

8. Procurement

PURPOSE OF THIS REVIEW AREA

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

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

Where Federal Transit Administration (FTA) funds are used in procurements for services or supplies, or where FTA-funded facilities or assets are used in revenue contracts, FTA Circular 4220.1F applies. FTA funds, even operating assistance, can be segregated from local funds. FTA Circular 4220.1F does not apply to wholly locally-funded capital procurements.

Please note that FTA Circular 4220.1F will be updated in fiscal year (FY) 2018 in order to incorporate the provisions of the Super Circular, 2 CFR part 200. Until that update is issued, when there is a conflict between FTA Circular 4220.1F and the Super Circular, the Super Circular supercedes.

Note to reviewers: For procurements reviewed that contain deficiencies related to statutory or regulatory requirements that may deem the procurements ineligible for Federal funding, discuss the appropriate corrective action with the FTA regional office and regional counsel.

QUESTIONS TO BE EXAMINED

1. Does the recipient have written procurement policies and procedures that include required state, local, and Federal provisions?
2. Does the recipient maintain written standards of conduct for its representatives engaged in the selection, award, and administration of FTA-funded contracts?
3. Does the recipient have and follow written procurement protest procedures?
4. Does the recipient make awards only to responsible contractors?
5. Does the recipient maintain records sufficient to detail the history of each procurement?
6. Does the recipient ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders?
7. Does the recipient ensure that it conducts all procurement transactions in a manner that provides full and open competition and does not restrict competition in its procurement process?
8. Did the recipient appropriately use each method of procurement?
9. Does the recipient procure Architectural Engineering (A&E) Services in accordance with 49 U.S.C. §5325(b)?

10. Does the recipient develop independent cost estimates and conduct cost and/or price analysis for each procurement action above the Simplified Acquisition Threshold?
11. Did the recipient include applicable federal clauses in FTA-funded procurements exceeding the micro-purchase limit and construction contracts over \$2,000?
12. Did the recipient include required certifications in solicitations and receive signed certifications from bidders as part of their bid or proposal, as applicable?
13. Did the recipient appropriately include and account for liquidated damages in its procurements?
14. Did the recipient approve, evaluate, and document change orders to procurements?
15. If the recipient included options in an FTA-funded procurement, did it base the quantity on its reasonably foreseeable need and evaluate the option price prior to awarding the contract?
16. If the recipient procured bus or rail rolling stock or replacement parts with FTA funds, did it adhere to the time limitations on placing orders against the contracts?
17. If the recipient purchased FTA-funded assets through a "piggyback" procurement method, did it comply with applicable requirements regarding inclusion of Federal requirements, assignability, and price, and no cardinal changes?
18. Did the recipient ensure that appropriate FTA approval was acquired for advance payments and that adequate protection was exercised for progress payments?
19. If the recipient procured buses with FTA funds, did it comply with requirements for bus testing reports?
20. If the recipient procured rolling stock with FTA funds, did it comply with pre-award and post-delivery audit requirements?
21. Does the recipient perform oversight of its subrecipients' FTA-funded procurement activities?

INFORMATION NEEDED FROM RECIPIENT

Recipient Information Request

- Current procurement policies and procedures
- State statute regarding A&E (qualifications-based) procurements (States only)
- Procurement standards of conduct policies
- Procurement protest procedures
- List of FTA-funded procurements conducted since the last review. Identify the following items for each award:
 1. Date
 2. Dollar value
 3. Type (professional service, architectural & engineering, operations management services, rolling stock, construction, materials and supplies)
 4. Method: (invitation for bid, request for proposal, pre-qualified bidders, sole source, single bid, brand name, award-to-other-than-low-bidder, piggyback, joint procurements, options)
 5. New Start or Small Start-related procurement
 6. Awarded by contractors or subrecipients
 7. Change order, if applicable
 8. Disadvantaged Business Enterprise (DBE) goal, if applicable
- List of protests received or denied since last review (Non-state recipients, only)
- List of revenue contracts awarded since the last review

P1. Does the recipient have written procurement policies and procedures that include required state, local, and Federal provisions?

BASIC REQUIREMENT

All recipients must have written procurement policies and procedures.

APPLICABILITY

All recipients

EXPLANATION

All recipients must have written procurement policies and procedures.

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

Non-state recipients. The non-Federal entity, including subrecipients of a state, must use its own documented procurement procedures which reflect applicable State, local, and tribal laws and regulations, and conform to applicable Federal law and the standards identified in 2 CFR part 200. Policies and procedures must explain how the recipient will ensure compliance with the standards and requirements identified in 2 CFR §§200.318 (General Procurement Standards) through 200.326 (Contract Provisions) including:

General procurement standards:

- **Contract oversight:** Recipients must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
- **Standards of conduct:** Recipients must maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent must participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity. If the recipient has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the recipient must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the recipient is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.
- **Unnecessary or duplicative items:** The recipient's procedures must avoid the acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.
- **Award to responsible contractors:** The recipient must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.
- **Procurement history:** The recipient must maintain records sufficient to detail the history of the procurement. These records will include, but are not necessarily limited to the following:

rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

- Time and Material contracts: The recipient may use time and material type contracts only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Since this contract type generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the recipient awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.
- Contract dispute resolution: The recipient alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims.

Competition:

- Full and open competition: All procurement transactions must be conducted in a manner that provides full and open competition. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:
 - Placing unreasonable requirements on firms in order for them to qualify to do business;
 - Requiring unnecessary experience and excessive bonding;
 - Noncompetitive pricing practices between firms or between affiliated companies;
 - Noncompetitive contracts to consultants that are on retainer contracts;
 - Organizational conflicts of interest;
 - Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and
 - Any arbitrary action in the procurement process.
- Geographic Preference: The recipient must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in 2 CFR part 200 preempts state licensing laws. When contracting for A&E services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.
- Procedures for procurement transactions: The recipient must have written procedures for procurement transactions. These procedures must ensure that all solicitations:
 - Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, must set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equivalent” description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offerors must be clearly stated; and

- Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.
- Prequalification: The recipient must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum full and open competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

Methods of procurement:

- Allowed methods of procurement: Recipients must use one of the following methods of procurement: (1) micro-purchases; (2) small purchase procedures; (3) sealed bid; (4) competitive proposals; or (5) non-competitive proposals.

Contract cost and price

- Cost or price analysis: Recipients must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.
- Profit: Recipients must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.
- Estimated costs: Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the recipient under 2 CFR part 200 Subpart E—Cost Principles. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.
- Cost plus: The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

Bonding requirements

- Bonding requirements: For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, FTA may accept the bonding policy and requirements of the non-Federal entity provided that FTA has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:
 - A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.
 - A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.
 - 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.

Contract provisions

- Contract provisions: Recipient’s contracts must contain the applicable provisions described in Appendix II to Part 200—Contract Provisions for non-Federal Entity Contracts Under Federal Awards.

Other requirements

- Exclusionary or discriminatory specification: Federal funds may not be used to support a procurement that uses an exclusionary or discriminatory specification.
- Buy America: Recipient’s procurements must comply with Buy America requirements in 49 U.S.C § 5323(j) and 49 CFR parts 661 and 663.

INDICATORS OF COMPLIANCE

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

DETERMINING COMPLIANCE

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

For non-state recipients, determine if the procurement policies and procedures address the items in the table below. If not, discuss on site with the recipient to determine and note why and how the recipient ensures compliance with the requirements.

Requirements	Addressed? (Y/N)	Page reference	Comments/Notes
General Procurement Standards			
Maintenance of contract oversight			
Maintenance of written standards of conduct			
Avoidance of unnecessary or duplicative items			
Contracting with responsible contractors			
Maintenance of written procurement history			
Use of time and material contracts			
Procedures for contract dispute resolution			
Competition			
Promotion of full and open competition			
Prohibition on geographic preference			
Procedures for procurement transactions			
Use and maintenance of prequalification lists			

Requirements	Addressed? (Y/N)	Page reference	Comments/Notes
Methods of procurement			
Allowed methods of procurement:			
DBE participation			
Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms			
Cost and price			
Cost or price analysis			
Negotiation of contractor profit			
Use of estimated costs			
Prohibition of cost plus contracts:			
Contract provisions			
Inclusion of required contract provisions			
Bonding requirements			
Bonding requirements for construction or facility improvement contracts			
Other requirements			
Prohibition of exclusionary or discriminatory specifications			
Compliance with Buy America			

POTENTIAL DEFICIENCY DETERMINATIONS

The state or non-state recipient is deficient if it does not have written procurement policies and procedures.

DEFICIENCY CODE: P1-1: Procurement policies and procedures not evident

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office procurement policies that include all required provisions.

The non-state recipient is deficient if it does not have written procedures for procurement transactions that ensure that all procurements 1) incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured and 2) identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

DEFICIENCY CODE: P1-2: Procurement transaction procedures missing or incomplete

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office procurement transaction procedures that include all required provisions.

Non-state recipients are deficient if procurement policies and procedures contain provisions that are contrary to the provisions outlined above or the recipient does not have a formal method to ensure compliance with the provisions.

DEFICIENCY CODE P1-3: Procurement policies and procedures not current/complete

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office revised procurement policies that include all required provisions and ensure compliance with 2 CFR 200.318 through 200.326.

GOVERNING DIRECTIVE

§200.317 Procurements by states

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

§200.318 General procurement standards

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

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

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

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

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

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

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

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

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

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

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

- (i) The actual cost of materials; and
- (ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

(2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

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

§200.319 Competition

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

- (1) Placing unreasonable requirements on firms in order for them to qualify to do business;
- (2) Requiring unnecessary experience and excessive bonding;
- (3) Noncompetitive pricing practices between firms or between affiliated companies;

- (4) Noncompetitive contracts to consultants that are on retainer contracts;
- (5) Organizational conflicts of interest;
- (6) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and
- (7) Any arbitrary action in the procurement process.

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

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

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

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

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

§200.320 Methods of procurement to be followed.

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

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

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

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

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

- (i) A complete, adequate, and realistic specification or purchase description is available;
- (ii) Two or more responsible bidders are willing and able to compete effectively for the business; and
- (iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

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

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

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

- (1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;
- (2) Proposals must be solicited from an adequate number of qualified sources;
- (3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;
- (4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and
- (5) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(e) [Reserved]

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

- (1) The item is available only from a single source;
- (2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
- (3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or
- (4) After solicitation of a number of sources, competition is determined inadequate.”

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

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

(b) Affirmative steps must include:

- (1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;
- (2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;
- (3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;
- (4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;
- (5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and
- (6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.”

§200.322 Procurement of recovered materials

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

§ 200.323 Contract cost and price

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

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

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

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

§200.325 Bonding requirements

“For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

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

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

(c) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.”

§200.326 Contract provisions

“The non-Federal entity's contracts must contain the applicable provisions described in Appendix II to Part 200—Contract Provisions for non-Federal Entity Contracts Under Federal Awards.”

Additional Guidance:

FTA Circular 4220.1F Chapter III

P2. Does the recipient maintain written standards of conduct for its representatives engaged in the selection, award, and administration of FTA-funded contracts?

BASIC REQUIREMENT

The recipient must have and implement written standards of conduct for those involved in its procurement and contract administration actions.

APPLICABILITY

All recipients

EXPLANATION

Recipients are required to maintain written standards of conduct governing the performance of their employees engaged in the award and administration of contracts supported by Federal funds. The standards must:

- Preclude any employee officer, agent, or board member or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing from participating in the election, award, or administration of a contract supported with FTA assistance. Such a conflict would arise when any of those previously listed has a financial or other interest in a firm considered for a contract.
- Include information that the recipient's officers, employees, or agents may neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements. The recipient may set minimum rules when the financial interest is not substantial or the gift is an unsolicited item of nominal value.
- Provide for disciplinary action for violation of such standards by the recipient's officers, employees, or agents, or by contractors or subrecipients or their agents to the extent permitted by state or local law or regulations.

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

INDICATORS OF COMPLIANCE

- a. *Does the recipient have written standards of conduct?*
- b. *Do the recipient's standards of conduct include all required elements?*

DETERMINING COMPLIANCE

Request and review the recipient's standards of conduct for procurement-related actions. These may be contained in the recipient's policies and procedures, in a separate document(s), or different documents for employees and governing board members. Please note that state and/or local laws may have requirements that are more restrictive than the Federal requirements below. Recipients must adhere to those state and local requirements.

Review standards of conduct to ensure that, at a minimum, they:

- Preclude any employee officer, agent, or board member or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing from participating in the election, award, or administration of a contract supported with FTA assistance.

- Include information that the recipient's officers, employees, or agents may neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements.
- Provide for disciplinary action for conflict of interest violations by the recipient's officers, employees, or agents, or by contractors or subrecipients or their agents to the extent permitted by state or local law or regulations.
- If the recipient has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, verify the written standards of conduct cover organizational conflicts of interest.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not have written standards of conduct.

DEFICIENCY CODE P2-1: No written standards of conduct

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office written standards of conduct that include all required provisions.

The recipient is deficient if its written standards of conduct do not contain required elements.

DEFICIENCY CODE P2-2: Incomplete standards of conduct

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office written standards of conduct that include all missing provisions.

GOVERNING DIRECTIVES

2 CFR 200.318 (c)(1) & (2)

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

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

FTA Master Agreement (23), Section 4

“a. Standards of Conduct. At a minimum, the Recipient agrees to, and assures that its Subrecipients will, establish and maintain written Standards of Conduct covering conflicts of interest that:

(1) Apply to the following individuals who have a present or potential financial interest, or other significant interest, such as a present or potential employment interest in the selection, award, or administration of a third party contract or subcontract:

(a) The Recipient or its Subrecipients' officers, employees, board members, or agents engaged in the selection, award, or administration of any third party agreement,

(b) The immediate family members or partners of those listed above in section 4.a(1)(a) of this Master Agreement, and

(c) An entity or organization that employs or is about to employ any person that has a relationship with the Recipient or its Subrecipient listed above in sections 4.a(1)(a) and (b) of this Master Agreement;

(2) Prohibit those individuals listed above in section 4.a(1) from:

(a) Engaging in any activities involving the Recipient or any of its Subrecipients' present or potential Third Party Participants at any tier, including selection, award, or administration of a third party agreement in which the individual has a present or potential financial or other significant interest, and

(b) Accepting a gratuity, favor, or anything of monetary value from a present or potential Third Party Participant in the Recipient's Underlying Agreement, unless the gift is unsolicited and has an insubstantial financial or nominal intrinsic value; and

(3) Establish penalties, sanctions, or other disciplinary actions for violations, as permitted by state or local law or regulations, that apply to those individuals listed above in section 4.a(1) and the Recipient or Subrecipient's Third Party Participants."

Additional Guidance:

FTA Circular. 4220.1F Chapter III

P3. Does the recipient have and follow written procurement protest procedures?

BASIC REQUIREMENT

The recipient must have and follow written protest procedures in compliance with all applicable state and local laws and regulations.

APPLICABILITY

All recipients

EXPLANATION

Recipients must have written protest procedures to handle and resolve protests of procurement actions.

FTA recipients are responsible for resolving all contractual and administrative issues arising out of their third party procurements, including source evaluation and selection, protests of awards, disputes, and claims using good administrative practices and sound business judgment. FTA encourages the recipient to use appropriate alternative dispute resolution procedures.

INDICATORS OF COMPLIANCE

a. *Does the recipient have written protest procedures?*

- b. *Has the recipient received any procurement protests since the last Comprehensive Review? If yes, did it follow its protest procedures?*

DETERMINING COMPLIANCE

Prior to the site visit, request and review the recipient's written protest procedures. Protest procedures may be contained in the recipient's policies and procedures or in a separate document.

Review milestone progress reports in TrAMS for protests noted. Onsite, ask the recipient for any bid protests received or denied. If there have been any protests during the review period, review related documentation to determine if the recipient followed its written protest procedures.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not have written protest procedures.

DEFICIENCY CODE P3-1: No written protest procedures

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office written protest procedures.

The recipient is deficient if it has written protest procedures and received protests, but did not follow its procedures.

DEFICIENCY CODE P3-2: Protest procedures not followed

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation of implemented procedures to ensure that its protest procedures are followed.

GOVERNING DIRECTIVES

2 CFR §200.318(k)

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

Guidance note regarding notifying FTA of Protests and Appeals to FTA

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

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

Thus, the FTA's role is limited to considering matters that are "primarily a Federal concern." Accordingly, Section (1)(b)(2)(a) of Chapter VII of FTA Circular 4220.1F, which provides for direct appeals to FTA, is no longer applicable.

P4. Does the recipient make awards only to responsible contractors?

APPLICABILITY

All recipients

BASIC REQUIREMENT

The recipient must only contract with responsible firms.

EXPLANATION

49 U.S.C. Section 5325 (j) requires recipients to make FTA-assisted contract awards only to “responsible” contractors possessing the ability, willingness, and integrity to perform successfully under the terms and conditions of the contract. Responsibility is determined by the recipient after receiving bids or proposals and before making contract award. FTA expects the prospective contractor to demonstrate affirmatively to the recipient that it qualifies as “responsible” and that its proposed subcontractors also qualify as “responsible.”

Factors that may be considered when making responsibility determinations include:

- Integrity and Ethics. Has a satisfactory record of integrity and business ethics.
- Public Policy. Is in compliance with the public policies of the Federal government.
- Administrative and Technical Capacity. Has the necessary organization, experience, accounting, and operational controls, and technical skills, or the ability to obtain them.
- Financial Resources. Has, or can obtain, sufficient financial resources to perform the contract.
- Performance Record. Is able to provide a satisfactory current and past performance record.

Recipients are also required to ensure, to the best of their knowledge and belief, that none of its principals, affiliates, third party contractors, and subcontractors is suspended, debarred, ineligible, or voluntarily excluded from participation in federally assisted transactions or procurements. For each third party contract expected to equal or exceed \$25,000, recipients must verify that the bidder is not excluded or disqualified by:

- Checking System for Award Management (SAM) Exclusions (at SAM.gov); or
- Collecting a certification; or
- Adding a clause or condition to the covered transaction.

