

7. PROCUREMENT - ENHANCED REVIEW MODULE

PURPOSE OF THIS REVIEW AREA

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. State recipients can use the state's overall policies and procedures. When applied to federal procurements, those policies and procedures must still be compliant with all federal requirements as applied to non-state recipients. The flexibility afforded by 2 CFR Part 200 should not be misconstrued as absolving a state from Federal requirements. For example, FTA does not require each State DOT to have policies and procedures separate from the state education department.

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

Information on procurement thresholds for federally-funded procurements:

- Micro-purchase threshold is \$3,500 or less if awarded prior to June 20, 2018, or \$10,000 or less for contracts awarded after June 20, 2018.
- Simplified Acquisition (small purchase) threshold is \$150,000 if awarded prior to June 20, 2018, or less, or \$250,000 or less for procurements awarded after June 20, 2018. Procurements funded by awards issued on or before December 25, 2014, are subject to the previous simplified acquisition threshold of \$100,000. (per 49 CFR 18.36(d)).
- State or local law or recipient procurement policies/procedures may set micro-purchase or small purchase thresholds lower than the federal threshold. In such cases, recipients must follow state or local law. However, if the state or local small purchase threshold is higher than the federal simplified acquisition threshold, the recipient is constrained by the federal threshold for FTA-funded contracts.

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.

USE OF THIS MODULE

This enhanced review module (ERM) questionnaire presents recommended questions for a Procurement enhanced review. Based on the scope of the approved ERM, all or a selection of the sections of this module will be conducted. The actual questions asked and the items sampled and observations made will be determined during the scoping meeting. The regional office and/or headquarters may ask the reviewer to develop a unique scope of work for the ERM. Additional questions may be asked and additional sampling and observations may be performed as directed by FTA. The scope, questionnaire, sampling, and observations will be subject to final review and approval by the respective regional FTA office, program office (if applicable) and the Office of Transit Safety and Oversight (TSO).

QUESTIONS TO BE EXAMINED

1. Has the recipient implemented the corrective actions from the final report of a Procurement System Review?
2. Does the recipient have written procurement policies and procedures?
3. What are the recipient's specific job descriptions and requirements for procurement positions?

4. Does the recipient have written standards of conduct for its representatives engaged in the selection, award, and administration of FTA-funded contracts??
5. Does the recipient have written protest procedures?
6. Does the recipient have a system in place to ensure the most efficient and economic purchases?
7. Does the recipient ensure that it conducts all procurement transactions in a manner that provides full and open competition?
8. Did the recipient appropriately use each method of procurement as described in its policies and procedures and in compliance with 2 CFR Part 200??
9. How does the recipient procure Architectural and Engineering (A&E) Services?
10. Does the recipient develop independent cost estimates and conduct cost and/or price analysis?
11. Did the recipient include applicable federal clauses in FTA-funded procurements?
12. Did the recipient approve, evaluate, and document change orders to procurements?
13. If the recipient included options in an FTA-funded procurement, did it base the number of options on its reasonably foreseeable need and evaluate the option price prior to awarding the contract?
14. Did the recipient adhere to the time limitations on placing orders against the contracts?
15. Did the recipient ensure that appropriate FTA approval was acquired for advance payments and that adequate protection was exercised for progress payments?
16. Did the recipient use a cost plus percentage of cost contract?

INFORMATION NEEDED FROM RECIPIENT

Pre-site Visit Request

- Documentation of Procurement Policies and Procedures
- Documentation of Management of the Procurement Functions
- Third-Party Contracts
- Expanded Procurement File Review

Recipient Follow-up

- Determined based upon initial response to pre-site visit request

PSRERM1. Has the recipient implemented the corrective actions from the final report of a Procurement System Review (PSR)?

BASIC REQUIREMENT

At the discretion of FTA, specialized compliance reviews in addition to Triennial or State Management reviews can be conducted that may cover all or a portion of a recipient's compliance with procurement requirements.

APPLICABILITY

All recipients of FTA funds

DETAILED EXPLANATION FOR REVIEWER

As part of its project oversight functions, FTA periodically conducts PSRs of selected recipients. If a review has been conducted, confer with the FTA regional office and the FTA headquarters Subject Matter Expert (SME) on what follow-up activities are appropriate during this ERM. The reviewer may be requested to validate the implementation of corrective actions for closed deficiencies, follow up on deficiencies that remain open, or a combination of both.

INDICATORS OF COMPLIANCE

- a. *If a PSR was conducted since the last comprehensive review, note the date of the final report. If no review was conducted, move to the next question.*

Review Response

- b. *What is the status of any corrective actions from the final report of the PSR?*

Review Response

Corrective Action	Status

Review Response

INSTRUCTIONS FOR REVIEWER

Review OTrak and information from the FTA regional office for issued reports on PSRs. Obtain direction from the regional office as to the level of follow-up to be done as a part of this review. Once directed, request and review correspondence between FTA and the recipient related to its responses submitted to address corrective actions. Compare information obtained from the regional office to the recipient responses to the Comprehensive Review to determine if the corrective actions taken are still being implemented.

