	8.b.	
15)	Contract Period of Performance Limitation	7.m.	
16)	Written Procurement Selection Procedures	8.c.	
17)	Solicitation Prequalification Criteria	8.d.	
18)	Award to Responsible Contractors	7.h.	
19)	Sound and Complete Agreement	15.	
20)	No Splitting [Micro-purchase]	9.a.	
21)	Fair and Reasonable Price Determination [Micro-purchase]	9.a.	
22)	Micro-Purchase Davis Bacon	9.a.	
23)	Price Quotations [Small Purchase]	9.b.	

No.	Element	FTA Circular 4220.1E Paragraph No.	Grantee Procurement Policy/Procedure Reference
24)	Clear, Accurate, and Complete Specification	8.c.(1), 9.c.(2)(b) & 9.c.(1)(a)	
25)	Adequate Competition - Two or More Competitors	9.c.(1)(b)	
26)	Firm Fixed Price [Sealed Bid]	9.c.(1)(c)	
27)	Selection on Price [Sealed Bid]	9.c.(1)(c)	
28)	Discussions Unnecessary [Sealed Bid]	9.c.(1)(d)	
29)	Advertised/Publicized	9.c. & d.	
30)	Adequate Solicitation	9.c.(2)(a) & 9.d.(2)	
31)	Sufficient Bid Time [Sealed Bid]	9.c.(2)(a)	
32)	Bid Opening [Sealed Bid]	9.c.(2)(c)	
33)	Responsiveness [Sealed Bid]	9.c.(2)(d)	
34)	Lowest Price [Sealed Bid]	9.c.(2)(d)	
35)	Rejecting Bids [Sealed Bid]	9.c.(2)(e)	
36)	Evaluation [RFP]	9.d.(1) & 9.d.(3)	
37)	Price and Other Factors [RFP]	9.d.(4)	
38)	Sole Source if Other Award is Infeasible	9.h.	
39)	Cost Analysis Required [Sole Source]	9.h.(2)	
40)	Evaluation of Options	9.i.(1)	
41)	Cost or Price Analysis	10.	
42)	Written Record of Procurement History	7.i.	
43)	Exercise of Options	9.i.(2)	
44)	Out of Scope Changes	9.h.	
45)	Advance Payments	12.a.	
46)	Progress Payments	12.b.	
47)	Time and Materials Contracts	7.j.	
48)	Cost Plus Percentage of Cost	10.e.	
49)	Liquidated Damages Provisions	13.	
50)	Qualifications Exclude Price [A&E]	9.e.	
51)	Serial Price Negotiations [A&E]	9.e.	

No.	Element	FTA Circular 4220.1E Paragraph No.	Grantee Procurement Policy/Procedure Reference
52)	Bid Security [Construction over $100,000]	11.a.	
53)	Performance Security [Construction over $100,000]	11.b.	
54)	Payment Security [Construction over $100,000]	11.c.	