FTA notes that affirmative actions, such as checking SAM.gov or including a requirement for a signed certification, are preferred. A best practice is for the recipient to print the screen with the results of the search to include in the award or procurement file, or to have a checklist noting when the SAM was reviewed.

2 CFR part 180 defines a principal as an officer, director, owner, partner, principal investigator, or other person with management or supervisory responsibilities related to a covered transaction. The recipient should have a similar review process for its principals as it does for its contractors and subrecipients regarding suspension and debarment.

In the event that a recipient becomes aware, after the award of a contract, that an excluded party is participating in a covered transaction, it must promptly inform the FTA regional office in writing of this information. The recipient may continue any covered transaction in existence at the time a party was debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded. The recipient is not required to continue the transaction and may consider termination. However, the recipient may not renew or extend the covered transaction (other than through a fully documented no-cost time extension) with the excluded party.

INDICATORS OF COMPLIANCE

- a. *Do procurement files contain documentation that the recipient made written responsibility determinations prior to award, considering all required information?*
- b. *Prior to award, does the recipient have documentation that third party contractors are not suspended or debarred?*
- c. *Did the recipient extend a contract with a contractor after it determined that the contractor had been suspended or debarred?*

DETERMINING COMPLIANCE

Review the recipient's policies and procedures for its process of conducting and documenting responsibility determinations and ensuring it does not award contracts to debarred or suspended contractors or individuals.

During the site visit, examine selected procurement files, in accordance with records sampling procedures, to determine if the recipient makes responsibility determinations prior to awarding contracts.

Examine responsibility determinations to verify that a written responsibility determination was made for each successful bidder prior to award and that consideration was given to matters such as:

- contractor integrity,
- compliance with public policy,
- record of past performance, and
- financial and technical resources.

Review contract and subrecipient files to verify if the recipient is determining that bidders were not excluded or disqualified before entering into any third party contracts. Document that the recipient makes this verification by:

- checking SAM Exclusions (at SAM.gov), or
- collecting a certification, or
- adding a clause or condition to the covered transaction.

Discuss with the recipient if it has become aware of any situation in which an excluded party is participating in a covered transaction. For the procurements reviewed, check SAM.gov to determine if the contractors are suspended or debarred. Determine if the recipient received FTA approval to extend (other than a no-cost extension) or renew a contract with a suspended or debarred contractor prior to taking those actions.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not make written responsibility determinations that include the required elements prior to award.

DEFICIENCY CODE P4-1: Responsibility determination deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation of an implemented process to make adequate responsibility determinations prior to award of a contract. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it has not verified that excluded parties are not participating prior to applicable awards or actions.

DEFICIENCY CODE P4-2: No verification that excluded parties are not participating

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office procedures for making excluded party determinations before entering into applicable transactions. For the next procurement, submit to FTA documentation that the required process was implemented.

The recipient is deficient if it extended (other than a no-cost time extension) or renewed a contract with a contractor subsequent to it becoming suspended or debarred, unless approved by FTA.

DEFICIENCY CODE P4-3: Excluded parties participating in covered transactions

SUGGESTED CORRECTIVE ACTION: The recipient must confer with the FTA regional office for any contract that was extended or renewed with a suspended or debarred contractor.

GOVERNING DIRECTIVES

49 U.S.C 5325(j) AWARDS TO RESPONSIBLE CONTRACTORS

“(1) IN GENERAL. Federal financial assistance under this chapter may be provided for contracts only if a recipient awards such contracts to responsible contractors possessing the ability to successfully perform under the terms and conditions of a proposed procurement.

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

- (A) the integrity of the contractor;
- (B) the contractor’s compliance with public policy;
- (C) the contractor’s past performance, including the performance reported in the Contractor Performance Assessment Reports required under section 5309(l)(2); and
- (D) the contractor’s financial and technical resources.”

2 CFR 180.300

“What must I do before I enter into a covered transaction with another person at the next lower tier? When you enter into a covered transaction with another person at the next lower tier, you must verify that the person with whom you intend to do business is not excluded or disqualified. You do this by: (a) Checking SAM Exclusions; or (b) Collecting a certification from that person; or (c) Adding a clause or condition to the covered transaction with that person.”

2 CFR 180.310

“What must I do if a Federal agency excludes a person with whom I am already doing business in a covered transaction? (a) You as a participant may continue covered transactions with an excluded person if the transactions were in existence when the agency excluded the person. However, you are not required to continue the transactions, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper and appropriate. (b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, unless the Federal agency responsible for the transaction grants an exception under §180.135.”

Additional Guidance:

FTA Master Agreement (23), Section 4(b)

FTA Circular 4220.1F Chapter III. d. (1) (c)

P5. Does the recipient maintain records sufficient to detail the history of each procurement?

BASIC REQUIREMENT

The recipient must maintain a written history of each procurement.

APPLICABILITY

All recipients

EXPLANATION

Recipients must maintain records sufficient to detail the significant history of a procurement. At a minimum, such records must include:

- Rationale for the method of procurement (i.e., request for proposals, invitation for bids, sole source)
- Selection of contract type (i.e., fixed price, cost reimbursement)
- Reason for contractor selection or rejection
- Basis for the contract price (i.e., cost/price analysis)

The extent of documentation should be reasonable. Documents included in a procurement history should be commensurate with the size and complexity of the procurement itself. FTA recognizes that these written records will vary greatly for different procurements.

INDICATORS OF COMPLIANCE

- a. Does the recipient have policies and/or procedures for documenting procurement files?*
- b. Do procurement files reviewed include required historical information?*

DETERMINING COMPLIANCE

Review recipient's policies and/or procedures for documenting procurement files to ensure that the policy requires, at a minimum, written documentation of the following:

- Rationale for the method of procurement (i.e., request for proposals, invitation for bids, sole source)
- Selection of contract type (i.e., fixed price, cost reimbursement)
- Reason for contractor selection or rejection
- Basis for the contract price (i.e., cost/price analysis)

During the site visit, examine selected procurement files, in accordance with records sampling procedures, to determine if procurement records include the minimum information listed above, as well as all documentation required in the recipient's policies and/or procedures.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if, for any procurement examined, procurement records do not contain the minimum documentation required and any additional information noted in the recipient's policies and/or procedures.

DEFICIENCY CODE P5-1: Incomplete written documentation of procurement history

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that the deficiencies identified in its record-keeping process have been corrected.

GOVERNING DIRECTIVE

2 CFR 200.318(j)

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

P6. Does the recipient ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders?

BASIC REQUIREMENT

Recipients must have oversight mechanisms to ensure that contractors perform in accordance with the terms of their contracts.

APPLICABILITY

All recipients

EXPLANATION

Recipients are required to have mechanisms in place that ensures that contractors perform in accordance with the terms, conditions, and specifications contained in their contracts or purchase orders. 2 CFR part 200 assigns responsibility to the recipient for resolving all contractual and administrative issues arising out of their third party procurements, including protests of awards, disputes, and claims using good administrative practices and sound business judgment. Neither FTA nor 2 CFR part 200 relieves the recipient of any responsibility under its contracts to resolve disagreements that may arise in the course of contract formation or contract administration.

Many FTA recipients assign contracting duties to technical, financial, or management personnel. If the recipient lacks qualified personnel within its organization to undertake the various procurement tasks, such as drafting specifications, evaluating contracts, or performing internal audits for the recipient, FTA expects the recipient to acquire the necessary services from sources outside the recipient’s organization. When using outside sources, the recipient should take appropriate steps to prevent or mitigate organizational conflicts of interest that would result in conflicting roles that might bias a contractor’s judgment or would result in unfair competitive advantage.

INDICATOR OF COMPLIANCE

- a. *Does the recipient conduct oversight of third party contractors to ensure performance in accordance with contract terms?*

DETERMINING COMPLIANCE

Prior to the site visit, review milestone progress reports in TrAMS and information provided by the recipient to determine if there were any contracts noted as having issues with the contractor not performing in accordance with the terms, conditions, and specification of their contracts or purchase orders. Review information in TrAMS on the resolution of disputes or claims. Ask the regional office if there are any procurements that should be reviewed for contractor performance issues. Prior to the site visit, request and review the recipient’s policies and procedures, which should include procedures to ensure contract performance and to resolve third party contracting issues, for any described contract administration processes and responsibilities.

Onsite, during review of selected procurements, determine if contract administration and oversight procedures are being implemented as described in policies and procedures. Determine if the recipient is monitoring the contractor’s on-time delivery of products or services as detailed in any contractual milestones. Determine if the recipient is analyzing the cause of cost overruns, scope changes, or slippages in delivery schedules or milestone dates.

For any procurements examined for which enforcement of contract administration remedies appeared to be warranted (i.e. liquidated damages, remedies related to milestone or delivery dates or performance standards), determine if appropriate actions were taken. In accordance with 2 CFR §200.318(j)(1), recipients must assert a high degree of oversight for time and materials type contracts in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if the recipient does not have documentation evidencing contract oversight pursuant to the its internal policies and/or procedures. For example, the recipient is deficient if non-performance of contractors is a persistent problem, with contractors either not performing in accordance with the terms and conditions of their contracts, or issues remain unresolved for a substantial length of time, and the recipient cannot demonstrate that it has taken remedial action in accordance with its policies and procedures.

DEFICIENCY CODE P6-1: Contract administration system not implemented

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office revised procurement procedures that include oversight procedures and remedies for non-performance, along with evidence of implementation.

GOVERNING DIRECTIVE

2 CFR 200.318(b)

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

P7. Does the recipient ensure that it conducts all procurement transactions in a manner that provides full and open competition and does not restrict competition in its procurement process?

BASIC REQUIREMENT

Procurement transactions must be non-restrictive.

APPLICABILITY

All recipients

EXPLANATION

Restricting Competition:

Recipients must conduct procurement transactions in a manner providing full and open competition. Recipients are prohibited from restricting competition in federally supported procurement transactions.

Some of the situations considered to be restrictive of competition include but are not limited to:

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

Geographic Preference:

Recipients are prohibited from specifying in-state or local geographical preferences, or evaluating bids or proposals in light of in-state or local geographic preferences, even if those preferences are imposed by state or local laws or regulations. In particular, 49 U.S.C. Section 5325(i) prohibits an FTA recipient from limiting its bus purchases to in-state dealers.

Exceptions expressly mandated or encouraged by law include the following:

- A&E Services. Geographic location may be a selection criterion if an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project. Although geographic preferences are permissible in procurements for A&E services, the reviewer should ensure that their use does not restrict competition (i.e., the use of geographic preference leaves only one or two qualified firms to bid on the contract).
- Licensing. A state may enforce its licensing requirements, provided that those requirements do not conflict with Federal law.
- Major Disaster or Emergency Relief. Federal assistance awarded under the Stafford Act, 42 U.S.C. Section 5150, to support contracts and agreements for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities permits a preference, to the extent feasible and practicable, for organizations, firms, and individuals residing or doing business primarily in an area affected by a major disaster or emergency.

Section 418 of the fiscal year (FY) 2015 Appropriations Act and Section 415 of the Consolidated Appropriations Act, 2016, Public Law 114-113 (FY 2016 Appropriations Act) prohibit FTA from using FY2015 or FY2016 funds to implement, administer, or enforce the prohibition of geographic preferences under 49 CFR 18.36(c)(2), (now 2 CFR 200.319(b)) for construction hiring purposes. "Construction hiring purposes" means hiring of the construction labor workforce for a construction project. Section 418 applies to all FTA awards, including awards funded under the Hurricane Sandy Emergency Relief and Transportation Investment Generating Economic Recovery (TIGER) programs. Recipients are asked to provide the FTA Regional Office notice of using local hiring preferences on construction projects.

On March 6, 2015, US DOT announced an initiative to permit, on an experimental basis, FTA recipients and subrecipients to utilize various contracting requirements that generally have been disallowed due to concerns about adverse impacts on competition. This initiative, being initially carried out as a pilot program was extended until March 6, 2017. Unless accepted into the pilot program, FTA recipients may not include local hiring or geographic preferences in FTA-funded projects, except for construction hiring purposes and other exceptions described above.

Prequalification Lists:

Except for small and micro purchases, proposals and/or bids must be publicly solicited from an adequate number of sources. Recipients are prohibited from restricting competition in federally supported procurement transactions. Recipients are not required to prequalify potential bidders. However, recipients that place such a requirement on potential bidders must adhere to FTA's requirements. If a recipient requires prospective bidders to prequalify, it must ensure that all lists of prequalified persons, firms, or products that are used in acquiring goods and services are current and include enough sources to ensure full and open competition. Recipients must permit potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date). Prequalification should not be confused with reviews of technical qualifications that are an essential process in two-step and qualifications-based procurements.

Revenue Contracts:

Revenue contracts are those in which the recipient or subrecipient provides access to public transportation assets for the primary purpose of either producing revenue in connection with an activity related to public transportation, or creating business opportunities with the use of FTA-assisted property. If there are several potential competitors for a limited opportunity (such as advertising space on the side of a bus), then the recipient should use a competitive process to permit interested parties an equal chance to obtain that limited opportunity. If, however, one party seeks access to a public transportation

asset (such as a utility that might seek cable access in a subway system), and the recipient is willing and able to provide contracts or licenses to other parties similarly situated (since there is room for a substantial number of such cables without interfering with transit operations), then competition would not be necessary because the opportunity to obtain contracts or licenses is open to all similar parties. In the case of joint development, FTA will work with the recipient to determine appropriate procedures, as necessary.

INDICATORS OF COMPLIANCE

- a. *Does the recipient restrict competition by applying unreasonable requirements, requiring unnecessary experience or excessive bonding, or by specifying brand names only?*
- b. *Does the recipient include prohibited geographic preferences in procurements?*
- c. *If the recipient uses prequalification lists for any of its procurements, does it do so properly?*
- d. *If the recipient awarded revenue contracts during the review period did it use a competitive process for the award, as applicable?*

DETERMINING COMPLIANCE

Prior to the site visit, request and review the recipient's written procurement policies for discussion of the requirements in the above indicators. Obtain and review the listing of FTA-funded procurements.

During the site visit:

- Review procurement files (including procurements that received two or fewer bids or responses), particularly legal notices and solicitation documents, to determine whether procurements were unreasonably restrictive. If a procurement only received one or two responses, did the specifications include non-essential requirements that only a single manufacturer can meet? Did potential bidders submit pre-submission questions regarding compliance with the specifications or other contract requirements? Examine any bid protests and any questions and answers to solicitations to determine if there are any perceived restrictions from potential bidders.
- Review procurement files for use of geographic preferences outside of the allowable exceptions. Examine any bid protests and any questions and answers to solicitations to determine if there are any potential geographic preference issues. These may include bid/evaluation preferences for, or restricting competition to, in-state or local firms. In-state licensing requirements do not constitute geographic preference. When contracting for A&E services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.
- Review procurement files, particularly legal notices and solicitation documents, to determine whether responses to procurements are limited to pre-qualified firms. If a recipient requires prospective bidders to prequalify, determine if it has documented that it has ensured that all prequalification lists include enough sources to ensure full and open competition. Determine if the recipient permitted potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date).
- Review the list of revenue contracts awarded. On site, discuss with the recipient, and evaluate procurement files to determine if a competitive process was used when the recipient provided access to public transportation assets for the primary purpose of either producing revenue in connection with an activity related to public transportation, or creating business opportunities with the use of FTA-assisted property when there were several potential competitors for a limited opportunity.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it has conducted a procurement without providing for full and open competition. Examples of failure to provide for full and open competition include impermissible or unnecessary restrictive requirements in specifications or on prospective bidders in any of the procurement files reviewed.

DEFICIENCY CODE P7-1: Lacking full and open competition for one or more methods of procurement

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office procurement procedures that ensure full and open competition in all procurement transactions.

The recipient is deficient if it has improperly included geographic preferences in its procurements.

DEFICIENCY CODE P7-2: Improper use of geographic preferences

SUGGESTED CORRECTIVE ACTION: The recipient must cease using inappropriate geographic preferences in FTA-funded procurements and submit to the FTA regional office documentation of a revised procurement process that prohibits the improper use of geographic preferences. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if its prequalification lists do not include enough qualified sources to ensure maximum full and open competition or it has precluded potential bidders from qualifying during the solicitation process.

DEFICIENCY CODE P7-3: Inadequate prequalification criteria

SUGGESTED CORRECTIVE ACTION: The recipient must provide to the FTA regional office documentation demonstrating that deficiencies identified in its prequalification process have been corrected. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it provided access to public transportation assets for the primary purpose of either producing revenue in connection with an activity related to public transportation, or creating business opportunities with the use of FTA-assisted property and there were several potential competitors for a limited opportunity, but it did not conduct a competitive process.

DEFICIENCY CODE P7-4: Lacking full and open competition for revenue contracts

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office with evidence that it has updated its procurement process to include procedures for competing revenue contracts when applicable. The recipient must obtain prior FTA regional office approval before entering into the next revenue contract.

GOVERNING DIRECTIVES

49 U.S.C. 5325(a). Contract requirements

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

49 U.S.C. 5325(h). Contract requirements

“(h) Grant prohibition. A grant awarded under this chapter or the Federal Public Transportation Act of 2012 2015 may not be used to support a procurement that uses an exclusionary or discriminatory specification.”

2 CFR 200.319 (a)

“All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to: (1) Placing unreasonable requirements on firms in order for them to qualify to do business; (2) Requiring unnecessary experience and excessive bonding; (3) Noncompetitive pricing practices between firms or between affiliated companies; (4) Noncompetitive contracts to consultants that are on retainer contracts; (5) Organizational conflicts of interest; (6) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and (7) Any arbitrary action in the procurement process.”

2 CFR 200.319 (c)(1)

“When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equivalent” description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated.”

2 CFR 200.319 (b)

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

2 CFR 200.319 (d)

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

Master Agreement (23), Section 16

FTA Circular 4220.1F Chapter VI 2. (g)

“In-State or Local Geographic Restrictions. Specifying in-State or local geographical preferences, or evaluating bids or proposals in light of in-State or local geographic preferences, even if those preferences are imposed by State or local laws or regulations. In particular, 49 U.S.C. Section 5325(i) prohibits an FTA recipient from limiting its bus purchases to in-State dealers. Exceptions expressly mandated or encouraged by Federal law include the following: 1) Architectural Engineering (A&E) Services. Geographic location may be a selection criterion if an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project. 2) Licensing. A State may enforce

its licensing requirements, provided that those State requirements do not conflict with Federal law. 3) Major Disaster or Emergency Relief. Federal assistance awarded under the Stafford Act, 42 U.S.C. Section 5150, to support contracts and agreements for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities permits a preference, to the extent feasible and practicable, for organizations, firms, and individuals residing or doing business primarily in the area affected by a major disaster or emergency.”