POTENTIAL DEFICIENCY DETERMINATIONS

If there were deficiencies in the PSR that relate to baseline review questions of the Comprehensive Review, the deficiencies will be made under the appropriate deficiency code of the Comprehensive Review. If there are outstanding or ongoing PSR review deficiencies that are beyond the scope of the baseline Comprehensive Review, confer with the FTA regional office to make the following deficiency.

DEFICIENCY CODE PSRERM1-1: Outstanding PSR deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office with documentation to address outstanding or ongoing specialty review deficiencies, along with evidence of implementation.

GOVERNING DIRECTIVE

FTA Circular 4220.1F Chapter I 6. FTA's Role

"To ensure compliance with Federal procurement requirements applicable to FTA projects, FTA will continue to provide guidance and technical assistance to its recipients consistent with its Federal oversight responsibilities.

- a. Reliance on the Recipient's Self-Certification. FTA recognizes that most FTA recipients have experience with the third party contracting requirements of the Common Grant Rules. Therefore, FTA will rely primarily on the recipient's annual "self-certification" (usually submitted in the first quarter of each Federal fiscal year) that its procurement system complies with FTA requirements and that the recipient has the technical capacity to comply with Federal procurement requirements. FTA requests each recipient to "self-certify" its procurement system as part of its Annual Certifications and Assurances. To preclude unnecessary delay of recipient procurements, FTA generally does not conduct preaward reviews of third party contracts or contract specifications as envisioned in the Common Grant Rules, 49 CFR Section 18.36(g)(2) and 49 CFR Section 19.44(e). Instead, FTA relies heavily on the recipient's self-certification of its procurement system. FTA, however, will review compliance with this circular as part of its routine oversight responsibilities. If FTA becomes aware of circumstances that might invalidate a recipient's self-certification, FTA will investigate and recommend appropriate measures to correct the recipient's deficiencies.
- b. Procurement System Reviews. Under 49 U.S.C. Section 5307(i), a recipient may request the Secretary of Transportation to approve its procurement system, and FTA may approve that procurement system if it complies with Federal requirements. As required by 49 U.S.C. Section 5307(h), FTA must perform reviews and evaluations of the Urbanized Area Formula Program, including full reviews and evaluations of the performance of each recipient that implement Urbanized Area Formula projects, with specific reference to the recipient's compliance with statutory and administrative requirements. Accordingly, FTA will perform procurement system reviews as part of its on-going project oversight responsibilities and will perform procurement system reviews for Urbanized Area Formula Program recipients that self-certify their procurement systems."

PSRERM2. Does the recipient have written procurement policies and procedures?

BASIC REQUIREMENT

All recipients must have written procurement policies and procedures.

APPLICABILITY

All recipients

DETAILED EXPLANATION FOR REVIEWER

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.
- 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 may 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 applied 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 2 CFR Part 200—Contract Provisions for non-Federal Entity Contracts Under Federal Awards, and any other provisions required under Federal law.

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.

In addition to a formal procurement ‘policy’ document, recipients often have additional or supplemental written guidance and/or procedures that guide their procurement actions. When procurement policies and procedures are revised, it is important for the recipient to ensure that those responsible for and authorized to conduct procurement actions are made aware of changes. It has become more common for recipients to maintain the most current version of their procurement policies in an electronic format so that those with procurement responsibilities maintain access to the most recent documentation.

INDICATORS OF COMPLIANCE

- In addition to an overall procurement policy document, what other additional documents (such as procedures, checklists, etc.) guide the procurement actions of the recipient? Do those additional documents conflict with the recipient's procurement policies and procedures or Federal requirements?*

Review Response

- b. *How are those responsible for or authorized to conduct procurement actions made aware of changes to procurement policies?*

Review Response

INSTRUCTIONS FOR REVIEWER

Review the procurement policies and procedures gathered as a part of the baseline review against the policy checklist provided in the ERM worksheets. Review any additional guidance or procedures documents provided by the recipient. Review how the policies are updated and how recipient staff responsible for and authorized to undertake procurement actions are kept apprised of any changes to procurement policies.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if additional procurement documents used for FTA-funded procurements contain provisions that are contrary to the recipient's procurement policies and procedures or Federal requirements. The recipient is deficient if those responsible for conducting procurements are not aware of, or are not utilizing the recipient's current procurement policies and procedures.

DEFICIENCY CODE PSRERM2-1: Procurement policies and procedures not current/complete

SUGGESTED CORRECTIVE ACTION 1: The recipient must develop and submit to the FTA regional office revised procurement policies that include all required provisions and identify procedures that ensure compliance with 2 CFR 200.318 through 200.326.

SUGGESTED CORRECTIVE ACTION 2: The recipient must develop and submit to the FTA regional office revised procurement procedures and documentation that those responsible for, or authorized to conduct, procurement actions have been made aware of revisions.

GOVERNING DIRECTIVES

2 CFR 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-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.
- (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."

2 CFR 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 offerors 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.”

2 CFR 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-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (\$200.67 Micro-purchase). 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.

(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.”