FTA Circular 4220.1F Chapter 2. b. (4) Revenue Contracts

“A revenue contract is a contract in which the recipient or subrecipient provides access to public transportation assets for the primary purpose of either producing revenues in connection with an activity related to public transportation, or creating business opportunities with the use of FTA assisted property. The recipient has broad latitude in determining the extent and type of competition appropriate for a particular revenue contract. Nevertheless, to ensure fair and equal access to FTA assisted property and to maximize revenue derived from such property, the recipient should conduct its revenue contracting as follows: (a) Limited Contract Opportunities. If there are several potential competitors for a limited opportunity (such as advertising space on the side of a bus), then the recipient should use a competitive process to permit interested parties an equal chance to obtain that limited opportunity. (b) Open Contract Opportunities. If, however, one party seeks access to a public transportation asset (such as a utility that might seek cable access in a subway system), and the recipient is willing and able to provide contracts or licenses to other parties similarly situated (since there is room for a substantial number of such cables without interfering with transit operations), then competition would not be necessary because the opportunity to obtain contracts or licenses is open to all similar parties. In the case of joint development, as explained below, FTA will work with the recipient to determine appropriate procedures, as necessary.”

P8. Did the recipient appropriately use each method of procurement?

BASIC REQUIREMENT

The non-Federal entity must appropriately use one of the following methods of procurement: micro-purchase, small purchase, sealed bid, competitive proposals or non-competitive proposals.

APPLICABILITY

Non-State recipients

EXPLANATION

Micro-purchases may be made without obtaining competitive quotations if the recipient determines that the price to be paid is fair and reasonable. These purchases should be distributed equitably among qualified suppliers in the local area, and should not be split to avoid the requirements for competition above the micro-purchase threshold.

Small purchase procedures require that price or rate quotations be obtained from an adequate number of qualified sources (at least two). The solicitations and quotations may be either oral or written.

For procurements exceeding the Federal simplified acquisition threshold (currently \$150,000), sealed bids or competitive proposals are generally required.

- Sealed Bids/IFB – Bids are publicly solicited and the award is made to the lowest (best price), responsive (meets all specifications), and responsible (is qualified to perform the work) bidder.
- Competitive Proposals/RFP – Proposals are publicly solicited from an adequate number of sources and the award is made to the responsive and responsible proposer whose offer is most advantageous to the recipient, with price and other factors considered. Recipients must identify their evaluation factors and indicate the relative importance that each has towards the award.

Non-competitive proposals: When the recipient requires supplies or services available from only one responsible source, and no other supplies or services will satisfy its requirements, the recipient may make

a sole-source award. In the case of a sole-source award, the recipient should prepare a written cost analysis and justification. The property or services are available from one source if one of the conditions described below is present:

- Unique or Innovative Concept. Unique or innovative concept means a new, novel, or changed concept, approach, or method that is the product of original thinking, the details of which are kept confidential or are patented or copyrighted, and is available to the grantee only from one source and in the past, has not been available from another source.
- Patents or Restricted Data Rights. Patent or data rights restrictions preclude competition.
- Substantial Duplication Costs. In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components, when it is likely that award to another contractor would result in substantial duplication of costs that are not expected to be recovered through competition.
- Unacceptable Delay. In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components, when it is likely that award to another contractor would result in unacceptable delays in fulfilling the grantee's needs.

A recurring problem has been the procurement of professional services. Often these services are procured with little or no competition. While such services can be procured on a sole-source basis if justified, in general, a competitive environment does exist for professional services and the recipient needs to follow federal requirements when FTA funds are used to pay for these services.

With a single bid, the documentation should include a cost analysis, as well as an explanation as to why a single bid was obtained. Upon receiving a single bid or proposal in response to a solicitation, the recipient should determine if competition was adequate. This should include a review of the specifications for undue restrictiveness and should include a survey of potential sources that chose not to submit a bid or proposal.

Time and materials contracts are listed as a restricted type of procurement. They are contracts in which the contractor charges a single rate that includes overhead and profit for labor, and materials are billed at cost. Generally, the total value of a time and materials type contract is an indeterminate amount. As such, recipients are not permitted to use FTA funds for time and materials type contracts unless it determines that no other type of contract is suitable for the procurement. If time and materials type contracts are used, recipients must specify a ceiling price that the contractor shall not exceed, except at its own risk.

INDICATORS OF COMPLIANCE

- a. *If the recipient used micro-purchase procedures, was it done in accordance with requirements?*
- b. *If the recipient used small purchase procedures, was it done in accordance with requirements?*
- c. *If the recipient used sealed bid procedures, was it done in accordance with requirements?*
- d. *If the recipient used competitive proposal procedures, was it done in accordance with requirements?*
- e. *Did the recipient include written justification of any non-competitive or sole source procurements in the procurement file?*
- f. *If the recipient had awarded a contract to a single bidder, did it appropriately determine that the item was available only from a single source?*
- g. *If the recipient awarded any time and materials type contracts during the review period, did it determine that it was the only method suitable and was a ceiling price identified?*

DETERMINING COMPLIANCE

Review the recipient's policies and procedures for dollar thresholds (if applicable) for micro-purchase, small purchase, sealed bid, competitive proposals or non-competitive proposals/sole source procurements.

Review the list of FTA-funded procurements to determine which types of procurement were used.

Micro-purchase: Review selected procurements to determine if:

- this method was only used for procurements \$3,500 or less,
- the procurements were distributed equitably if there was more than one qualified supplier in the local area,
- the recipient documented its determination that the price was reasonable with a description of how that determination was made, and
- there was no evidence that procurements were split to avoid procurement requirements for purchases above the micro-purchase threshold (such as repeated purchases of the same item(s)).

Small purchase: Review selected procurements to determine if:

- this method was only used for procurements when appropriate (2 CFR part 200 increased the simplified acquisition threshold to \$150,000 for procurements funded by awards issued on or after December 26, 2014. Procurements funded by awards issued on or before December 25, 2014, are subject to the previous simplified acquisition threshold of \$100,000. (per 49 CFR 18.36(d)),
- price or rate quotations were obtained from an adequate (at least two) number of qualified sources, and
- there was no evidence that procurements were split to avoid procurement requirements for purchases above the small purchase threshold (such as repeated purchases of the same item(s)).

Sealed bid: Review selected procurements to determine if:

- bids were solicited from an adequate number of known suppliers,
- bids were publicly advertised,
- the invitation for bids defined the items or services in order for the bidder to properly respond,
- bids were publicly opened at the time and place prescribed in the invitation for bids,
- a firm fixed price contract (lump sum or unit price) was awarded to the lowest responsive and responsible bidder, and
- any or all bids were rejected only if there was a sound, documented reason

Competitive proposal: Review selected procurements to determine if:

- requests for proposals were publicly advertised,
- evaluation criteria and their relative importance were identified,
- proposals were solicited from an adequate number of qualified sources,
- there was a written method for conducting technical evaluations of the proposals received and for selecting recipients
- contracts were awarded to the responsible firm whose proposal is most advantageous, with price and other factors considered.
- For A&E procurements, price should not be a factor in the selection criteria. These procurements are reviewed in a following question of the review.

Non-competitive procurement: Review selected procurements to determine if one of the following conditions was met:

- The recipient appropriately determined that the item was available from only a single source. Property or services are available from one source because one of the conditions described below is present:
 - *Unique or Innovative Concept.* Unique or innovative concept means a new, novel, or changed concept, approach, or method that is the product of original thinking, the details of which are kept confidential or are patented or copyrighted, and is available to the recipient only from one source and in the past, has not been available from another source.
 - *Patents or Restricted Data Rights.* Patent or data rights restrictions preclude competition.
 - *Substantial Duplication Costs.* In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components, when it is likely that award to another contractor would result in substantial duplication of costs that are not expected to be recovered through competition.
 - *Unacceptable Delay.* In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components, when it is likely that award to another contractor would result in unacceptable delays in fulfilling the recipient's needs.
- There was a public exigency or emergency for the requirement which would not permit a delay resulting from competitive solicitation. When relying on this provision, recipients may use a non-competitive procurement method only for its reasonable needs to address the exigency or emergency. For example, a recipient's facility receives an unprecedented 24-inches of snow in 24 hours in October and it does not have a snow removal contract in place. The recipient may enter into a non-competitive snow removal contract to clear the snow. However, the recipient may not use this emergency to justify entering into a non-competitive snow removal contract for the entire winter season.
- FTA expressly authorized noncompetitive proposals in response to a written request from the recipient.

Determine if the recipient included a written sole source justification in its procurement file.

Single bidder: Review selected procurements to determine if the procurement files include an explanation as to why a single bid was obtained and if the recipient's determination of adequate competition included a review of the specifications for undue restrictiveness and a survey of potential sources that chose not to submit a bid or proposal.

Time and materials: Prior to the site visit, examine the procurement listing provided by the recipient to determine if any time and materials type contracts were awarded during the review period. During the site visit, examine at least one time and materials procurement file to determine if there was information noting that this was the only suitable type of procurement and that a ceiling price was included.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it made procurements using micro-purchase procedures but used this method for procurements over \$3,500, did not make reasonable price determinations, did not distribute purchases equitably if applicable, and/or if there was evidence of splitting improperly.

DEFICIENCY CODE P8-1: Improper micro-purchase procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to correctly implement micro-purchase procedures. For the next micro-purchase, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it made procurements using small purchase procedures for procurements over \$150,000, price or rate quotations were not obtained from an adequate number of qualified sources, and/or if there is evidence of splitting procurements to be within the small purchase threshold.

DEFICIENCY CODE P8-2: Improper small purchase procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to correctly implement small purchase procedures. For the next small purchase, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it made procurements using sealed bid procedures but bids were not publicly advertised and/or a fixed price contract was not awarded to the lowest responsive, responsible bidder.

DEFICIENCY CODE P8-3: Improper sealed bid procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to correctly implement sealed bid procedures. For the next sealed bid, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made procurements using competitive proposal procedures but requests for proposals were not publicly advertised, evaluation criteria and their relative importance were not identified in the solicitation documents, and/or price and other factors were not considered in the award.

DEFICIENCY CODE P8-4: Improper competitive proposal procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to correctly implement competitive proposal procedures. For the next competitive proposal, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made sole source procurements but does not have a sole-source justification in its procurement files, and/or if its justification does not include at least one of the conditions permitting the use of a sole source procurement.

DEFICIENCY CODE P8-5: Lacking required justification(s) and documentation for sole-source award(s)

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence of an implemented policy to ensure that future sole source procurements are properly conducted and documented. Where contracts are ongoing, confer with the FTA regional office to determine if the recipient should be directed not to exercise any options, or possibly terminate the existing contract for convenience, and rebid for the required goods and services in accordance with Federal requirements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it does not have the appropriate justification for single-bid awards.

DEFICIENCY CODE P8-6: Lacking required justification(s) and documentation for single-bid award(s)

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence of an implemented policy to ensure that future single bid procurements are properly documented. For the next applicable procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if FTA funds were used for a time and materials contract and the files do not support the recipient's decision or the contract does not specify a ceiling price.

DEFICIENCY CODE P8-7: Improper time and materials contract

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to include procedures for the proper use of FTA-assisted time and materials contracts. The recipient must obtain prior FTA regional office approval before entering into the next time and materials contract.

GOVERNING DIRECTIVES

2 CFR 200.320 (a) Procurement by micro-purchases

“Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (\$3,000 or less prior to October 1, 2015; \$3,500 or less effective October 1, 2015). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.”

FTA 4220.1F Chapter VI 3. a. (2) (b) Prohibited Divisions

“The recipient may not divide or reduce the size of its procurement to avoid the additional procurement requirements applicable to larger acquisitions.”

FTA 4220.1F Chapter VI 3. a. (2) (c) Documentation

“FTA’s only documentation requirement for micro-purchases is a determination that the price is fair and reasonable and a description of how the recipient made its determination. FTA does not require the recipient to provide its rationale for the procurement method used, selection of contract type, or reasons for contractor selection or rejection.”

2 CFR 200.320 (b) Procurement by small purchase procedures

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

2 CFR 200.320 (c) Procurement by sealed bids (formal advertising)

“Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply. (1) In order for sealed bidding to be feasible, the following conditions should be present: (i) A complete, adequate, and realistic specification or purchase description is available; (ii) Two or more responsible bidders are willing and able to compete effectively for the business; and (iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price. (2) If sealed bids are used, the following requirements apply: (i) Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publicly advertised; (ii) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond; (iii) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly; (iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and (v) Any or all bids may be rejected if there is a sound documented reason.”

2 CFR 200.320 (d) Procurement by competitive proposals

“The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply: (1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical; (2) Proposals must be solicited from an adequate number of qualified sources; (3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients; (4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered”

2 CFR 200.320 (f) Procurement by noncompetitive proposals

“Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply: (1) The item is available only from a single source; (2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation; (3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or (4) After solicitation of a number of sources, competition is determined inadequate.”
FTA Circular 4220.1F Chapter VI 3. i. Other Than Full and Open Competition.”

FTA Circular 4220.1F Chapter VI 3. i. (1) (b) 2. Single Bid or Single Proposal

“Upon receiving a single bid or single proposal in response to a solicitation, the recipient should determine if competition was adequate. This should include a review of the specifications for undue restrictiveness and might include a survey of potential sources that chose not to submit a bid or proposal.
a. Adequate Competition. FTA acknowledges competition to be adequate when the reasons for few responses were caused by conditions beyond the recipient’s control. Many unrelated factors beyond the recipient’s control might cause potential sources not to submit a bid or proposal. If the competition can be determined adequate, FTA’s competition requirements will be fulfilled, and the procurement will qualify as a valid competitive award.
b. Inadequate Competition. FTA acknowledges competition to be inadequate when, caused by conditions within the recipient’s control. For example, if the specifications used were within the recipient’s control and those specifications were unduly restrictive, competition will be inadequate.”

2 CFR 200.318 (j)(1)

“The non-Federal entity may use a time and materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time and materials type contract means a contract whose cost to a non-Federal entity is the sum of: (i) The actual cost of materials; and (ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit. (2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.”

P9. Does the recipient procure A&E services in accordance with 49 U.S.C. §5325(b)?

BASIC REQUIREMENT

If the recipient procures services for program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services (collectively referred to as “A&E services”) for an FTA-funded project, it must use a qualifications-based method. This method is not to be used for procuring services other than A&E.

APPLICABILITY

All recipients

EXPLANATION

A&E services include program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services. FTA interprets 49 U.S.C. Section 5325(b) to authorize the use of qualifications-based procurement procedures only for those services that directly support or are directly connected or related to construction, alteration, or repair of real property. Unless FTA determines otherwise in writing, neither a recipient or its subrecipients may use qualifications-based procurement procedures to acquire other types of services if those services are not directly in support of, directly connected to, directly related to, or do not lead to construction, alteration, or repair of real property. For design/build procurements, FTA expects recipients and their subrecipients to use the procurement method appropriate for the services having the greater cost, even though the other necessary services would not typically be procured by that method.

When using FTA assistance to contract for A&E services, states are required to use competitive proposal procedures based on the Brooks Act or an equivalent qualifications-based requirement adopted before August 10, 2005.

For qualifications-based procurements under the Brooks Act, (unlike other two-step procurement procedures in which price is an evaluation factor), an offeror’s qualifications are evaluated to determine contract award. Price must not be considered during the selection phase in these procurements. Firms are selected based only on their qualifications. Price is then negotiated with the most qualified firm. If an agreement cannot be reached, then the recipient may negotiate with the next most qualified firm and so on until an agreement is reached on a price that the State determines is fair and reasonable.

INDICATORS OF COMPLIANCE

- a. *If the recipient is a state, does it have and follow a statute prescribing a formal procedure for the procurement of A&E services, adopted prior to August 10, 2005 that it is an equivalent qualifications-based requirement of the Brooks Act?*

- b. *If the recipient is not a state or is a state that does not have a procedure for the procurement of A&E services adopted prior to August 10, 2005, does it use competitive proposals based on the Brooks Act when procuring A&E services?*

DETERMINING COMPLIANCE

Prior to the site visit, review State statutes, the state management plan, and other documentation of procurement procedures for procedures for contracting for A&E service through qualifications-based requirements. For recipients that are not a state, review their procedures for qualifications-based procurements. Review the list of procurements provided in advance of the review for procurements that would likely require these types of procedures. On site, discuss with the recipient, and evaluate procurement files to determine if these procedures were used when procuring applicable services, but not used when procuring services that do not meet the definition of A&E services.

Determine if A&E services were procured using a qualifications-based process in accordance with the Brooks Act, where firms are ranked based only on their qualifications and price is then negotiated with the most qualified firm. If an agreement cannot be reached, then the recipient may negotiate with the next most qualified firm and so on until an agreement is reached on a price that the recipient determines is fair and reasonable.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it is a state with a policy for A&E procurements adopted prior to August 10, 2005 but it is not following it or it is not following the Brooks Act, when procuring applicable services. The State also is deficient if it is using a qualifications-based method for procuring non-A&E services and does not have a State statute authorizing that type of procurement.

DEFICIENCY CODE P9-1: State A&E procurement deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office procedures for following qualifications-based procedures when using FTA assistance to contract for A&E services. For the next procurement, the State must submit to the FTA regional office documentation that the required process was implemented.

A non-State recipient is deficient if it does not follow the Brooks Act when using FTA assistance to contract for A&E services or has used qualifications-based procedures when not appropriate.

DEFICIENCY CODE P9-2: Non-state A&E procurement deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office procedures for following qualifications-based procedures when using FTA assistance to contract for A&E services. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES

49 U.S.C. 5325 (b) ARCHITECTURAL, ENGINEERING, AND DESIGN CONTRACTS

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

40 U.S.C. §§ 1101- 1104 (“Brooks Act”)

§1101: “The policy of the Federal Government is to publicly announce all requirements for architectural and engineering services and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.”