2 CFR 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.”

2 CFR 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.”

2 CFR 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.”

2 CFR 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.”

2 CFR 200.326 Contract provisions

“The non-Federal entity's contracts must contain the applicable provisions described in Appendix II to 2 CFR Part 200—Contract Provisions for non-Federal Entity Contracts Under Federal Awards.”

Additional Guidance:
FTA C 4220.1F, III, 3.a.

Each recipient and subrecipient may use its own procurement procedures, provided that its procurements conform to applicable Federal law and regulations.

PSRERM3. What are the recipient's specific job descriptions and requirements for procurement positions?

BASIC REQUIREMENT

The recipient must have adequate technical capacity to carry out its FTA-funded projects and comply with the Federal requirements.

APPLICABILITY

All recipients

DETAILED EXPLANATION FOR REVIEWER

FTA recipients are obligated to maintain adequate technical capacity to carry out projects and comply with Federal requirements. As such, the recipient's third party contracting capability must be adequate to undertake its procurements effectively and efficiently, in compliance with applicable Federal, State, and local requirements. 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.

Many FTA recipients assign contracting duties to technical, financial or management personnel. The way in which the agency's procurement function is organized and staffed, along with the experience of procurement staff, should be commensurate with the agency's size and complexity, as well as the type and complexity of procurements that it conducts.

The way in which the procurement function is organized may result in procurement deficiencies. For example, if procurements are done by a department that primarily conducts non-FTA procurements, it could be a contributing factor to certain deficiencies.

INDICATORS OF COMPLIANCE

- a. *How does the recipient determine procurement staffing levels? How often does the recipient experience procurement personnel turnover? Has the recipient had problems filling vacant positions? If so, why?*

Review Response

- b. *What office/department is responsible for developing, controlling, revising, and communicating procurement policies and procedures? What staff level is responsible for reviewing and approving the procedures? Is final approval of these policies and procedures required by the recipient's governing entity?*

Review Response

INSTRUCTIONS FOR REVIEWER

Review the organizational information provided in response to the baseline review package. During the baseline procurement sampling and the expanded sampling of the ERM, determine if the way that the procurement function is organized contributes to deficiencies.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if it can be determined through review of expanded procurement files, organizational structure, and interviews with staff that the recipient does not have adequate capacity to comply with applicable Federal, state, and local procurement requirements.

DEFICIENCY CODE PSRERM3-1: Insufficient procurement resources

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office an implementation plan for improved management of the procurement function.

GOVERNING DIRECTIVES

FTA Circular 5010.1E, Ch. II Section 3. Roles and Responsibilities of the Management of Awards

Recipients are responsible for the day-to-day management of their Awards that provide assistance for eligible activities or projects.

- a. Recipient Role. In addition to FTA's responsibility to monitor FTA Awards and the federally assisted projects thereunder, recipients must monitor federally assisted activities to ensure compliance with applicable federal requirements. This includes the administration and management of the Award in compliance with federal regulations, the Grant or Cooperative Agreement, and applicable FTA circulars. A recipient is also responsible for federal assistance that "passes through" to a subrecipient. In general, submission of the annual Certifications and Assurances stands in lieu of detailed FTA oversight before approval of an Award; however, the results of ongoing or routine FTA oversight activities also will be considered as applicable. Annual, independent, organization-wide audits, 2 CFR Part 200, Subpart F, "Audits", audits of recipients, and other recurring and specialized reviews provide FTA an opportunity to verify the recipient's Certifications and Assurances (See Chapter V, "Oversight," of this circular). The recipient's responsibilities include, but are not limited to, actions that:
 - (1) Demonstrate the legal, financial, and technical capacity to carry out the program, including safety and security aspects of the program;
 - (2) Provide administrative and management support of project implementation;
 - (3) Provide, directly or by contract, adequate technical inspection and supervision by qualified professionals of all work in progress;
 - (4) Ensure conformity to Grant Agreements and Cooperative Agreements, applicable statutes, codes, ordinances, and safety standards;
 - (5) Maintain project work schedules agreed to by FTA and the recipient and monitor activities under the Award to assure schedules are met and other performance goals are achieved;
 - (6) Keep expenditures within the latest approved Award Budget;
 - (7) Ensure compliance with FTA and federal requirements by agencies, consultants, contractors, and subcontractors working under approved third-party contracts or inter-agency agreements;
 - (16) Obtain all necessary prior approvals and/or waivers before incurring costs or taking any requested actions.

PSRERM4. Does the recipient have 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

DETAILED EXPLANATION FOR REVIEWER

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, or agent from participating in the selection, award, or administration of a contract supported with FTA assistance if he or she has any real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing has a financial or other interest or a tangible personal benefit from a firm considered for a contract.
- Include a restriction 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.

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.