§1104(b): “Order of Negotiation. The agency head shall attempt to negotiate a contract, as provided in subsection (a), with the most highly qualified firm selected under section 1103 of this title. If the agency head is unable to negotiate a satisfactory contract with the firm, the agency head shall formally terminate negotiations and then undertake negotiations with the next most qualified of the selected firms, continuing the process until an agreement is reached. If the agency head is unable to negotiate a satisfactory contract with any of the selected firms, the agency head shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached.”

2 CFR § 200.320(d)(5)

“The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.”

FTA Circular 4220.1F Chapter IV 2. h. (2) (a)

“FTA has long administered the requirement for using qualifications-based procurement procedures for selection of contractors that perform A&E services, generally associated with the construction, alteration, or repair of real property. FTA interprets 49 U.S.C. Section 5325(b) to authorize the use of qualifications-based procurement procedures only for those services that directly support or are directly connected or related to construction, alteration, or repair of real property. FTA's interpretation of 49 U.S.C. Section 5325(b) is consistent with typical Federal policies implementing the “Brooks Act,” 40 U.S.C. Section 1102, which limits qualifications-based procurement procedures to research, planning, development, design, construction, alteration, or repair of real property. Thus, if services, such as program management, feasibility studies, or mapping, are not directly in support of, directly connected to, or directly related to, or lead to construction, alteration, or repair of real property, then the recipient may not use qualifications-based procurement procedures to select the contractor that will perform those services.”

Third Party Contracting FAQs

Q. Can a transit authority make multiple awards to A&E firms for a discipline such as surveying, when no specific tasks have been identified, and then select the best firm for the specific task to negotiate with? We have several surveying projects that may materialize, but none are certain. We would like to advertise for "Surveying Services" and make multiple awards for on-call services. Then, when a project or task for surveying is identified we would select the best A&E firm for a specific task and negotiate with them. If an agreement could not be made we would proceed to negotiate with the next most qualified firm. The idea is to identify qualified firms for surveying and avoid having to advertise and rank each firm for each task or project.

A. You may make multiple awards to cover your needs for various disciplines, as you described them; e.g., geothermal, railroad, surveying, etc. However, your solicitation needs to describe how the work will actually be assigned, and not leave the process undefined. For example, if you evaluate company A initially as being the best for geothermal work, then all such work should be given to that company as tasks are defined, assuming the company can perform within the timeframes required for the task. You should not leave it to someone's judgment later to withhold work from company A and give it to company B based on a subjective judgment that B would be better than A for this job even though A was evaluated first initially. We would also not let the selected companies update their qualifications during the term of the contract and so be rated higher than they were initially. There should be a finite period for these contract awards, after which a new round of qualifications-based awards would be made.

P10. Does the recipient develop independent cost estimates and conduct cost and/or price analysis for each procurement action above the Simplified Acquisition Threshold?

BASIC REQUIREMENT

Recipients must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold. As a starting point, the recipient must make independent estimates before receiving bids or proposals.

APPLICABILITY

Non-State recipients

EXPLANATION

Recipients must perform cost or price analyses in connection with every procurement exceeding the Simplified Acquisition Threshold (currently \$150,000); after receiving bids, but before awarding a contract. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation. A cost analysis must be performed for: (1) procurements which require that offerors submit detailed elements of direct and indirect costs; (2) procurements where adequate price competition is lacking; and/or (3) sole-source procurements, unless price reasonableness can be established based on market prices. Price analysis (i.e., using catalog or market prices) may be performed for all other procurements.

The independent cost estimate (ICE) is a tool to assist in determining the reasonableness of the bid or proposal being evaluated; that is, to assist in performing the cost or price analysis. An ICE is the starting point for conducting a cost or price analysis. It is required for all procurements exceeding the simplified acquisition threshold. An ICE is completed prior to receipt of bids or proposals. It can range from a simple budgetary estimate to a complex estimate based on inspection of the product itself and review of items like drawings, specifications, and prior data. The word "independent" does not imply that it is performed by someone other than the recipient. This could be the case, however, if the recipient does not have the expertise for a large complex procurement.

The ICE is especially critical whenever there is no price competition (e.g., for architect-engineer procurements during price negotiations), or where offerors are submitting price proposals for goods or services that are not exactly comparable (e.g., for procurements of high-technology items or professional services). It is also useful in competitive procurements to alert the recipient when all competitors are submitting unreasonably high or low-cost proposals.

INDICATORS OF COMPLIANCE

- a. *Did the recipient develop ICE prior to the receipt of bids and proposals for procurements above the Simplified Acquisition Threshold?*
- b. *Did the recipient conduct a cost analysis or price analysis for every procurement action above the Simplified Acquisition Threshold?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures. Onsite, review selected procurements to determine if the recipient developed an independent estimate prior to receipt of bids or proposals for procurements above the Simplified Acquisition Threshold.

Determine if a cost analysis was performed for: (1) procurements which require that offerors submit detailed elements of direct and indirect costs; (2) procurements where adequate price competition is lacking; and/or (3) sole-source procurements.

Determine if the recipient documented a price analysis when a cost analysis was not required.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it has not conducted independent cost estimates for procurements above the Simplified Acquisition Threshold.

DEFICIENCY CODE P10-1: Lacking independent cost estimate

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation that it has updated its procurement process to include development of

independent cost estimates prior to receipt of bids or proposals. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it did not conduct a cost analysis or price analysis, as applicable, for procurements above the Simplified Acquisition Threshold.

DEFICIENCY CODE P10-2: Lacking required cost/price analysis

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation that it has updated its procurement process to include performing applicable cost or price analysis procurements above the Simplified Acquisition Threshold. For the next applicable procurement, submit to FTA documentation that the required analysis was implemented.

GOVERNING DIRECTIVES

2 CFR § 200.323

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

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

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

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

FTA Circular 4220.1F Chapter VI 6. a. Cost Analysis

“The recipient must obtain a cost analysis when a price analysis will not provide sufficient information to determine the reasonableness of the contract cost. The recipient must obtain a cost analysis when the offeror submits elements (that is, labor hours, overhead, materials, and so forth) of the estimated cost, (such as professional consulting and A&E contracts, and so forth). The recipient is also expected to obtain a cost analysis when price competition is inadequate, when only a sole source is available, even if the procurement is a contract modification, or in the event of a change order. The recipient, however, need not obtain a cost analysis if it can justify price reasonableness of the proposed contract based on a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation.”

FTA Circular 4220.1F Chapter VI 6. b. Price Analysis

“If the recipient determines that competition was adequate, a price analysis, rather than a cost analysis, is required to determine the reasonableness of the proposed contract price. As discussed previously in subsection 3.a of this Chapter, the price analysis for micro-purchases may be limited. Similarly, the

recipient may use an abbreviated price analysis for small purchases in most cases. One method to record this price analysis is through the use of a preprinted form on which a contracting officer (or other responsible person) can annotate a finding of fair and reasonable pricing and check off the most common reasons why this would be so, such as catalog or market prices offered in substantial quantities to the general public, regulated prices (for example, for many utilities purchases), or a comparison with recent prices for similar goods and services.”

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

APPLICABILITY

All recipients

BASIC REQUIREMENT

Recipients must include and implement required clauses in its procurements.

EXPLANATION

Recipients are required to include specific required clauses in FTA-funded procurements, intergovernmental agreements (e.g., those involving states and other public entities), and subrecipient agreements. FTA Master Agreement identifies certain clauses that apply to third party contracts. 2 CFR 200.326 and Appendix II to 2 CFR part 200 identify contract provisions for non-Federal contracts under a Federal award. FTA C. 4220.1F discusses Federal requirements that affect a recipient’s acquisitions.

Additional guidance is provided through FTA’s Third Party Procurement Frequently Asked Questions website. Through the National Rural Transportation Assistance Program (RTAP), FTA developed ProcurementPRO, an on-line procurement tool that assists recipients in developing procurement packages. Using ProcurementPRO, can assist a recipient in developing a procurement package that includes federally required clauses.

Recipients may not modify their own contracts after award to include Federal clauses and so make them eligible for procuring goods and services with Federal funds. Recipients may, however, modify its state’s (General Services Administration (GSA)-type contracts to add Federal clauses when they issue orders against those state contracts.

Not all clauses apply to every contract. The applicability of clauses depends on the size and type of contract as is described in the exhibit at the end of this section. Procurements above the micro-purchase threshold must include all applicable FTA clauses as part of the solicitation, purchase order, or contract. A general reference to FTA guidelines is not sufficient to meet this requirement. A checklist of required clauses is provided at the end of this section. The checklist provides a citation from the FTA Master Agreement for each required clause. Certifications, reports, and forms that are required for DBE, Buy America, debarment, and suspension and lobbying are also included as are other required items to assist in determining whether the recipient’s policies and procedures are actually being followed. The applicability of FTA clauses to different types of procurements is shown in the exhibit. Note that the construction of ferry vessels using Federal funds is considered a public works project and therefore, the clauses related to construction contracts are applicable.

INDICATOR OF COMPLIANCE

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

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient’s policies and procedures. During the site visit, examine procurement files for inclusion of required clauses as detailed in the exhibit at the end of this section.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if did not include all applicable required clauses in FTA-funded procurements reviewed.

DEFICIENCY CODE P11-1: Missing FTA clauses

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office revised procurement procedures that address inclusion of all FTA-required third party contract clauses through use of a clause checklist or other mechanism. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES:

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS

"In addition to other provisions required by the Federal agency or non-Federal entity, all contracts made by the non-Federal entity under the Federal award must contain provisions covering the following, as applicable.

(A) Contracts for more than the simplified acquisition threshold currently set at \$150,000, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

(B) All contracts in excess of \$10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.

(C) Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of "federally assisted construction contract" in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

(D) Davis-Bacon Act, as amended (40 U.S.C. 3141-3148). When required by Federal program legislation, all prime construction contracts in excess of \$2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction"). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the

compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.

(E) Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708). Where applicable, all contracts awarded by the non-Federal entity in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

(F) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of “funding agreement” under 37 CFR §401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.

(G) Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended—Contracts and subgrants of amounts in excess of \$150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

(H) Debarment and Suspension (Executive Orders 12549 and 12689)—A contract award (see 2 CFR 180.220) must not be made to parties listed on the governmentwide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), “Debarment and Suspension.” SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.

(I) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)—Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

(J) See §200.322 Procurement of recovered materials.”

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

BASIC REQUIREMENT

Recipients must include required certifications in its procurements and received signed certification from bidders.

APPLICABILITY

All recipients

EXPLANATION

Transit Vehicle Manufacturer (TVM) Certification: As part of their DBE program, all recipients must require that each TVM, as a condition of being authorized to bid on transit vehicle procurements funded by FTA, certify that it has complied with the requirements of 49 CFR 26.49. Only those TVMs listed on FTA's certified list or that have submitted a goal methodology to FTA that has been approved or has not been disapproved at the time of solicitation are eligible to bid. The recipient is required to include a provision in its bid specifications requiring the TVM certification as a condition of permission to bid. The certification should reference 49 CFR part 26 (not Part 23).

A list of certified TVMs that have submitted required DBE information to FTA is available at the FTA website: <https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/eligible-tvms-list>. However, this list is not exclusive and recipients should consult with FTA to verify the status of TVMs not currently on the website. Prior to award, evidence that this website has been checked or evidence of communication with FTA's Office of Civil Rights to validate TVM certification, should be included in applicable procurement files. FTA has instructed TVMs to submit to recipients a copy of their FTA approval letters along with the TVM certifications.

The TVM definition is codified at 49 CFR 26.5. Note that producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (e.g., so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered to be TVMs. Further, to the extent to which a vehicle remanufacturer is responding to a solicitation for new or remanufactured vehicles with a vehicle to which the remanufacturer has provided post-production alterations or retro-fitting, that remanufacturer is considered a TVM. Again, only certified TVMs are eligible to bid on FTA-assisted procurements. Businesses that manufacture, mass-produce, or distribute vehicles solely for personal use and for sale "off the lot" are not considered TVMs.

Lobbying Certification: Recipients are required to include a lobbying certification in agreements, contracts, and subcontracts exceeding \$100,000. Signed certifications regarding lobbying must be obtained by the recipient from subrecipients and contractors. Subrecipients retain their contractors' certifications and contractors retain subcontractors' certifications. The recipient is responsible for ensuring that they fulfill the requirements in applicable direct procurements exceeding \$100,000.

Buy America Certification: Buy America regulations require that all steel, iron, and manufactured products used in the project are produced in the United States. Solicitations for steel, iron, and manufactured products must contain a Buy America certification, unless the procurement is subject to a general waiver or the small purchase waiver. Buy America requirements also apply to capital leases for rolling stock and related equipment. Buy America requirements applicable to rolling stock procurements are discussed in more detail in Part D, Revenue Rolling Stock Procurements.

The small purchase waiver is now included in 49 U.S.C 5323(j)(13) and provides that the term "small purchase" means a purchase of not more than \$150,000. On September 16, 2016, the FTA Chief Counsel issued a Dear Colleague Letter regarding the small purchase waiver. The statutory language is clear that the small purchase waiver applies to purchases of \$150,000 or less, regardless of the size of the project. Therefore, purchases made with FTA financial assistance, including capital, planning, or operating assistance, are subject to the waiver. The waiver applies both to purchases made directly by

recipients or subrecipients and to purchases made by third-party contractors on behalf of the recipient or subrecipient. This provision of the FAST Act applies to all purchases made after October 1, 2015. The \$150,000 contract value is based on the total contract amount, including labor and options, and not just the value of the goods purchased. Also, recipients are not permitted to break up procurements in order to stay under the \$150,000 threshold. Finally, if a solicitation may result in bids near \$150,000, recipients should include the Buy America certifications in the solicitation, with a note clarifying that if the bid is more than \$150,000, the bidder must certify per the Buy America requirements, but if the bid is \$150,000 or less, no certification will be necessary.

Buy America statute applies to:

- All purchases of steel, iron, and manufactured products greater than \$150,000, regardless of whether they involve capital, operating, or planning funds
- Contractors and subcontractors if the contract or subcontract is more than \$150,000, including labor and options
- Purchases made using an intergovernmental agreement and jointly purchased manufactured products
- Purchases of used items

For all procurements more than \$150,000, the recipient shall include in its bid or request for proposal 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 or offer a completed Buy America certificate in accordance with 49 CFR §§ 661.6 or 661.12 of this part, as appropriate. Recipients should include only the applicable Buy America certification. Inclusion of both certifications for both rolling stock and non-rolling stock procurements is discouraged and may result in confusion on the part of the contractor as to the applicable Buy America requirements.

Recipients may not obtain signed Buy America certifications after contract award for its own contracts or contracts of other recipients to make the contracts eligible for Federal funding. Recipients may, however, obtain signed Buy America certifications before buying off state GSA-type contracts to make them eligible for Federal funding. The recipient should consider the full GSA-type contract amount, not the amount of its purchase, when determining whether Buy America requirements apply to those purchases.

If a bidder or offeror cannot certify compliance with Buy America requirements, the recipient must seek a waiver of the Buy America statute before it may award the contract to the bidder or offeror. Buy America waivers are available on one of the following grounds: applying Buy America requirements would be inconsistent with the public interest; the materials produced in the United States are not produced in a sufficient and reasonably available quantity or are not of a satisfactory quality (i.e., non-availability waiver); or including domestic material will increase the cost of the overall project by more than 25 percent.

The Buy America waiver for minivans was rescinded on December 3, 2012.

INDICATORS OF COMPLIANCE

- a. For FTA-funded vehicle procurements including procurements of remanufactured vehicles, did the recipient include the required DBE TVM certifications in solicitations and receive and verify signed certifications as part of bid responsiveness?*
- b. Did the recipient include required lobbying certifications in solicitations and receive signed certifications from contractors as part of bid responsiveness in procurements over \$100,000?*
- c. Did the recipient include required Buy America certifications in solicitations and receive signed certifications from contractors as part of bid responsiveness in applicable procurements over \$150,000 that included iron, steel or manufactured products?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures.

During the site visit, examine procurement files for inclusion of the following required certifications and receipt of signed certifications from bidders at the time of submitting bids or proposals:

- DBE TVM certifications
- Lobbying certifications
- Buy America certifications

For transit vehicle manufacturer purchases determine if, prior to award, the recipient documented that it verified TVM certifications received by either consulting FTA's Office of Civil Rights TVM website or contact the Office of Civil Rights directly. If the bidder is not listed on the website, confirm that recipient contacted FTA's Office of Civil Rights to verify bidder's or proposer's eligibility to bid at the time the bid or proposal was submitted. TVM status cannot be cured after bid or proposal submittal, but before contract award.

Examine procurement files for inclusion of required Lobbying certifications in solicitations and receipt of signed certifications from bidders in agreements, contracts, and subcontracts exceeding \$100,000.

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

- all purchases of steel, iron, and manufactured products greater than \$150,000, regardless of whether they involve capital, operating, or planning funds
- contractors and subcontractors if the contract or subcontract is more than \$150,000, including labor and options
- purchases made using an intergovernmental agreement and jointly purchased manufactured products
- purchases of used items

If a bidder or offeror cannot certify compliance with Buy America requirements, document if the recipient received a waiver of the Buy America statute before it awarded the contract to the bidder or offeror.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not include, where applicable, a provision in its bid specifications requiring TVM certifications, if the files do not contain TVM certifications from successful bidders, or if the TVM certification is out of date (references Part 23 instead of Part 26). The recipient is deficient if it cannot provide evidence that it ensured that the manufacturer was an eligible TVM at the time it submitted its bid or proposal.

DEFICIENCY CODE P12-1: No TVM certification

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA RCRO procedures for obtaining signed TVM certifications and for ensuring that manufacturers are eligible TVMs at the time of bid or proposal submission. The recipient must submit to the RCRO an updated TVM certification template to be used in future transit vehicle procurements. The recipient must submit to the FTA regional office a copy of the signed form with the next revenue rolling stock procurement.

The recipient is deficient if it has not included the lobbying certification in its procurement solicitations that exceed \$100,000 or if it has not obtained the proper certifications from contractors awarded contracts that exceed \$100,000.