INDICATOR OF COMPLIANCE

- a. Does it appear that any person covered by the standards of conduct violated the recipient's standards during the last two years?*

Review Response

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, research procurement actions of the recipient on the internet and request any relevant information from the regional office and FTA's Chief Counsel's Office relating to violations of the standards of conduct. Record any issues regarding standards of conduct that the region has noted in the recipient's OAT. On site, during interviews with the CEO and the Head of Procurement, follow up on any issues found during the pre-site review and inquire if there have been any covered employees that violated any part of the written standards of conduct during the last two years. Obtain documentation of the disciplinary action taken in each case.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if there have been violations to its written standards of conduct and no disciplinary action was taken.

DEFICIENCY CODE PSRERM4-1: Lack of enforcement of written standards of conduct

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office procedures for ensuring that disciplinary action is taken when there is a violation of the written standards of conduct.

GOVERNING DIRECTIVES

2 CFR §200.318(k)

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

FTA Master Agreement (25), Section 16.w

Bid Protests. The Recipient agrees to provide FTA, as part of the annual or quarterly Milestone Progress Report, with a list of all bid protests and appeals for solicitations or contracts in excess of \$500,000. The Recipient also should be mindful of the requirement in Section 39, Disputes, that the Recipient must promptly notify the FTA Chief Counsel, or FTA Regional Counsel for the Region in which the Recipient is located, of significant current or prospective legal matters that may affect the Federal Government.

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.

PSRERM5. Does the recipient have written protest procedures?

BASIC REQUIREMENT

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

APPLICABILITY

All recipients

DETAILED EXPLANATION FOR REVIEWER

Recipients must have written procedures that allow bidders or proposers to protest a procurement action. Notice of protest procedures must be available to all potential bidders or proposers, either by inclusion in the solicitation documents or available to the public. Protest procedures should allow for the filing of protests prior to receipt of bids or proposals, after receipt of bids or proposals, and prior to award of a contract.

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.

INDICATOR OF COMPLIANCE

- a. *Has the recipient received any procurement protests since the last Comprehensive Review?*
- *If yes, does the number of protests received indicate potential issues with the recipient's procurement process?*

Review Response

INSTRUCTIONS FOR REVIEWER

Review milestone progress reports in TrAMS for protests noted. On site, ask the recipient for any bid protests received, granted, 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. Discuss the number and nature of protests with the regional office. If the recipient has received more than three protests over the past three years, determine if there are any trends that may indicate issues in other areas of the recipient's procurement processes.

POTENTIAL DEFICIENCY DETERMINATION

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

DEFICIENCY CODE PSRERM5-1: Protest procedures not followed

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office documentation of implemented procedures or documentation of the process that will be followed to ensure that its protest procedures are followed. If the number of protests appear to be high, the recipient must provide the regional office with details on the next protest received within 10 business days of receiving such protest.

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."

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Bid Protests. The Recipient agrees to provide FTA, as part of the annual or quarterly Milestone Progress Report, with a list of all bid protests and appeals for solicitations or contracts in excess of \$500,000. The Recipient also should be mindful of the requirement in Section 39, Disputes, that the Recipient must promptly notify the FTA Chief Counsel, or FTA Regional Counsel for the Region in which the Recipient is located, of significant current or prospective legal matters that may affect the Federal Government.

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.

PSRERM6. Does the recipient have a system in place to ensure the most efficient and economic purchases?

BASIC REQUIREMENT

Recipients must avoid acquisition of unnecessary or duplicative items and purchase items in the most economical manner.

APPLICABILITY

All recipients

DETAILED EXPLANATION FOR REVIEWER

2 C.F.R. 200 requires that recipients have procedures in place to avoid purchasing unnecessary or duplicative items and they should consider consolidating or breaking out procurements to obtain a more economical purchase.

Recipients who invest the time and resources to develop checks and balances in their procurement program, along with development of short and long range procurement plans, can avoid last minute, emergency, or unnecessary procurements, which are contrary to open, efficient, and effective procurements.

FTA recipients vary in size and organization, therefore the system that each develops and implements to avoid unnecessary or duplicative purchases should be tailored to their agency. Whether the procurement functions are centralized, decentralized, or a combination of both, it is essential that no employee undertakes any procurement function without delegated authority and guidelines. It is easier for an entity to effectively manage its procurement responsibilities if most of the decisions and contractual actions are concentrated in one or more experienced individuals who are familiar with the requirements that span the entire procurement cycle. Because initial identification of need is often initiated by a recipient's internal

customers (i.e., program or technical personnel for whom goods or services are being procured), the procurement office should be in a position to facilitate the consolidation of procurements of different internal customers with the same need.

INDICATORS OF COMPLIANCE

- a. *Does the recipient have procedures in place to avoid unnecessary and duplicative purchases?*

Review Response

- b. *Does the recipient have procedures in place to evaluate procurements to determine the most economical methods?*

Review Response

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, review the procurement policies and/or procedures to determine if there are written procedures in place to:

- avoid unnecessary and duplicative purchases,
- consolidate or break out purchases to make more economical purchases, or
- consider lease vs. purchase alternatives.