DEFICIENCY CODE P12-2: Lobbying certifications not included in procurement solicitations or signed contractors or subcontractors

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office procedures for obtaining signed lobbying certifications. The recipient must submit to the FTA regional office a copy of the signed lobbying certification with the next applicable procurement.

The recipient is deficient if it did not include applicable Buy America provision in its solicitation documents.

DEFICIENCY CODE P12-3: Buy America provision not in solicitation and/or contract

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office revised procurement procedures that require the recipient to include Buy America provisions in solicitation documents and to obtain signed certifications from vendors when procuring steel, iron, or manufactured products not subject to a general waiver. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

For procurements for which a Buy America certification was not obtained, the recipient must provide the FTA regional office information documenting that the procurement complies with the Buy America provisions.

For procurements in progress for which bids have not been received, the recipient must submit to the FTA regional office documentation that it included, via an addendum, Buy America requirements in the solicitation.

The recipient must submit to the FTA regional office a copy of the signed Buy America certification before awarding the contract for the next procurement subject to Buy America requirements.

The recipient is deficient if it did not obtain signed Buy America certifications from vendors as part of the vendor's bid or proposal.

DEFICIENCY CODE P12-4: Contract files lacking signed Buy America certifications

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office revised procurement procedures that require the recipient to include Buy America provisions in solicitation documents and to obtain signed certifications from vendors when procuring steel, iron, or manufactured products not subject to a general waiver. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

For procurements for which a Buy America certification was not obtained, the recipient must provide the FTA regional office information documenting that the procurement complies with the Buy America provisions.

For procurements in progress for which bids have not been received, the recipient must submit to the FTA regional office documentation that it included, via an addendum, Buy America requirements in the solicitation.

The recipient must submit to the FTA regional office a copy of the signed Buy America certification before awarding the contract for the next procurement subject to Buy America requirements.

The recipient is deficient if it awarded the contract to a contractor who certified non-compliance with Buy America and did not obtain a waiver from FTA or it awarded the contract to a contractor who certified both compliance and non-compliance.

DEFICIENCY CODE P12-5: Contract awarded without Buy America waiver

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office revised procurement procedures that require the recipient to include Buy America provisions in solicitation documents and to obtain signed certifications from vendors when procuring steel, iron, or manufactured products not subject to a general waiver. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

For procurements for which a Buy America certification was not obtained, the recipient must provide the FTA regional office information documenting that the procurement complies with the Buy America provisions.

For procurements in progress for which bids have not been received, the recipient must submit to the FTA regional office documentation that it included, via an addendum, Buy America requirements in the solicitation.

The recipient must submit to the FTA regional office a copy of the signed Buy America certification before awarding the contract for the next procurement subject to Buy America requirements.

GOVERNING DIRECTIVES

49 CFR 26.49 (a)

"If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section."

FTA Circular 9030.1E Chapter V 11.

h. "The recipient is obligated to determine, by checking the TVM listing on FTA's website or by checking with FTA's Office of Civil Rights at the time of bid opening, that the manufacturer likely to receive the contract is in compliance with part 26."

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS. (I) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)

"Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award."

49 CFR 661.6

"Certification requirements for procurement of steel or manufactured products. If steel, iron, or manufactured products (as defined in §§661.3 and 661.5 of this part) are being procured, the appropriate certificate as set forth below shall be completed and submitted by each bidder or offeror in accordance with the requirement contained in §661.13(b) of this part."

“Certification requirement for procurement of buses, other rolling stock and associated equipment. If buses or other rolling stock (including train control, communication, and traction power equipment) are being procured, the appropriate certificate as set forth below shall be completed and submitted by each bidder in accordance with the requirement contained in §661.13(b) of this part.”

P13. Did the recipient appropriately include and account for liquidated damages in its procurements?

BASIC REQUIREMENT

If recipients include liquidated damages in procurements, the rate must be stated and it must be based on a calculation. Any recovered damages should be credited back to the project account.

APPLICABILITY

Non-state recipients

EXPLANATION

Recipients are allowed to use liquidated damage clauses when there is a reasonable expectation of damages (increased costs on the project involved) from late completion or if weight requirements are exceeded and the extent or amount of such damages would be difficult or impossible to determine. Liquidated damage clauses may not be punitive. They may not be used to impose a penalty or limit or restrict competition, or used in situations where delayed performance will not affect the recipient adversely. The rate and measurement of liquidated damages must be specified in the solicitation and contract. The procurement file should include a record of the calculation and rationale for the amount of the damages assessed.

The assessment for damages is often established at a specific rate per day for each day beyond the contract’s delivery date or performance period. A measurement other than a day or another period of time, however, may be established if that measurement is appropriate, such as weight requirements in a rolling stock purchase. Any liquidated damages recovered should be credited to the project account involved unless FTA permits otherwise.

Liquidated damages should not be utilized as a substitute for other contract performance requirements. Recipients are required to maintain a contract administration system to ensure that they and their third party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders. There are methods that may be more appropriate than liquidated damages to incentivize or enforce contractor performance.

INDICATORS OF COMPLIANCE

- a. *If the recipient included liquidated damages in its procurements, did it specify the rate in the contract, based on a calculation and rationale?*
- b. *If the recipient recovered liquidated damages in its FTA-funded procurements, did it appropriately account for those damages with FTA?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient’s policies and procedures to determine how the recipient determines if it will use liquidated damages in contracts.

During the site visits, examine selected contract files, in accordance with records sampling procedures, for liquidated damages clause(s). Determine if the rationale for and calculation of the dollar value of liquidated damages was documented in the procurement file and presented in the solicitation documents

as a specific rate. Examine selected contract files and correspondence in TrAMS to determine if any liquidated damages recovered were credited to the project account involved or if FTA allowed the recipient to handle the recovered damages in a different manner.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if a liquidated damages rate is not specified in the solicitation documents but is included in a resulting contract. The recipient is deficient if it cannot provide a reasonable explanation regarding expected damages as a result of late completion and an appropriate mathematical basis for the dollar value of the liquidated damages.

DEFICIENCY CODE P13-1: Improper use of liquidated damage clause

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office written procedure for the correct use of liquidated damages clauses. If clauses are in existing contracts improperly, direct the recipient to modify the contract to eliminate the clause or provide a justification for the use and level of liquidated damages. Direct the recipient to obtain prior FTA regional office approval before awarding the next contract with a liquidated damage clause.

The recipient is deficient if it assessed liquidated damages, but did not credit these funds back to the project account or account for them as directed by FTA.

DEFICIENCY CODE P13-2: Improper accounting for recovered liquidated damages

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office procedures for appropriately accounting for recovered liquidated damages.

GOVERNING DIRECTIVE

Master Agreement, section 39(c)

“Federal Interest in Recovery. The Federal Government retains the right to a proportionate share of any proceeds recovered from any third party, based on the percentage of the federal share for the Underlying Agreement. Notwithstanding the preceding sentence, the Recipient may return all liquidated damages it receives to its Award Budget for its Underlying Agreement rather than return the federal share of those liquidated damages to the Federal Government, provided that the Recipient receives FTA’s prior written concurrence.”

FTA Circular 4220.1F Chapter IV 2. b. (6) (b)1

“Liquidated Damages. FTA has determined that a recipient may use liquidated damages if the recipient reasonably expects to suffer damages through delayed contract completion, or if weight requirements are exceeded, and the extent or amount of such damages are uncertain and would be difficult or impossible to determine. The rate and measurement standards must be calculated to reasonably reflect the recipient’s costs should the standards not be met, and must be specified in the solicitation and contract. The assessment for damages is often established at a specific rate per day for each day beyond the contract’s delivery date or performance period. A measurement other than a day or another period of time, however, may be established if that measurement is appropriate, such as weight requirements in a rolling stock purchase. The procurement file should include a record of the calculation and rationale for the amount of damages established. Any liquidated damages recovered must be credited to the project account involved unless FTA permits otherwise.”

P14. Did the recipient approve, evaluate, and document change orders to procurements?

BASIC REQUIREMENT

The recipient is responsible for issuing, evaluating, and making necessary decisions involving any change to its third party contracts, and any change orders, or modifications it may issue.

APPLICABILITY

All recipients

EXPLANATION

Recipients use their own procurement procedures that reflect applicable state and local laws and regulations, provided that the process ensures competitive procurement and the procedures conform to applicable Federal law, including 2 CFR part 200, and FTA Circular 4220.1F, "Third Party Contracting Guidance."

A change order is an order authorized by the recipient directing the contractor to make changes, pursuant to contract provisions for such changes, with or without the consent of the contractor. Change orders must be approved by authorized recipient officials. Change orders are, in effect, sole source procurements. If project managers can approve change orders with minimal or no oversight, outside of normal procurement channels, potential problems may arise.

Recipients must develop an ICE and perform a cost or price analysis in connection with every contract modification or change order over \$150,000. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation.

To be eligible for FTA assistance under the recipient's award or cooperative agreement, the cost of the change, modification, change order, or constructive change must be allowable, allocable, within the scope of its award or cooperative agreement, and reasonable for the completion of project scope.

INDICATORS OF COMPLIANCE

- a. *Did the recipient ensure that executed change orders were within the scope of the original contract?*
- b. *Did the recipient evaluate and document change orders?*

DETERMINING COMPLIANCE

Prior to the site visit, receive and review the recipient's policies and procedures to determine how the recipient describes:

1. management of change orders
2. evaluations of change orders
3. thresholds and responsibilities for change order approvals

During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that had significant change orders issued.

Determine if selected change orders were within the scope of the recipient's award and reasonable for the completion of project's scope. A change to a contract that is beyond the scope of that contract, is a new non-competitive or sole source award that must be justified under the provisions for non-competitive procurements.

Determine if documentation for selected change orders included:

- Cost justification
- Approval by an authorized official

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if it executed change orders to contracts that were not within the scope of the contract, did not evaluate the cost of the change, and/or did not document authorized official approval in accordance with its procurement procedures.

DEFICIENCY CODE P14-1: Insufficient documentation to support change orders

SUGGESTED CORRECTIVE ACTION: The recipient must submit compliant change order procedures to the FTA regional office. For the next change order, submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES

FTA Circular 4220.1F Chapter VII 2. a. The Recipient's Role and Responsibilities

"The recipient is responsible for issuing, evaluating, and making necessary decisions involving any change to its third-party contracts, and any change orders, or modifications it may issue. The recipient is also responsible for evaluating and making the necessary decisions involving any claim of a constructive change. In general, FTA expects each recipient to comply with the following procedures: (1) Approval Requirements. FTA expects the recipient to have cost justifications supporting each change order it may issue. FTA also expects the recipient's authorized official to approve any proposed change order before it is issued. (2) Cost Restrictions. To be eligible for FTA assistance under the recipient's grant or cooperative agreement, the cost of the change, modification, change order, or constructive change must be allowable, allocable, within the scope of its grant or cooperative agreement, and reasonable for the completion of project scope."

FTA Circular 4220.1F Chapter VI 3. i. (1) (b)

"When the recipient requires an existing contractor to make a change to its contract that is beyond the scope of that contract, the recipient has made a sole source award that must be justified."

P15. If the recipient included options in an FTA-funded procurement, did it base the amount on its reasonably foreseeable need and evaluate the option price prior to awarding the contract?

BASIC REQUIREMENT

Recipients that include options in FTA-funded contracts must ensure that options reflect their reasonably foreseeable need and are evaluated prior to contract award.

APPLICABILITY

All recipients

EXPLANATION

Recipients may include options in contracts that reflect reasonably foreseeable need. If a recipient chooses to use options, the option quantities or periods in the bid must be evaluated in order to determine contract award. The price associated with exercising the option needs to be defined at the outset, either as a specific price or as a percentage increase of the base price. If the options were not evaluated as part of the award, the exercise of the options is considered a sole-source procurement.

If the option quantities on a rolling stock or replacement parts purchase appear to exceed the recipient's reasonably foreseeable needs, the recipient may be in violation of the five- or seven-year limitation.

INDICATORS OF COMPLIANCE

- a. *Did the recipient base the quantity or amount of options on its reasonably foreseeable need?*
- b. *Did the recipient evaluate option prices included in solicitations prior to contract award?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures to determine if the recipient describes the use options. During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that included options. Determine if the recipient documented that the inclusion of options in the solicitation represented its foreseeable need. If the documentation does not appear to be sufficient, provide this information to the FTA regional office for their further review and action.

During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that included options. Determine if the recipient documented its evaluation of the option prices prior to contract award if it intended to exercise the option(s) at a later date.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if the contract quantities were not based on the recipient's foreseeable needs.

DEFICIENCY CODE P15-1: Contract quantities not based on need

SUGGESTED CORRECTIVE ACTION: The recipient must develop procedures for complying with FTA requirements when including options in solicitations.

The recipient is deficient if it exercised options that were not evaluated with the initial bid.

DEFICIENCY CODE P15-2: Options exercised not evaluated

SUGGESTED CORRECTIVE ACTION: The recipient must develop procedures for complying with FTA requirements when evaluating contracts which included options and for exercising options. For the next applicable procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient must provide to the FTA regional office a written assurance that it will not exercise the options unless FTA approval is granted for instances where options that may violate the requirements have not been exercised. The recipient may not assign the options to any other FTA recipients.

GOVERNING DIRECTIVES

2 CFR 200.318(d)

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

FTA Circular 4220.1F Chapter IV. 1.b. Necessity

"... requires the recipient to establish procedures to avoid the purchase of unnecessary property and services (including duplicative items and quantities or options it does not intend to use or whose use is unlikely)."

FTA Circular 4220.1F Chapter VI 7. b. (1). Evaluation Required

"In general, FTA expects the recipient to evaluate bids or offers for any option quantities or periods contained in a solicitation if it intends to exercise those options after the contract is awarded."

P16. If the recipient procured bus or rail rolling stock or replacement parts with FTA funds, did it adhere to the time limitations on placing orders against the contracts?

BASIC REQUIREMENT

Options for the procurement of buses or replacement parts must not extend for more than 5 years after the date of the original contract or 7 years for rail rolling stock.

APPLICABILITY

All recipients

EXPLANATION

Recipients must not enter into contracts for revenue rolling stock and replacement parts with a period of performance exceeding five years for bus procurements inclusive of options, extensions, or renewals, and seven years for rail procurements. The five- and seven-year rules do not mean the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. The recipient, may not exercise the option to acquire buses or replacement parts later than five years (bus) or seven years (rail) after the date of its original contract. However, the maximum quantity specified in such multi-year contracts must represent the recipient's reasonably foreseeable need.

INDICATOR OF COMPLIANCE

- a. *If the recipient procured bus or rail rolling stock or replacement parts did it ensure that the contracts met the five- and seven-year contract term restriction?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures to determine if the recipient describes management of options for rolling stock purchases. During the site visit, examine selected rolling stock and replacement part contracts to ensure that these met the five- and seven-year contract term restriction. The five- and seven-year rules do not mean the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. The recipient may not exercise the option to acquire buses or replacement parts later than five years (bus) or seven years (rail) after the date of its original contract.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if it exercised rolling stock options outside of the five- or seven-year period.

DEFICIENCY CODE P16-1: Contract(s) period of performance exceeds limitation

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office revised procurement procedures that include the five- and seven-year restriction on the period of performance for rolling stock and replacement part contracts supported with FTA funds. The recipient must provide the FTA regional office with an assurance that unexecuted options will not be executed on an existing contract that exceeds the five- or seven-year restriction. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVE

49 USC § 5325(e) Multiyear rolling stock

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

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

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

FTA Circular 4220.1F Chapter IV 2. e. (10) Time Limits for Options on Rolling Stock Contracts

“MAP-21 amended 49 U.S.C. Section 5325(e)(1) by adding subsections (A) and (B), retaining the five (5) year option for the procurement of buses, while extending the option for rail procurements to seven (7) years. Consequently: (a) Buses. A recipient: 1 May enter into a multi-year contract to acquire buses or replacement parts, with an option not exceeding five (5) years to buy additional buses or replacement parts, 49 U.S.C. Section 5325(e)(1)(A), but 2 May not exercise the option to acquire buses or replacement parts later than five (5) years after the date of its original contract. (b) Rail. A recipient: May enter into a multi-year contract to acquire railcars or replacement parts, with an option not exceeding five (5) years to buy additional railcars or replacement parts, 49 U.S.C. Section 5325(e)(1)(B), but 2 May not exercise the option to acquire railcars or replacement parts later than seven (7) years after the date of its original contract.

FTA interprets these five and seven-year periods as covering the recipient’s “material requirements” for rolling stock and replacement needs from the first day when the contract becomes effective to its “material requirements” at the end of the fifth or seventh year, as applicable. In the case of rolling stock, which frequently cannot be delivered expeditiously, FTA recognizes that a recipient’s “material requirements” for rolling stock will necessarily precede its actual need to put that rolling stock to use in public transportation service. This means that the contract may not have options for more rolling stock and replacement parts than a recipient’s material requirements for the applicable five or seven-year period. This does not mean the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. Instead it means only that FTA limits a contract to purchasing no more than the recipient’s material requirements for rolling stock or replacement parts for five or seven years based on the effective date of the contract.”

P17. If the recipient purchased FTA-funded assets through a “piggyback” procurement method, did it comply with applicable requirements regarding inclusion of Federal requirements, assignability, price, and no cardinal changes?

BASIC REQUIREMENT

Recipients may use another recipient’s contract rights if the original contract contained required Federal provisions, included an assignability provision, does not contain excessive options, the optioned vehicles do not include cardinal changes to the original vehicles, and the contract price is fair and reasonable.

APPLICABILITY

All recipients

EXPLANATION

For reasons of economy, FTA permits the assignment of unneeded contract rights, sometimes called “piggybacking.” FTA discourages the assignment of another recipient’s contract rights as a substitute for a stand-alone procurement. Assignments are intended to be used only when a recipient has

inadvertently acquired contract rights in excess of its needs due to changed circumstances or honest mistakes.

Intentionally procuring excessive quantities using Federal money is a violation of the Super Circular. Furthermore, to the extent that an improper assignment of contract rights enables an assignee to avoid otherwise required procurement procedures, it also undermines the Super Circular's general purpose of full and open competition in federally assisted procurements.