Review the list of procurements to identify any repetitive purchases for the same items or same amounts. On site, gain an understanding of how the procurement function operates, if there are decentralized procurement functions, and if procurements are reviewed to ensure that they are necessary and not duplicative. Pay particular attention to the processes used and the personnel authorized to undertake FTA-funded procurements using purchase cards (P-cards). Determine if there is a process in place to determine the most efficient and economical methods of procurement. Determine if, for the procurements selected, any procedures regarding the necessity and economy of procurements were followed.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if it does not have or does not implement procedures to avoid unnecessary and duplicative purchases or to make the most economical purchases.

DEFICIENCY CODE PSRERM6-1: No system for efficient and economic purchases

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office documentation that it has revised its procurement policies and procedures to include procedures for efficient and economical purchases, or that it has implemented procedures it had previously developed.

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.”

“... 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).”

PSRERM7. Does the recipient ensure that it conducts all procurement transactions in a manner that provides full and open competition?

BASIC REQUIREMENT

Procurement transactions must be non-restrictive.

APPLICABILITY

All recipients

DETAILED EXPLANATION FOR REVIEWER

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. An organizational conflict of interest occurs when any of the following circumstances arise:

- Lack of Impartiality or Impaired Objectivity. When the contractor is unable, or potentially unable, to provide impartial and objective assistance or advice to the recipient due to other activities, relationships, contracts, or circumstances.
- Unequal Access to Information. The contractor has an unfair competitive advantage through obtaining access to nonpublic information during the performance of an earlier contract.
- Biased Ground Rules. During the conduct of an earlier procurement, the contractor has established the ground rules for a future procurement by developing specifications, evaluation factors, or similar documents.

Recipients are prohibited from taking any arbitrary action when awarding contracts. Arbitrary actions include lack of adhering to the requirements contained in the procurement solicitation when awarding contracts. An arbitrary action can also be found when there is lack of documentation for awarding a contract to other than the low responsive and responsible bidder or the most qualified proposal when price and other factors are considered.

INDICATORS OF COMPLIANCE

- a. *Does the recipient implement mechanisms to identify and mitigate organizational conflicts of interest?*

Review Response

- b. *Does a review of procurement files indicate any arbitrary action(s) by the recipient?*

Review Response

INSTRUCTIONS FOR REVIEWER

Review procurement policies and procedures for how organizational conflicts of interest are defined. Review procurement files to determine if there were any potential organizational conflicts of interest and how the recipient mitigated the conflict.

Review procurement files to determine if it is clear that the awarded vendor's file clearly documents that there was no arbitrary action. Determine that the award for each of the procurements reviewed followed the recipient's conditions for award detailed in its procurement policies and procedures and the solicitation. For example, for sealed bids, if the awarded bidder was not the lowest bidder ensure that documentation exists that reasons for this; for requests for proposals, determine if the results of evaluations clearly identify that, the recipient followed its evaluation criteria. For competitive proposals, determine if the evaluation criteria included in the solicitation was the criteria used to determine the awardee.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if an organizational conflict of interest was present in its procurements.

DEFICIENCY CODE PSRERM7-1: Organizational conflict of interest not properly mitigated

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office documentation of a revised procurement process for identifying and mitigating organizational conflicts of interest. 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 an arbitrary action was taken in connection with the award of its procurements.

DEFICIENCY CODE PSRERM7-2: Improper arbitrary action

SUGGESTED CORRECTIVE ACTION: The recipient shall submit to the FTA regional office documentation of a revised procurement process that will insure no arbitrary actions are taken in connection with the award of FTA funded procurements. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES

2 CFR 200.319 (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."

PSRERM8. Did the recipient appropriately use each method of procurement as described in its policies and procedures and in compliance with 2 CFR Part 200?

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

All recipients

DETAILED EXPLANATION FOR REVIEWER

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 must be distributed equitably among qualified suppliers to the extent practicable, and must 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, but must be evidenced in the recipient's records.

For procurements exceeding the Federal simplified acquisition threshold (currently \$250,000), sealed bids or competitive proposals are generally required. All solicitations must incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured.

- Sealed Bids/IFB – Bids are publicly solicited and solicited from an adequate number of known suppliers; sufficient response time is provided; the solicitation defines the items or services requested; there must be two or more responsible bidders; bids are to be opened publicly at a prescribed time and place; a firm fixed-price award is made to the lowest (best price), responsive (meets all specifications), and responsible (is qualified to perform the work) bidder; and any bids may be rejected for sound documented reason.
- 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 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.

While professional 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 provide for competition 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 competitive solicitation, the recipient should determine if its solicitation was unduly restrictive. 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 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?*

Review Response

- b. *If the recipient used small purchase procedures, was it done in accordance with requirements?*

Review Response

- c. *If the recipient used sealed bid procedures, was it done in accordance with requirements?*

Review Response

- d. *If the recipient used competitive proposal procedures, was it done in accordance with requirements?*

Review Response

- e. *Did the recipient include written justification of any non-competitive or sole source procurements in the procurement file?*

Review Response

- 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?*

Review Response

- 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? Did the recipient have a monitoring process in place to verify actual time and materials used?*

Review Response

INSTRUCTIONS FOR REVIEWER

The procedures for reviewing these procurements in the ERM are the same as those for the baseline review. However, a larger sample size is to be selected for one or more of the types detailed below based on consultation with the regional office. Review the recipient's policies and procedures for dollar thresholds and

procedures for micro-purchase, small purchase, sealed bid, competitive proposals or non-competitive proposals/sole source procurements, as applicable.