While it has become increasingly popular for recipients to acquire vehicles through this method of procurement, piggybacking can also occur for purchases of services and property. A recipient that obtains contractual rights through assignment may use them after first determining that the contract price remains fair and reasonable, and the contract provisions are adequate for compliance with all Federal requirements. The recipient need not perform a second price analysis if a price analysis was performed for the original contract. However, FTA expects the recipient to determine whether the contract price or prices originally established are still fair and reasonable before using those rights.

FTA expects the recipient seeking the assignment to review the original contract to be sure that the quantities the assigning recipient acquired, coupled with the quantities the acquiring recipient seeks, do not exceed the amounts available under the assigning recipient's contract. Otherwise, the purchase is a "tag-on" and is considered an improper sole source procurement.

Any changes in the vehicle when assigned must be within the original scope (i.e., no major changes in configuration or design). FTA has not developed a finite list of acceptable contract changes. In the case of rolling stock, a major change in quantity or a substitution of major end items not contemplated when competition for the original award took place would generally be a cardinal change. Another cardinal change includes a change from a high-floor to a low-floor vehicle. Changing an engine might result in a cardinal change depending on the circumstances surrounding the project and whether a compatible replacement could be obtained through competition. FTA, however, considers changes to seating, fabrics, colors, exterior paint schemes, signage, floor covering, and other similar items to be permissible changes.

A manufacturer may not agree to amend the contract to provide for a higher domestic content in order to permit a recipient to piggyback on an existing contract. Such an amendment is considered a cardinal change to the original contract.

Vehicles added to the base or option amounts originally specified are called "tag-ons." Tag-ons are not permitted. A tag-on 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 requirements of competition.

If a recipient is using another recipient's procurement contract for purchasing revenue vehicles (i.e., "piggybacking"), the purchaser may rely on the pre-award audit completed prior to the original contract. However, the recipient must review the audit and prepare its own signed certifications.

Piggybacking is different from joint procurements. A joint procurement is a method of contracting in which two or more recipients agree from the outset to use a single solicitation document and enter into a single contract with a vendor. FTA encourages the use of joint procurements when combining requirements into a larger order can result in a more advantageous contract for the participating recipients.

Joint procurements

A joint procurement is a method of contracting in which two or more recipients agree from the outset to use a single solicitation document and enter into a single contract with a vendor. The parties to a joint procurement may be from more than one state. FTA encourages the use of joint procurements when combining requirements into a larger order can result in a more advantageous contract for the participating recipients. FTA's current guidance does not require the needs of each joint procurement

participant to be separately written into the contract. And, as with regular procurements, a joint procurement may take the form of an indefinite delivery/indefinite quantity contract (ID/IQ) if it contains “total minimum and total maximum” terms.

Participation in a joint procurement does not relieve any recipient of the responsibilities it would have if it were procuring goods or services by itself. Recipients that participate in a joint procurement must adhere to all applicable Federal requirements, including the prohibition against using Federal money to procure unneeded items.

A joint procurement may not be used as an opportunity to improperly expand the scope of a federally assisted contract. A contract has been improperly expanded when excess capacity has been added primarily to permit assignment of those contract rights to another entity.

State-led procurements

States are accorded substantial deference under 49 CFR 18.36(a) and 2 CFR 200.317 in the policies and procedures used in state procurements. By this authority, a state may follow the same policies and procedures it uses for procurements from its non-Federal funds, so long as it ensures that every purchase order or similar contract includes any clauses required by Federal law. Many states use this authority to create purchasing schedules by which the state and its subsidiaries may acquire goods.

INDICATORS OF COMPLIANCE

- a. *For “piggyback” procurements, did the recipient ensure that the underlying contract was solicited and awarded in accordance with Federal and FTA requirements?*
- b. *For “piggyback” procurements, did the recipient ensure that original contract contained an assignability clause and that the quantities it used were available?*
- c. *For “piggyback” procurements, did the recipient document that the price of assignments acquired was fair and reasonable?*
- d. *For “piggyback” procurements, did the recipient make cardinal changes to the vehicle ordered under the option (e.g., ordered a different size vehicle, fuel option, etc.)?*
- e. *Did the recipient exercise an assigned option for delivery of vehicles on a contract that was entered into before December 4, 2015? If yes:*
 1. *If the assigned option is exercised for delivery of vehicles in FY2018 or FY2019, did the original contract include a provision for domestic content of more than 65 percent?*
 2. *If the assigned option is exercised for delivery of vehicles in FY2020 and beyond, did the original contract include a provision for domestic content of more than 70 percent?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient’s policies and procedures to determine how the recipient describes compliance with “piggybacking” purchases. Examine the recipient’s listing of procurements to identify any piggybacking procurements

During the site visit, examine selected “piggyback” procurement files to:

- Ensure that the recipient files include sufficient documentation that the underlying contract was solicited and awarded in compliance with Federal and FTA requirements and included required contract provisions.
- Determine if the recipient verified that:
 - the original contract contained an assignability provision, and
 - the quantities acquired, coupled with the quantities already assigned, did not exceed the amounts available under the assigning recipient’s contract

- Ensure that the recipient files include sufficient documentation that the original contract price remained fair and reasonable.
- Ensure that the recipient files include sufficient documentation that the vehicle ordered under the option is substantially the same as the original vehicle in the contract.

Identify any piggybacking procurements entered into subsequent to December 4, 2015. Onsite, review the date of the underlying contract on which the recipient is piggybacking. Determine if that contract was awarded subsequent to December 4, 2015. If the contract was entered into prior to December 4, 2015, assigned options for delivery during FY2018 and FY2019 must include provisions for domestic content of 65 percent in the original contract. Also, assigned options for delivery during FY2020 and FY2021 must include provisions for domestic content of 70 percent in the original contract.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it cannot document that:

- the original award met Federal requirements,
- the contract contained an assignability clause, and that assigned quantities did not exceed contract allowable amounts,
- the price was determined to be fair and reasonable, and
- the option vehicle did not contain a cardinal change to the original vehicle.

DEFICIENCY CODE P17-1: Improper piggyback purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office piggybacking procedures that comply with FTA requirements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient may be required by FTA to terminate the agreement for convenience if an improper piggyback procurement is in process.

The recipient is deficient if, subsequent to December 4, 2015, it acquired options through piggybacking on a contract that was awarded prior to October 1, 2015 and the base contract did not have the correct FY2018, FY2019 or FY2020 domestic content requirement.

DEFICIENCY CODE P17-2: Domestic content requirements not met in piggyback purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office piggybacking procedures that comply with FTA requirements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient may be required by FTA to terminate the agreement for convenience if an improper piggyback procurement is in process.

GOVERNING DIRECTIVES

FTA Circular 4220.1F Chapter V (7)(2) Assignment of Contract Rights

“...The recipient may assign those contract rights to other recipients if the original contract contains an assignability provision that permits the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions. Some refer to this process as “piggybacking...” “...A recipient that obtains contractual rights through assignment may use them after first determining that the original contract price remains fair and reasonable, and the original contract provisions are adequate for compliance with all Federal requirements. The recipient need not perform a second price analysis if a price analysis was performed for the original contract. However, FTA expects the recipient to determine whether the contract price or prices originally established are still fair and reasonable before using those rights.”

FTA Circular 4220.1F Chapter V 7. a. (1) (b). Exercise of Options

“A recipient may use contract options held by another recipient with the following limitations: ... The recipient may not exercise an option unless it has determined that the option price is better than prices available in the market, or that when it intends to exercise the option, the option is more advantageous.”

FTA Circular 4220.1F Chapter V, Section 7. b. (2) (d)

“In the case of rolling stock, a major change in quantity or a substitution of major end items not contemplated when competition for the original award took place would generally be a cardinal change. Another cardinal change would, at this time, include a change from a high-floor to a low-floor vehicle. Changing an engine might result in a cardinal change depending on the circumstances surrounding the project and whether a compatible replacement could be obtained through competition. FTA, however, considers changes to seating, fabrics, and colors, exterior paint schemes, signage, and floor covering, and other similar changes to be permissible changes.”

Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances IV, 81 Federal Register 60278 (September 1, 2016)

“The right to exercise an option does not create a contractual obligation until that contract is actually signed. Thus, assigning contract options to a third party will result in a new contract between that third party and the transit vehicle manufacturer, negating commenters' concerns that an increase in domestic content might be viewed as a “cardinal change.” Third parties seeking the assignment of procurement options (a/k/a “piggybacking”) have no contractual or statutory right to that option, and FTA considers that procurement to be a “new” contract and therefore subject to the applicable FAST Act standard based upon the scheduled delivery date of the first production vehicle under the new contract.”

P18. Did the recipient ensure that appropriate FTA approval was acquired for advance payments and that adequate protection was exercised for progress payments?

BASIC REQUIREMENT

The recipient must receive FTA approval for advance payments and protect FTA’s interest on progress payments.

APPLICABILITY

All recipients

EXPLANATION

FTA does not authorize and will not participate in funding advance payments to a contractor without prior, written approval from the FTA regional office administering the project. A recipient may use its local funds for advance payments. However, advance payments made with local funds before an award has been awarded or before the issuance of a letter of no prejudice or other pre-award authority are ineligible for reimbursement.

FTA will allow progress payments if the payments are made to the contractor only for costs incurred in the performance of the contract. The recipient may use FTA assistance to support progress payments, provided the recipient obtains adequate security for those payments and has sufficient written documentation to substantiate the work for which payment is requested. Adequate security for progress payments may include taking title or obtaining a letter of credit or taking equivalent measures to protect the recipient’s financial interest in the progress payment.

INDICATORS OF COMPLIANCE

- a. *If the recipient used FTA funds for advance payments to contractors, is prior FTA approval documented in procurement files?*

- b. *If the recipient used FTA funds for progress payments to contractors, did it adequately protect FTA's interest and substantiate the work for which payment was made?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes management of payments to contractors and administration and management of progress payments.

During the site visit, examine selected contract files, in accordance with records sampling procedures, for payments that may be categorized as payment to a contractor before the contractor incurred contract costs. Progress payments that do not reflect contractor incurred costs could be determined to be advance payments. If such payments are evident, determine if the recipient documented that it received prior FTA approval in advance of the payments.

Examine selected contract files for description of how and when progress payments will be made. Determine if the recipient documented appropriate measures it took to protect FTA's interest before making any progress payments and that it has written documentation to substantiate the work for which payment was made.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it has used advance payments without prior FTA approval.

DEFICIENCY CODE P18-1: No FTA approval for advance payments

SUGGESTED CORRECTIVE ACTION: The recipient must report immediately to the FTA regional office any improper advance payments with an explanation of the circumstances surrounding the payments. The recipient must submit to the FTA regional office procedures for obtaining prior FTA approval for advance payments. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it has made progress payments but has not obtained adequate security for those payments and does not have written documentation to substantiate the work for which payment was made.

DEFICIENCY CODE P18-2: Federal interest not protected in advance/progress payments

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office procedures for obtaining adequate security and or sufficient written documentation to substantiate the work for progress payments. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES

2 CFR 200.305

2 CFR Part 205

FTA C. 5010.1E, page IV-15

“Provisions in 2 CFR §200.305 and 31 CFR Part 205 govern payments to recipients for financing operations under federal assistance and other programs. These regulations require that advance payment to a recipient be limited to the minimum amounts needed and timed to be in accord with only the actual, immediate cash requirements of the recipient in carrying out the purpose of the Award. The timing and amount of advance payments must be as close as is administratively feasible to the actual disbursements by the recipient for direct program or costs of the Award and the proportionate share of any allowable indirect costs. The recipient must make timely payment to third-party contractors in accordance with the third-party contract provisions.”

FTA C. 4220.1F, Ch. IV, Sections 2. b. (5)(b) Advance Payments

“Advance payments are payments made to a contractor before the contractor incurs contract costs. The recipient may use its local share funds for advance payments. However, if there is no automatic preaward authority for its project, then advance payments made with local share funds before FTA assistance has been awarded, or before a letter of no prejudice has been issued or other preaward authority has been provided, or before FTA approval for the specific advance payment has been obtained, are ineligible for reimbursement. The following principles and restrictions apply: 1 Use of FTA Assistance Prohibited. The recipient may not use FTA assistance to make payments to a third party contractor before the contractor has incurred the costs for which the payments would be attributable. 2 Exceptions for Sound Business Reasons. Apart from advance payments that are customary, as discussed further, FTA does occasionally make exceptions to its advance payment prohibitions, if the recipient can provide sound business reasons for doing so and has obtained FTA's advance written concurrence. A recipient that seeks to use FTA assistance to support advance payments should contact the regional office administering its project to obtain FTA concurrence. a Adequate Security for Advance Payments. FTA recognizes that advance payments may be needed for certain costs supported by sound business judgment. Adequate security for the advance payment is an essential pre-condition to FTA's concurrence in the use of FTA or local share funds. b Customary Advance Payments. FTA recognizes that advance payments are typically required for, but are not limited to, public utility connections and services, rent, tuition, insurance premiums, subscriptions to publications, software licenses, construction mobilization costs, transportation, hotel reservations, and conference and convention registrations. Accordingly, the recipient may use FTA assistance to support or reimburse the costs of such acquisitions. FTA concurrence is required only when such advance payment or payments customarily required in the marketplace exceed \$100,000.”

FTA C. 4220.1F, Ch. IV, Sections 2. b. (5)(c) Progress Payments

“Progress payments are payments for contract work that has not been completed. The recipient may use FTA assistance to support progress payments provided the recipient obtains adequate security for those payments and has sufficient written documentation to substantiate the work for which payment is requested. 1. Adequate Security for Progress Payments. Adequate security for progress payments may include taking title or obtaining a letter of credit or taking equivalent measures to protect the recipient's financial interest in the progress payment. Adequate security should reflect the practical realities of different procurement scenarios and factual circumstances. FTA acknowledges the practical reality that taking title to work in progress may not be desirable in some circumstances. The recipient should always consider the costs associated with providing security (for example, the recipient may need to acquire bonds or letters of credit in the commercial marketplace) and the impact of those costs on the contract price, as well as the consequences of incomplete performance. 2. Adequate Documentation. Sufficient documentation is required to demonstrate completion of the amount of work for which progress payments are made.”



P19. If the recipient procured buses with FTA funds, did it comply with requirements for bus testing reports?

BASIC REQUIREMENT

For bus procurements, the recipient must have in its possession a copy of the Altoona Bus Testing Report before final acceptance of the first vehicle.

APPLICABILITY

All recipients

EXPLANATION

The recipient must have in its possession a copy of the Altoona Bus Testing Report before final acceptance of the first vehicle. Testing applies to buses and modified vans used in transit service, including, but not limited to, new bus and van models using alternative fuels such as methanol, ethanol, compressed natural gas (CNG), hydrogen, and electricity (if stored and/or generated on-board the vehicle).

FTA does not require a vehicle manufacturer to test its model before bidding. However, recipients of FTA funds acquiring any bus model must certify that an example of that model will have been tested and the recipient will have received a copy of the resulting test report prepared on the bus model before the final acceptance of the first vehicle. Effective October 31, 2016, the effective date of the revision to 49 CFR part 665, recipients must certify that the bus models submitted to Altoona following the effective date received a passing score before FTA funds can be spent on that vehicle.

Bus testing is not required for unmodified mass-produced vans (provided they are only offered to FTA recipients in the 4-year/100,000-mile service life category). Unmodified mass-produced vans are vehicles manufactured as complete, fully assembled vehicles as provided by the original equipment manufacturer (OEM). This category includes vans with raised roofs or wheelchair lifts or ramps that are installed by the OEM or by someone other than the OEM, provided that the installation of these components is completed in strict conformance with the OEM modification guidelines.

INDICATORS OF COMPLIANCE

- a. *Were the bus models that the recipient purchased during the review period tested?*
- b. *Did the recipient obtain the bus testing report showing the bus model met FTA's bus testing requirements prior to acceptance of the first vehicle?*

DETERMINING COMPLIANCE

Prior to the site visit, examine the make and models of all buses procured since the last Comprehensive Review. Review the Altoona Bus Research and Testing Center Database at <http://altoonabustest.psu.edu/> to determine if a bus report has been issued for that model. For bus models tested subsequent to October 31, 2016, determine if the bus model received a passing score.

During the site visit, examine selected bus procurement files to ensure that the recipient had in its possession a copy of the Altoona Bus Testing Report before final acceptance of the first vehicle and that, subsequent to October 31, 2016, any new bus model tested received a passing score.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if the bus model purchased with FTA funds was not tested or, for new bus models tested after October 31, 2016, the bus model did not receive a passing score.

DEFICIENCY CODE P19-1: Deficiency with bus model testing requirements

SUGGESTED CORRECTIVE ACTION: If any vehicles have not been tested and the recipient has accepted the vehicles, the recipient must notify the FTA regional office

immediately. The recipient must provide procedures for only accepting vehicles that were tested and received a passing score for future bus purchases to the FTA regional office. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if a copy of the Altoona Bus Test Report is not in the recipient's procurement files.

DEFICIENCY CODE P19-2: Missing documentation of bus model testing

SUGGESTED CORRECTIVE ACTION: The recipient must obtain the Altoona Bus Test Report for the specific make/model purchased and provide a copy of it and procedures for obtaining the report for future bus purchases to the FTA regional office.

GOVERNING DIRECTIVE

49 CFR 665.7 Certification of compliance

“(a) In each application to FTA for the purchase or lease of any new bus model, or any bus model with a major change in configuration or components to be acquired or leased with funds obligated by the FTA, the recipient shall certify that the bus was tested at the Bus Testing Facility and that the bus received a passing test score as required in this part. The recipient shall receive the appropriate full Bus Testing Report and any applicable partial testing report(s) before final acceptance of the first vehicle.”

P20. If the recipient procured rolling stock with FTA funds, did it comply with pre-award and post-delivery audit requirements?

BASIC REQUIREMENT

A recipient purchasing revenue service rolling stock with Federal funds must conduct pre-award and post-delivery audits verifying compliance with Buy America provisions, purchaser's requirements, and Federal Motor Vehicle Safety Standards (FMVSS).