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

Micro-purchase: Review selected procurements to determine if:

- this method was only used for procurements \$3,500 or less awarded prior to June 20, 2018, or \$10,000 or less for contracts awarded after June 20, 2018,
- the procurements were distributed equitably if there was more than one qualified supplier,
- the recipient documented its determination that the price was reasonable with a description of how that determination was made, and
- there is 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)).

Note to reviewers: State or local law or recipient policies/procedures may set a micro-purchase threshold lower than the federal threshold. In such cases, recipients must follow state or local law. However, if the state or local micro-purchase threshold is higher than the federal threshold, the recipient is constrained by the federal threshold for FTA-funded contracts.

Small purchase: Review selected procurements to determine if:

- this method was only used for procurements of \$150,000 awarded prior to June 20, 2018, or less, or \$250,000 or less for procurements awarded after June 20, 2018. Procurements funded by awards issued on or before December 25, 2014, are subject to the previous simplified acquisition threshold of \$100,000. (per 49 CFR 18.36(d)),
- 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)).

Review the full listing of procurements to determine if there were repetitive types or amounts of procurements that were below the small purchase threshold. Review any instances of these, along with interviewing procurement staff, to verify that 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)).

Note to reviewers: State or local law or recipient policies/procedures may set a small purchase threshold lower than the federal threshold. In such cases, recipients must follow state or local law. However, if the state or local small purchase threshold is higher than the federal simplified acquisition threshold, the recipient is constrained by the federal threshold for FTA-funded contracts.

Sealed bid: Review selected procurements to determine if:

- bids were solicited from an adequate number of known suppliers,
- solicitation documents contained a clear and accurate specification or scope of work,
- if the recipient is a local or tribal government, the invitation for bids was publicly advertised,
- adequate time was allowed for potential vendors to prepare bids,

- the invitation for bids defined the items or services in order for the bidder to properly respond,
- bids were opened at the time and place prescribed in the invitation for bids, and, if the recipient is a local or tribal government, the bids were opened publicly,
- a responsiveness determination was made,
- responsiveness was determined from the bid documents themselves, and, with very few exceptions, it was determined with no discussions or further input from the bidder,
- 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 in accordance with State and local laws,
- solicitation documents contained a clear and accurate specification or scope of work,
- 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, and
- contracts were awarded to the responsive and responsible firm whose proposal is most advantageous, with price and other factors considered.

For A&E procurements, the recipient must use qualifications-based procurement methods.

Non-competitive (sole source) 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. Commonly, property or services are available from one source when 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-inch 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 that meets one of the criteria above.

Single bidder: Ask the recipient to provide information on state or local requirements for advertisement/dissemination of solicitation. Review any advertisement/dissemination procedures in the recipient's procurement policies. 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. Reviewing a solicitation for undue restrictiveness may include a survey of potential sources that chose not to submit a bid or proposal, and a review of whether the solicitation was adequately advertised and open for a sufficient period of time given the complexity of the project.

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. If so, 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. Also, review the procurement file to determine if the recipient had a monitoring system to verify actual time and materials used.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it made procurements using micro-purchase procedures and there was evidence of splitting procurements to be within the micro-purchase threshold.

DEFICIENCY CODE PSRERM8-1: Improper splitting of micro-purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure improper splitting will not occur with micro-purchase procurements. 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 and there was evidence of splitting procurements to be within the small purchase threshold.

DEFICIENCY CODE PSRERM8-2: Improper splitting of small purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure improper splitting will not occur with small purchase procurements. 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 small purchase procedures for procurements over \$150,000 for contracts awarded prior to June 20, 2018, or \$250,000 for contracts awarded after June 20, 2018, and price or rate quotations were not obtained.

DEFICIENCY CODE PSRERM8-3: Lack of price or rate quotations for small purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure price or rate quotations are documented for small purchases. 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 small purchase procedures and price or rate quotations were not obtained from an adequate number of qualified sources.

DEFICIENCY CODE PSRERM8-4: Price or rate quotations not obtained from an adequate number of suppliers for small purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure price or rate quotations will be obtained from at least two suppliers for small purchases. 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, or competitive proposal procedures and the procurement documents did not contain a clear accurate and complete specification or scope of work.

DEFICIENCY CODE PSRERM8-5: Lack of clear, accurate, or complete specification

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure clear, accurate, and complete specifications or scope of work for small purchases, sealed bids, and competitive proposals. For the next applicable procurement, 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 and the procurement documents did not document that two or more competitors submitted bids.

DEFICIENCY CODE PSRERM8-6: Inadequate competition [two or more competitors]

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure adequate competition is achieved for sealed bids. For the next applicable procurement, 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 and did not utilize a firm fixed price contract or justify the use of an alternate type of contract.

DEFICIENCY CODE PSRERM8-7: Firm fixed price contract [sealed bid]

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure that a firm fixed price contract is used for sealed bid awards or a written justification is made for use of an alternate type of contract. For the next applicable procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it used sealed bid procedures that did not contain a selection process based on the lowest price provided by a responsive and responsible bidder.

DEFICIENCY CODE PSRERM8-8: Selection on price [sealed bid]

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure that sealed bid selection processes are based on the lowest responsive and responsible bid. For the next applicable procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if, when using sealed bid procedures, responsiveness was not determined from the bid documents themselves, and, with very few exceptions, discussions or further input was sought from the bidder(s),

DEFICIENCY CODE PSRERM8-9: Discussions unnecessary [sealed bid]

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure that when using the sealed bid method of procurement, the solicitation and procurement process is designed so that discussions are not necessary with potential bidders. For the next applicable procurement, 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 or competitive proposal procedures but bids or proposals were not publicly advertised.

DEFICIENCY CODE PSRERM8-10: Procurement not advertised or publicized

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure competitive procurements above the Simplified Acquisition Threshold are advertised or publicized. For the next sealed bid or competitive proposal, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made procurements using sealed bid procedures or competitive proposal procedures but cannot document that an adequate number of potential sources were solicited.

DEFICIENCY CODE PSRERM8-11: Adequate solicitation

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure the procurement file contains documentation of the potential vendors solicited for competitive procurements above the Simplified Acquisition Threshold. For the next sealed bid or competitive proposal, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made procurements using sealed bid procedures and did not allow adequate time for a bidder to prepare bids.

DEFICIENCY CODE PSRERM8-12: Sufficient bid time

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure potential bidders will have sufficient time to prepare bids. 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 sealed bid procedures but did not have a public bid opening or did not advertise the date, place and time of the bid opening.

DEFICIENCY CODE PSRERM8-13: Bid opening deficient

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure public bid openings are held when using the sealed bid method of procurement and that the date, location and time of the bid opening are made public. 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 sealed bid procedures and did not document a determination of responsiveness for the bid that was awarded.

DEFICIENCY CODE PSRERM8-14: Responsiveness determination deficient

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure a written determination of responsiveness is made prior to awarding a low bid contract. 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 sealed bid procedures and the contract was awarded to other than the lowest responsive and responsible bidder.

DEFICIENCY CODE PSRERM8-15: Lowest price [sealed bid]

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure sealed bid procurements are awarded to the responsible bidder submitting the lowest responsive bid. For the next sealed bid, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it used sealed bid procedures and rejected any or all bids without documenting a sound business reason.

DEFICIENCY CODE PSRERM8-16: Rejecting bids

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure that a sound business reason is documented in the procurement file if any or all bids are rejected. 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 the competitive proposal procedures but the RFP did not include a description of the process to be used to evaluate proposals and/or the relative importance of the evaluation factors.

DEFICIENCY CODE PSRERM8-17: Evaluation deficiencies [RFP]

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure competitive proposal procurement documents contain a description of the evaluation process, the evaluation factors and the relative importance of the evaluation factors. 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 an award using competitive proposal procedures but the procurement file does not contain documentation of how the award was based on price and other factors.

DEFICIENCY CODE PSRERM8-18: Price and other factors [RFP]

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure competitive proposal procurement

files contain documentation that demonstrates the recipient awarded the contract based on price and other factors. For the next competitive proposal, submit to the FTA regional office documentation that the required procedures were followed.

GOVERNING DIRECTIVES

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 200.319 (c)(1) Clear accurate and complete specification

(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 offerors, 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.

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. (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.”

PSRERM9. How does the recipient procure Architectural and Engineering (A&E) Services?

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

DETAILED EXPLANATION FOR REVIEWER

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 guidance suggests that 49 U.S.C. Section 5325(b) authorizes the use of qualifications-based procurement procedures only for services that directly relate or lead to construction, alteration, or repair of real property. A recipient may not use qualifications-based procurement procedures to acquire non-A&E services, even if those non-A&E services will be or could be provided by an A&E firm. For design/build procurements, FTA expects the recipient 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, recipients, including states, are required to use competitive proposal procedures based on the Brooks Act or an equivalent qualifications-based requirement of a State adopted before August 10, 2005.

For qualifications-based procurements under the Brooks Act, price must not be considered during the selection phase of the most qualified offeror. Offeror's qualifications are evaluated to determine the most qualified offeror. 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.

Recipients may make multiple awards to cover needs for various disciplines under an “on-call” type of contract. Under this type of contract, the recipient must select the most qualified firm for each discipline (e.g., architect, seismic engineer, etc.). When the recipient has a project that needs an A&E firm, the recipient negotiates price with the most qualified firm only. On-call contracts may be suited for smaller jobs that would be too expensive (administratively) to compete individually. The Brooks Act does not permit a recipient to enter into a contract with multiple “qualified” A&E firms with work assignments to be distributed among the various firms based on price or some other selection method. An on-call A&E contract means that the recipient has identified the most qualified firm and has entered into a contract with that firm for future A&E work, as needed.