APPLICABILITY

All recipients

EXPLANATION

A recipient purchasing revenue service rolling stock with Federal funds must conduct pre-award and post-delivery audits verifying compliance with Buy America provisions, purchaser's requirements, and FMVSS. The recipient is required to keep records, including pre-award and post-delivery certifications, which show that the regulations have been followed. The audits require the recipient to complete two certifications (Buy America and Purchaser's Requirements) at the pre-award stage and three certifications (Buy America, Purchaser's Requirements, and FMVSS) at the post-delivery stage.

A procurement of small buses and vans which totals not more than \$150,000 is not subject to the general Buy America requirements of 49 CFR part 661. This waiver does not exempt rolling stock from the pre-award and post-delivery purchaser's requirements and FMVSS audits required by 49 CFR part 663.

Pre-Award Audits and Certifications

Recipients may purchase vehicles in several groups over several years using either vehicle procurement contracts with options or multi-year vehicle procurement contracts. FTA requires that each group of vehicles purchased, i.e., each "order" of vehicles, have a pre-award audit before the order is placed. One pre-award audit may suffice, provided that there is no change in vehicle configuration, i.e., no change that is expected to have a significant impact on vehicle handling and stability or structural integrity, between successive deliveries of vehicles.

If a recipient is using another recipient's procurement contract for purchasing revenue vehicles (i.e., "piggybacking"), the purchaser may rely on the pre-award audit completed prior to the original contract. However, the recipient must review the audit and prepare its own signed certification.

Compliance with purchaser's specifications: The recipient must complete a pre-award purchaser's requirements certification verifying that the manufacturer's bid specifications comply with the recipient's solicitation requirements and that the proposed manufacturer is responsible and capable of building the bus to the solicitation specifications. The pre-award certification may be based on the recipient's determination that the vendor is responsive and responsible. The requirement to conduct an audit for compliance with purchaser's requirements and sign a certification applies to all purchases of revenue rolling stock, even those below the Federal simplified acquisition threshold. The pre-award audit is required before a recipient enters into a formal contract with a supplier.

Compliance with Buy America: If the procurement exceeds the simplified acquisition threshold, at the pre-award stage, the recipient must complete:

- A compliance certification verifying that the rolling stock will contain the required minimum percent domestic components, by cost, and that final assembly will take place in the United States; or
- An exemption certification indicating that the recipient has a letter from FTA granting a waiver from the Buy America requirement

The recipient or an independent third party must conduct the Buy America audit. The audit may be based on information provided by the manufacturer; however, certification by the manufacturer is not adequate.

For rolling stock contracts entered into before October 1, 2015, the domestic content must exceed 60 percent. For rolling stock contracts entered into on or after October 1, 2015, the applicable domestic content percentage under section 5323(j)(2)(C) will be based on the scheduled delivery date of the first production vehicle (i.e., the first vehicle intended to carry passengers in revenue service), final acceptance notwithstanding. Thus, if a recipient or group of recipients as part of a joint procurement enter into a contract for rolling stock on or after October 1, 2015, then the new FAST Act provisions applicable for the date of delivery of the first production vehicle shall apply. Accordingly, if the first production vehicle is delivered in FY2018 or FY2019, the domestic content must be more than 65 percent, and if the first production vehicle is delivered in FY2020 or beyond, the domestic content must be more than 70 percent.

Compliance with FMVSS: The recipient must receive a certification from the vehicle manufacturer at the pre-award stage that the vehicles being procured comply with FMVSS issued by the National Highway Traffic Safety Administration (49 CFR part 571).

Post Delivery Audits and Certifications

Compliance with purchaser's specifications: The recipient must complete a post-delivery purchaser's requirements certification verifying that the buses delivered meet the contract specifications. This must be completed before a bus title is transferred to the recipient or before a bus is placed into revenue service, whichever is first. The post-delivery certification is based on the recipient's visual inspections and road tests and, if required, the resident inspector's monitoring of the final assembly process and final report of manufacturing activities. The requirement to conduct an audit for compliance with purchaser's requirements and sign a certification applies to all purchases of revenue rolling stock, even those below the Federal simplified acquisition threshold.

Recipients are required to have a resident inspector during final assembly process if they meet the following criteria:

- Recipient is purchasing any number of rail vehicles
- Recipient is in an urbanized area with a population of more than 200,000 and is purchasing more than 10 buses
- Recipient is in an area with a population of 200,000 or less and is purchasing more than 20 buses

FTA does not require in-plant inspectors for any number of unmodified vans manufactured by the automobile companies. FTA requires only a visual inspection and road test after delivery for such procurements.

In the case of consolidated procurements on behalf of multiple subrecipients, the in-plant inspection requirement is triggered only if any single subrecipient will receive more than 10 or more than 20 vehicles, depending on area size. One in-plant inspector can meet the requirement for multiple recipients. The inspector may not be an agent or employee of the manufacturer. The inspector must prepare a report providing accurate records of all vehicle construction activities and summarizing how the construction and operational characteristics of the vehicles met (or did not meet) the contract specifications.

Compliance with Buy America: Required post-delivery certification includes disclosure by the manufacturer of the final assembly location; a listing of the component and subcomponent parts, the cost (actual or percent of total) of such components and subcomponents and the country of origin; a description of final assembly activities; and the cost of final assembly. Final assembly costs are not to be included when calculating the percent of domestic content of the vehicle.

The recipient or an independent third party must conduct the Buy America audits. The audit may be based on information provided by the manufacturer; however, certification by the manufacturer is not adequate.

Compliance with FMVSS: The recipient must complete, at the post-delivery stage, a certification that the recipient has received from the vehicle manufacturer at both the pre-award and post-delivery stages a certification that the vehicles comply with the FMVSS issued by the National Highway Traffic Safety Administration (49 CFR part 571). The requirement to conduct an audit for compliance with FMVSS and sign a certification applies to all purchases of revenue rolling stock, even those below the Federal simplified acquisition threshold.

INDICATORS OF COMPLIANCE

- a. *For rolling stock procurements, did the recipient include the appropriate Buy America domestic content requirements in its solicitation?*
- b. *For rolling stock purchases, did the recipient conduct pre-award and post-delivery audits to ensure the manufacturer(s) complied with contract specifications and Buy America?*
- c. *Did the recipient document its pre-award and post-delivery audits by completing and maintaining written certifications?*

DETERMINING COMPLIANCE

Prior to the site visit, review the recipient's list of rolling stock procurements to determine which Buy America domestic content percentage is required. Onsite, review contract documents to ensure that the appropriate domestic content requirements are included.

- For contracts entered into before October 1, 2015, all vehicles delivered under the original contract base order and any properly exercised options by recipients who are direct parties to the contract must contain a domestic content of 60 percent or more.
- The FAST Act amendments below regarding increasing domestic content do not apply to contracts entered into after October 1, 2015, even if the contract provides for the delivery of the first production vehicle after FY2017.
- For rolling stock contracts entered into on or after October 1, 2015, the applicable domestic content percentage is based on the scheduled delivery date of the first production vehicle (i.e., the first vehicle intended to carry passengers in revenue service), final acceptance notwithstanding.
- If the first production vehicle is delivered in FY2018 or FY2019, the domestic content must be more than 65 percent, and if the first production vehicle is delivered in FY2020 or beyond, the domestic content must be more than 70 percent.

- If the delivery date of the first production vehicle is delayed such that it will be delivered in a year with a higher domestic content, FTA will address those situations on a case-by-case basis.

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes compliance with pre-award and post-delivery audits and audit certifications for rolling stock purchases. During the site visit, examine selected rolling stock procurement files to ensure that, for each group of vehicles purchased, the recipient conducted the following audits and made an included in their files the following certifications:

- Pre-award Buy America
- Pre-award Purchaser's Requirements
- Post-delivery Buy America
- Post-delivery Purchaser's Requirements
- Post-delivery FMVSS

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it did not include the appropriate Buy America domestic content requirements in its rolling stock procurements.

DEFICIENCY CODE: P20-1 Buy America domestic content deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must confer with the FTA regional office for the appropriate remedy based on the stage of the procurement process.

The recipient is deficient if it did not conduct all of the required audits for revenue rolling stock procurements. The recipient is deficient if it ordered a group of vehicles from a multi-year procurement before the pre-award audit was conducted.

DEFICIENCY CODE P20-2: Pre-award and/or post-delivery audits not performed

SUGGESTED CORRECTIVE ACTION: The recipient must confer with the FTA regional office for the appropriate corrective action. The recipient must submit to the FTA regional office procedures for pre-award and post-delivery review and inspection. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient must submit to the FTA regional office procedures for conducting pre-award audits for options and/or multi-year contracts so that future procurements will comply with this requirement. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it did not make pre-award and/or post-delivery certifications for applicable rolling stock procurements.

DEFICIENCY CODE P20-3: Pre-award and/or post-delivery certifications lacking

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office the certifications for the procurement reviewed and procedures for completing the applicable pre-award and post-delivery audits certifications for future revenue rolling stock procurements. If the recipient cannot certify compliance, it must confer with the FTA regional office for the appropriate corrective action. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

For the next revenue rolling stock procurement, the recipient must submit to the FTA regional office pre-award audit information and certifications before awarding the contract and the post-delivery audit information and certifications before drawing FTA funds.

GOVERNING DIRECTIVES

49 U.S.C. §5323(j)

49 CFR 663 Pre-award and Post-delivery Audits of Rolling Stock Purchases “Subpart B—Pre-Award Audits

§663.21 Pre-award audit requirements

“A recipient purchasing revenue service rolling stock with FTA funds must ensure that a pre-award audit under this part is complete before the recipient enters into a formal contract for the purchase of such rolling stock.”

§663.23 Description of pre-award audit

“A pre-award audit under this part includes—(a) A Buy America certification as described in §663.25 of this part; (b) A purchaser's requirements certification as described in §663.27 of this part; and (c) Where appropriate, a manufacturer's Federal Motor Vehicle Safety certification information as described in §663.41 or §663.43 of this part.”

§663.25 Pre-award Buy America certification

“For purposes of this part, a pre-award Buy America certification is a certification that the recipient keeps on file that—(a) There is a letter from FTA which grants a waiver to the rolling stock to be purchased from the Buy America requirements under section 165(b)(1), (b)(2), or (b)(4) of the Surface Transportation Assistance Act of 1982, as amended; or (b) The recipient is satisfied that the rolling stock to be purchased meets the requirements of section 165(a) or (b)(3) of the Surface Transportation Assistance Act of 1982, as amended, after having reviewed itself or through an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer which lists—(1) Component and subcomponent parts of the rolling stock to be purchased identified by manufacturer of the parts, their country of origin and costs; and (2) The location of the final assembly point for the rolling stock, including a description of the activities that will take place at the final assembly point and the cost of final assembly.”

§663.27 Pre-award purchaser's requirements certification

“For purposes of this part, a pre-award purchaser's requirements certification is a certification a recipient keeps on file that— (a) The rolling stock the recipient is contracting for is the same product described in the purchaser's solicitation specification; and (b) The proposed manufacturer is a responsible manufacturer with the capability to produce a vehicle that meets the recipient's specification set forth in the recipient's solicitation. Subpart C—Post-Delivery Audits”

§663.31 Post-delivery audit requirements

“A recipient purchasing revenue service rolling stock with FTA funds must ensure that a post-delivery audit under this part is complete before title to the rolling stock is transferred to the recipient.”

§663.33 Description of post-delivery audit

“A post-delivery audit under this part includes—(a) A post-delivery Buy America certification as described in §663.35 of this part; (b) A post-delivery purchaser's requirements certification as described in §663.37

of this part; and (c) When appropriate, a manufacturer's Federal Motor Vehicle Safety Standard self-certification information as described in §663.41 or §663.43 of this part.”

§663.35 Post-delivery Buy America certification

“For purposes of this part, a post-delivery Buy America certification is a certification that the recipient keeps on file that—(a) There is a letter from FTA which grants a waiver to the rolling stock received from the Buy America requirements under sections 165 (b)(1), or (b)(4) of the Surface Transportation Assistance Act of 1982, as amended; or (b) The recipient is satisfied that the rolling stock received meets the requirements of section 165 (a) or (b)(3) of the Surface Transportation Assistance Act of 1982, as amended, after having reviewed itself or by means of an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer which lists—(1) Components and subcomponent parts of the rolling stock identified by manufacturer of the parts, their country of origin and costs; and (2) The actual location of the final assembly point for the rolling stock including a description of the activities which took place at the final assembly point and the cost of the final assembly.”

§663.37 Post-delivery purchaser's requirements certification

“For purposes of this part, a post-delivery purchaser's requirements certification is a certification that the recipient keeps on file that—(a) Except for procurements covered under paragraph (c) in this section, a resident inspector (other than an agent or employee of the manufacturer) was at the manufacturing site throughout the period of manufacture of the rolling stock to be purchased and monitored and completed a report on the manufacture of such rolling stock. Such a report, at a minimum, shall—(1) Provide accurate records of all vehicle construction activities; and (2) Address how the construction and operation of the vehicles fulfills the contract specifications. (b) After reviewing the report required under paragraph (a) of this section, and visually inspecting and road testing the delivered vehicles, the vehicles meet the contract specifications. (c) For procurements of: (1) Ten or fewer buses; or (2) Procurements of twenty vehicles or fewer serving rural (other than urbanized) areas, or urbanized areas of 200,000 people or fewer; or (3) Any number of primary manufacturer standard production and unmodified vans, after visually inspecting and road testing the vehicles, the vehicles meet the contract specifications.”

§663.39 Post-delivery audit review

“(a) If a recipient cannot complete a post-delivery audit because the recipient or its agent cannot certify Buy America compliance or that the rolling stock meets the purchaser's requirements specified in the contract, the rolling stock may be rejected and final acceptance by the recipient will not be required. The recipient may exercise any legal rights it has under the contract or at law. (b) This provision does not preclude the recipient and manufacturer from agreeing to a conditional acceptance of rolling stock pending manufacturer's correction of deviations within a reasonable period. Subpart D—Certification of Compliance With or Inapplicability of Federal Motor Vehicle Safety Standards”

§663.41 Certification of compliance with Federal motor vehicle safety standards

“If a vehicle purchased under this part is subject to the Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in part 571 of this title, a recipient shall keep on file its certification that it received, both at the pre-award and post-delivery stage, a copy of the manufacturer's self-certification information that the vehicle complies with relevant Federal Motor Vehicle Safety Standards.”

§663.43 Certification that Federal motor vehicle standards do not apply

“(a) Except for rolling stock subject to paragraph (b) of this section, if a vehicle purchased under this part is not subject to the Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in part 571 of this title, the recipient shall keep on file its certification that it received

a statement to that effect from the manufacturer. (b) This subpart shall not apply to rolling stock that is not a motor vehicle.”

Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances IV, 81 Federal Register 60278 (September 1, 2016)

“For rolling stock contracts entered into on or after October 1, 2015, i.e., the effective date of the FAST Act, the applicable domestic content percentage under section 5323(j)(2)(C) will be based on the scheduled delivery date of the first production vehicle (i.e., the first vehicle intended to carry passengers in revenue service), final acceptance notwithstanding. Thus, if a recipient or group of recipients as part of a joint procurement enter into a contract for rolling stock on or after October 1, 2015, then the new FAST Act provisions applicable for the date of delivery of the first production vehicle shall apply. Accordingly, if the first production vehicle is delivered in FY2018 or FY2019, the domestic content must be more than 65 percent, and if the first production vehicle is delivered in FY2020 or beyond, the domestic content must be more than 70 percent. These delivery provisions apply to contracts entered into on or after October 1, 2015, unless a waiver is granted. If the delivery date of the first production vehicle is delayed such that it will be delivered in a year with a higher domestic content, FTA will address those situations on a case-by-case basis. The FAST Act amendments do not apply to contracts entered into before October 1, 2015, even if the contract provides for the delivery of the first production vehicle after FY2017. For contracts entered into before October 1, 2015, all vehicles delivered under the original contract base order and any properly exercised options by recipients who are direct parties to the contract may contain a domestic content of more than 60 percent, per the pre-FAST Act requirements.”

FTA is issuing two general public interest waivers to address two categories of recipients and manufacturers: (1) Recipients who entered into contracts or placed purchase orders against State schedules between October 1, 2015 and December 4, 2015; and (2) recipients who have entered into contracts after December 4, 2015, as a result of solicitations for bids or requests for proposals that were advertised before December 4, 2015. In addition, FTA is issuing a third public interest waiver for recipients who solicited contracts on or after December 4, 2015, provided they enter into a contract within 60 days of publication of this Notice.

P21. Does the recipient perform oversight of its subrecipients’ FTA-funded procurement activities?

BASIC REQUIREMENT

The recipient is responsible for ensuring that subrecipients administer FTA-funded procurements in accordance with the requirements in 2 CFR part 200 and FTA Circular 4220.1F.

APPLICABILITY

All recipients of FTA funds

EXPLANATION

When a recipient contracts out a portion of its federally funded operation or passes through funding to a subrecipient, competitive procurement requirements may apply to the contractor and/or subrecipient. Typically, this requirement would apply to any third party or subrecipient agreement in which the contractor or subrecipient performs primary project activities normally performed by the recipient directly. In such circumstances, the procurement process of the contractor/subrecipient should meet Federal requirements contained in the FTA Master Agreement, including Buy America, debarment and suspension, and lobbying requirements. Furthermore, a recipient needs to have a mechanism to ensure contractor/subrecipient compliance.

Some recipients provide written guidelines or standard terms and conditions to subrecipients and contractors for direct procurements. Some recipients review subrecipients' and contractors' direct procurements, particularly for vehicles, equipment, and construction. Such reviews, which generally focus on bid evaluation and selection, may be used to ensure that FTA (and state) requirements are met.

Monitoring of compliance with FTA third party contracting requirements will require a review of procurement procedures, either through site visits or a periodic review of written procurement manuals. The recipient is not required to review each subrecipient's procurement to ensure compliance with Federal requirements. The recipient may review selected procurements on a periodic basis in conjunction with a site visit or other general review of compliance with Federal requirements.

INDICATORS OF COMPLIANCE

- a. *Does the recipient implement oversight procedures of its subrecipients for FTA-funded procurements?*
- b. *Do subrecipient procurement files reviewed demonstrate adequate oversight by the recipient?*

DETERMINING COMPLIANCE

Request and review a listing of subrecipients. Request and review the recipient's oversight procedures, State Management Plans, and any procurement requirements that have been included in subrecipient agreements. Discuss with the recipient onsite and determine who monitors the subrecipients' procurement processes. Examine written reports or audit reports of the process to determine if the recipient is monitoring in accordance with its documented procedures.

Onsite, during subrecipient visits, select sample procurements for compliance with 2 CFR part 200 and FTA Circular 4220.1F. Governmental subrecipients may use State procurement procedures and only procurement provisions that apply to the State apply to them. Private, non-profit subrecipients must follow 4220.1F.

Subrecipients of states that are public entities and contractors must comply with FTA requirements that apply to states. Subrecipients of states that are private nonprofit or for profit entities must comply with all the FTA requirements of FTA C. 4220.1F. FTA considers all metropolitan planning organizations (MPOs), even those incorporated as a nonprofit organization under state law, to be "local governments." Consequently, MPOs must comply with the FTA requirements that apply to states.

The following procurement requirements apply to states and their public entity subrecipients and contractors:

- Comply with its own procurement regulations
- Conduct all procurements in a manner providing full and open competition
- Exclude the use of statutorily or administratively imposed in-state or local geographical preferences in the evaluation of bids or proposals except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference
- Use competitive proposal procedures based on the Brooks Act when contracting for architectural and engineering services, if the State has not adopted a statute governing the procurement of such services before August 10, 2005
- Award to only responsible contractors possessing the ability, willingness and integrity to perform successfully under the terms and conditions of the contract
- Ensure that every purchase order and contract executed using Federal funds includes all clauses required by Federal statutes and executive orders and their implementing regulations
- Do not enter into any contract for rolling stock with a period of performance for ordering exceeding five years (seven years for rail) inclusive of options without prior FTA approval
- Comply with Buy America requirements, including pre-award and post-delivery requirements
- Comply with debarment and suspension requirements
- Comply with lobbying requirements
- Comply with piggybacking requirements in addition to the requirements that apply to states

FTA C. 4220.1F requirements that apply to private nonprofit or for-profit entities include, but are not limited to, the following:

- Maintain a written code of standards of conduct governing the performance of employees engaged in the award and administration of contracts
- Have written procurement policies and procedures
- Have written protest procedures to handle and resolve disputes relating to the award of contracts
- Have procedures for settlement of contract issues/disputes
- Analyze each planned acquisition in order to identify and evaluate potential organizational conflicts of interest
- Review procurement requests to avoid duplicative or unnecessary purchases
- Incorporate a clear and accurate description of the material, product, or services being procured; identify all requirements that offerors must fulfill; and identify evaluation factors in solicitations
- Develop an ICE before receiving bids or proposals
- Conduct a contract cost or price analysis for every procurement
- Evaluate options at the time of bid award, exercise the options at the agreed upon terms, and determine that the option price is better than current market prices before exercising the options
- Maintain a contract administration system that ensures that contractors perform in accordance with the terms, conditions and specifications of their contracts or purchase orders
- Maintain a written record of procurement history

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if 1) it is not providing oversight of its subrecipients' procurement processes as described in its written documents, 2) it does not monitor subrecipients or contractors making direct procurements with FTA assistance for compliance with the requirements, and/or 3) during a review of subrecipient procurements, deficiencies are found.

DEFICIENCY CODE P21-1: Insufficient oversight of subrecipient procurements

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office with documentation that it has implemented a procurement monitoring program.

GOVERNING DIRECTIVE

2 CFR §200.331 "Requirement for pass-through entities:

All pass-through entities must: (d) Monitor the activities of the subrecipient as necessary to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward; and that subaward performance goals are achieved. Pass-through entity monitoring of the subrecipient must include: (1) Reviewing financial and performance reports required by the pass-through entity. (2) Following-up and ensuring that the subrecipient takes timely and appropriate action on all deficiencies pertaining to the Federal award provided to the subrecipient from the pass-through entity detected through audits, on-site reviews, and other means. (3) Issuing a management decision for audit findings pertaining to the Federal award provided to the subrecipient from the pass-through entity as required by §200.521 Management decision."

ISSUES/AREAS OF CONCERN FOR FTA AWARENESS

1. Have any oversight reviews audits, or investigations of the recipient conducted since the last Comprehensive Review (including Procurement System Reviews (PSRs), Buy America audits, Financial Management Oversight Reviews (FMOs), and the most recent Comprehensive Review) identified significant deficiencies, material weaknesses and/or repeat deficiencies in the area of procurement or Buy America?
2. Are any oversight reviews audits, or investigations scheduled during this Federal fiscal year?

3. Did the recipient experience difficulty resolving or closing any oversight review, investigation, or audit findings?
4. Are any oversight review, investigation, or audit findings currently open?
5. If a PSR has been requested for the upcoming year, what triggered the review request (e.g., new recipient, known procurement)?
6. Are any issues related to procurement indicated in the Oversight Assessment Tool (OAT)?
7. Does the recipient appear to have an appropriate organizational structure, including sufficient staff levels, for procurement? Does the recipient provide technical training to procurement employees?
8. How does the recipient organize and structure procurement functions and personnel to support FTA-funded procurements (e.g., separate department within organization; split responsibility between transit staff and procurement office; etc.)?
9. How does the recipient manage FTA-related procurement functions: centralized with one department establishing, monitoring, and overseeing policies and procedures, or decentralized, allowing other internal departments/staff to purchase goods and or services using FTA funds?
10. If the procurement function is decentralized, how does the recipient ensure that FTA-funded procurements are in compliance with FTA requirements?
11. How do procurement personnel collaborate with users in the development of specifications and choosing the method for procurement?
12. Did background research or site visit observations reveal any potential issues or concerns about the management or implementation of the Procurement process not covered previously in this section?

REFERENCES

Procurement

1. 49 U.S.C. Chapter 53, Federal Transit Laws
2. 2 CFR Part 1201, incorporating 2 CFR Part 200, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards"
3. 49 CFR Part 18, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments"
4. FTA Circular 4220.1F, "Third Party Contracting Guidance"
5. FTA Circular 5010.1E, "Award Management Requirements"
6. FTA Circular 9030.1E, "Urbanized Area Formula Program: Program Guidance and Grant Application Instructions"
7. FTA Master Agreement

Buy America

8. 49 U.S.C 5323(j)
9. 49 CFR Part 661, "Buy America Requirements"

10. 49 CFR Part 663, "Pre-Award and Post-Delivery Audits of Rolling Stock Purchases"
11. FTA September 16, 2016, Chief Counsel issued a Dear Colleague Letter regarding the small purchase waiver

Federal Motor Vehicle Safety Standards

12. 49 CFR Part 571, "Federal Motor Vehicle Safety Standards"

Bus Testing

13. 49 CFR Part 665, "Bus Testing"

Suspension/Debarment

14. 2 CFR Part 180, "OMB Guidelines to Agencies on Government-wide Debarment and Suspension"
15. 2 CFR Part 180, "Non-procurement Suspension and Debarment"

Lobbying

16. 49 CFR Part 20, "New Restrictions on Lobbying"

USEFUL WEBLINKS

1. FTA Procurement Frequently Asked Questions
2. FTA Buy America Website
3. Bus Testing Website
4. National RTAP ProcurementPRO
5. System for Award Management

Exhibit 6
APPLICABILITY OF THIRD-PARTY CONTRACT CLAUSES
(excluding micro-purchases, except for construction contracts over \$2,000)

CLAUSE	TYPE OF PROCUREMENT				
	Professional Services/A&E	Operations/ Management/ Subrecipients	Rolling Stock Purchase	Construction	Materials & Supplies
No Federal government obligations to third parties by use of a disclaimer	All	All	All	All	All
Program fraud and false or fraudulent statements and related acts	All	All	All	All	All
Access to Records	All	All	All	All	All
Federal changes	All	All	All	All	All
Civil Rights (EEO, Title VI & ADA)	All	All	All	All	All
Incorporation of FTA Terms	All	All	All	All	All
Energy Conservation	All	All	All	All	All
Termination Provisions (not required of states)	>\$10,000	>\$10,000	>\$10,000	>\$10,000	>\$10,000
Debarment and Suspension	>\$25,000	>\$25,000	>\$25,000	>\$25,000	>\$25,000
Buy America			>\$150,000	>\$150,000	>\$150,000 (for steel, iron, manufactured products)
Provisions for resolution of disputes, breaches, or other litigation	>\$150,000 (see Note)	>\$150,000 (see Note)	>\$150,000 (see Note)	>\$150,000 (see Note)	>\$150,000 (see Note)
Lobbying	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Clean Air	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Clean Water	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Cargo Preference			Involving property that may be transported by ocean vessel	Involving property that may be transported by ocean vessel	Involving property that may be transported by ocean vessel
Fly America	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air

Exhibit 6
APPLICABILITY OF THIRD-PARTY CONTRACT CLAUSES
(excluding micro-purchases, except for construction contracts over \$2,000)

CLAUSE	TYPE OF PROCUREMENT				
	Professional Services/A&E	Operations/ Management/ Subrecipients	Rolling Stock Purchase	Construction	Materials & Supplies
<i>Davis Bacon Act</i>				>\$2,000 (including ferry vessels)	
<i>Copeland Anti-Kickback Act Section 1 Section 2</i>				All >\$2,000 (including ferry vessels)	
<i>Contract Work Hours & Safety Standards Act</i>		>\$100,000	>\$100,000	>\$100,000 (including ferry vessels)	
<i>Bonding (not required of states)</i>				>\$100,000 (including ferry vessels)	
<i>Seismic Safety</i>	A&E for new buildings & additions			New buildings & additions	
<i>Transit Employee Protective Arrangements</i>		Transit operations funded with Section 5307, 5309, 5311 or 5316 funds			
<i>Charter Service Operations</i>		All			
<i>School Bus Operations</i>		All			
<i>Drug and Alcohol Testing</i>		Transit operations funded with Section 5307, 5309 or 5311 funds			
<i>Patent Rights</i>	Research & development				
<i>Rights in Data and Copyrights requirements</i>	Research & development				

Exhibit 6

APPLICABILITY OF THIRD-PARTY CONTRACT CLAUSES
(excluding micro-purchases, except for construction contracts over \$2,000)

CLAUSE	TYPE OF PROCUREMENT				
	<i>Professional Services/A&E</i>	<i>Operations/ Management/ Subrecipients</i>	<i>Rolling Stock Purchase</i>	<i>Construction</i>	<i>Materials & Supplies</i>
<i>Special DOL EEO clause for construction projects</i>				>\$10,000	
<i>Disadvantaged Business Enterprises (DBEs)</i>	<i>All</i>	<i>All</i>	<i>All</i>	<i>All</i>	<i>All</i>
<i>Prompt Payment</i>	<i>All if threshold for DBE program met</i>	<i>All if threshold for DBE program met</i>	<i>All if threshold for DBE program met</i>	<i>All if threshold for DBE program met</i>	<i>All if threshold for DBE program met</i>
<i>Recycled Products</i>		<i>Contracts for items designated by EPA, when procuring \$10,000 or more per year</i>		<i>Contracts for items designated by EPA, when procuring \$10,000 or more per year</i>	<i>Contracts for items designated by EPA, when procuring \$10,000 or more per year</i>
<i>ADA Access</i>	<i>A&E</i>	<i>All</i>	<i>All</i>	<i>All</i>	
<i>Special Notification Requirements for States</i>	<i>Limited to states</i>	<i>Limited to states</i>	<i>Limited to states</i>	<i>Limited to states</i>	<i>Limited to states</i>

Exhibit 6.1
REQUIRED THIRD PARTY CONTRACT CLAUSES
(excluding micro-purchases, except for construction contracts over \$2,000)

REQUIREMENT	COMMENTS	MASTER AGREEMENT REFERENCE***
All FTA-Assisted Third Party Contracts and Subcontracts		
No Federal government obligations to third parties by use of a disclaimer		§ 3.l
Program fraud and false or fraudulent statements and related acts		§ 4.3.f
Access to Records		§ 9.c
Federal changes		§ 3.i
Civil Rights (EEO, Title VI & ADA)		§ 12.c, e, and h.
Incorporation of FTA Terms	Per FTA C. 4220.1F	
Energy Conservation		§ 26.j
Awards Exceeding \$10,000		
Termination provisions	49 CFR Part 18 Not required of states	§ 16.d(2)12
Awards Exceeding \$25,000		
Debarment and Suspension	2 CFR Parts 180 and 1200	§ 4.b
Awards Exceeding the Simplified Acquisition Threshold (\$150,000)		
Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.		
Buy America	When tangible property or construction will be acquired	§ 15.a
Provisions for resolution of disputes, breaches, or other litigation		§ 39
Awards Exceeding \$100,000 by Statute		
Lobbying		§ 3.d
Clean Air		§ 16.d(7)7.n
Clean Water		§ 16.d(7)
Transport of Property or Persons		
Cargo Preference	When acquiring property suitable for shipment by ocean vessel	§ 15.b
Fly America	When property or persons transported by air between U.S. and foreign destinations, or between foreign locations	§15.c

Exhibit 6.1
REQUIRED THIRD PARTY CONTRACT CLAUSES
(excluding micro-purchases, except for construction contracts over \$2,000)

REQUIREMENT	COMMENTS	MASTER AGREEMENT REFERENCE***
Construction Activities		
Davis Bacon Act	Except for contracts <\$2,000 or third party contracts for supplies, materials, or articles ordinarily available on the open market	§ 16.d(4)
Copeland Anti-Kickback Act Section 1 Section 2	All Contracts >\$2,000	§ 24.a(3)
Contract Work Hours & Safety Standards Act	Contracts >\$100,000	§ 16.d(5)
Bonding for construction activities exceeding \$100,000	5% bid guarantee; 100% performance bond; and Payment bond equal to: <ul style="list-style-type: none"> • 50% for contracts < \$1 M • 40% for contracts > \$1 M, but < \$5 M • \$2.5 M for contracts > \$5 M Not required of states	§ 16.n(1)
Seismic Safety	Contracts for construction of new buildings or additions to existing buildings	§ 23.b
Special DOL EEO Clause	Contracts >\$10,000	§ 12.d(3)
Nonconstruction Activities		
Nonconstruction Employee Protection (Contract Work Hours and Safety Standards Act)	Applicable to all turnkey, rolling stock and operational contracts (excluding contracts for transportation services) > \$100,000	§ 28.b
Transit Operations		
Transit Employee Protective Arrangements	Applies to Section 5307, 5309, 5311 and 5316 projects	§ 24.d28.d
Charter Service Operations		§ 2832
School Bus Operations		§ 29
Drug and Alcohol Testing	Safety sensitive functions. Applies to Section 5307, 5309 and 5311 projects	§40.b
Planning, Research, Development, and Documentation Projects		
Patent Rights		§ 17
Rights in Data and Copyrights		§ 1820
Miscellaneous Special Requirements		
Disadvantaged Business Enterprises (DBEs)	Contracts awarded on the basis of a bid or proposal offering to use DBEs	§ 12.e3.d

Exhibit 6.1
REQUIRED THIRD PARTY CONTRACT CLAUSES
(excluding micro-purchases, except for construction contracts over \$2,000)

REQUIREMENT	COMMENTS	MASTER AGREEMENT REFERENCE***
<i>Prompt Payment and Return of Retainage</i>	<i>Per 49 CFR Part 26, if recipient meets the threshold for a DBE program</i>	§ 12.e
<i>Recycled Products</i>	<i>Contracts for items designated by EPA, when procuring \$10,000 or more per year</i>	§ 16.d(10)
<i>ADA Access</i>	<i>Contracts for rolling stock or facilities construction/ renovation</i>	§ 12.h3.g
<i>Assignability Clause</i>	<i>Piggyback procurements</i>	§ 16.a(3)
State Requirements		
<i>Special Notification Requirements for States</i>		§ 37

Exhibit 6.2
REQUIRED CERTIFICATIONS, REPORTS, AND FORMS
(excluding micro-purchases, except for construction contracts over \$2,000)

REQUIREMENT	COMMENTS	MASTER AGREEMENT REFERENCE***
<i>Bus Testing Certification and Report</i>	<i>Procurements of buses and modified mass produced vans</i>	<i>§ 16.m</i>
<i>Transit Vehicle Manufacturer Certification</i>	<i>Procurements of railcars or buses and modified mass produced vans</i>	<i>§ 12.d(4)</i>
<i>Buy America Certification</i>	<i>Projects >\$150,000 that contain steel, iron or manufactured products</i>	<i>§ 15.a</i>
<i>Pre-Award Audit</i>	<i>Rolling stock procurements</i>	<i>§ 16 m</i>
<i>Pre-Award Buy America Certification</i>	<i>Rolling stock procurements>\$150,000</i>	<i>§ 16 m</i>
<i>Pre-Award Purchaser's Requirement Certification</i>	<i>Rolling stock procurements</i>	<i>§ 16 m</i>
<i>Post-Delivery Audit</i>	<i>Rolling stock procurements</i>	<i>§ 16 m</i>
<i>Post-Delivery Buy America Certification</i>	<i>Rolling stock procurements >\$150,000</i>	<i>§ 16 m</i>
<i>Post-Delivery Purchaser's Requirement Certification</i>	<i>Rolling stock procurements</i>	<i>§ 16.m7.p(3)</i>
<i>On-Site Inspector's Report</i>	<i>Rolling stock procurements for more than 10 vehicles for areas >200,000 in population and 20 for areas <200,000 in population</i>	<i>§ 16.m</i>
<i>Federal Motor Vehicles Safety Standards Pre-Award and Post-Delivery Certification</i>	<i>Non-rail rolling stock procurements</i>	<i>§ 16.m</i>
<i>Excluded Parties Listing System search</i>	<i>Procurements > \$25,000</i>	<i>§ 4.b</i>
<i>Lobbying Certification</i>	<i>Procurements > \$100,000</i>	<i>§ 4.d</i>
<i>Standard Form LLL and Quarterly Updates (when required)</i>	<i>Procurements > \$100,000 where contractor engages in lobbying activities</i>	<i>§ 4.d</i>

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