Solicitations for on-call awards must describe how the work will be assigned, and not leave the process undefined. For example, if company A is initially evaluated as being the best for geothermal work, then all such work should be given to that company as tasks are defined, assuming the company can perform within the timeframes required for the task. The procurement officials should not leave it to someone's 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. The selected companies also should not be allowed to update their qualifications during the term of the contract and so be rated higher than they were initially. There should be a finite period for these contract awards, after which a new round of qualifications-based awards would be made.

INDICATORS OF COMPLIANCE

- a. *Were price negotiations only carried out with the most qualified firm?*

Review Response

- b. *Did on-call solicitations describe how on-call work will be assigned?*

Review Response

- c. *If on-call contracting was used, were the on-call task orders only negotiated and awarded to the most qualified firm?*

Review Response

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, review State statutes, the state management plan, and other documentation of procurement procedures for contracting A&E services through qualifications-based requirements. Review the list of procurements provided in advance of the review to identify procurements that would likely require Brooks method procedures. Procurements requiring the Brooks method must include both A&E and procurements directly in support of, directly connected to, directly related to, or leading to construction, alteration, or repair of real property.

On site, discuss with the recipient, and evaluate procurement files to 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. The instructions to proposers and the evaluation criteria of the solicitation document should be reviewed to ensure price was not to be used to evaluate proposals. The description of how the contract will be awarded should also be reviewed to ensure proposed pricing information will only be evaluated for the firm that is identified as most qualified and that other pricing will only be evaluated if a fair and reasonable price cannot be negotiated with the most qualified firm and negotiations are terminated. Review the scoring completed by each member of the evaluation committee and the justifications for scores selected. Review documentation of the price negotiations to verify that only the most qualified firm was involved in price negotiations.

Review all "on-call" contracts for A&E services to determine if they comply with the Brooks Act. The recipient should be specifically asked if they utilize on-call A&E contracting where multiple firms are selected and eligible for assignments. These types of contracts may also be identified by recipients as "delivery order", "open-end", "job-order", or "pool" contracts. Review solicitations and contracts to determine if the method of assignments from these types of contracts would be selected and awarded. If on-call contracting is used, review the recipient's on-call contracting procedures to determine if assignments under these contracts are negotiated with the most qualified firm identified during the on-call contractor selection process. Review a sample of assignment authorizations to document the actual process used to authorize assignments of work.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it carried out price negotiations with more than one proposer simultaneously.

DEFICIENCY CODE PSRERM9-1: A&E price negotiation deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office a list of all active A&E contracts procured where price negotiations were conducted with more than one proposer simultaneously. The FTA regional office will advise the recipient as to whether those contracts must be terminated and resolicited. The recipient must submit to the FTA regional office procedures for following qualifications-based procurements 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.

The recipient, including states, is deficient if solicitations for multi-consultant on-call services did not describe how work will be assigned or on-call A&E services were not negotiated and awarded to the most qualified firm identified in a multi-consultant on-call services procurement.

DEFICIENCY CODE PSRERM9-2: A&E on-call service deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office a list of all active A&E on-call contracts and associated task orders. The FTA regional office will advise the recipient as to whether those contracts must be terminated and resolicited. The recipient must submit to the FTA regional office procedures for following qualifications-based procedures when using FTA assistance to contract for on-call 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.”

PSRERM10. Does the recipient develop independent cost estimates and conduct cost and/or price analysis?

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

All recipients

DETAILED EXPLANATION FOR REVIEWER

Recipients must perform cost or price analyses in connection with every procurement exceeding the applicable Simplified Acquisition Threshold, including contract modifications, after receiving bids, but before awarding a contract. Note that effective June 20, 2018, the Simplified Acquisition Threshold increased from \$150,000 to \$250,000. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the recipient must make independent estimates before receiving bids or proposals. Generally 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 actions exceeding the Simplified Acquisition Threshold. An ICE is completed prior to receipt of bids or proposals. An ICE is required for procurement actions such as contract modifications and change orders. It can range from a simple budgetary estimate to a complex estimate based on items like drawings, specifications, and information from previous procurements. The word “independent” means that the estimate is prepared without the influence of persons who have a financial interest in or will be considered for the resulting award. It 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, 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 unexpectedly high or low-cost proposals.

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. Obtaining cost elements for sole source pricing of manufactured items can be difficult or impossible since many vendors may feel this information is proprietary. In these cases, recipients should prepare a price analysis to determine if the price is fair and reasonable.

Price analysis (i.e., using catalog, market prices, or comparison of bidders) may be performed for all other procurements. A price analysis is a more simplified process and is normally used when two or more responsive and responsible bids or proposals have been received.

For each contract in which there is no price competition and in all cases where a cost analysis is performed, the recipient must negotiate profit as a separate element of the price. 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. A bidder's profit should be separately negotiated and not based on a flat percentage of estimated contract costs.

INDICATORS OF COMPLIANCE

- a. *Did the recipient develop an ICE for change orders and sole source procurements over the Simplified Acquisition Threshold?*

Review Response

- b. *Was the independent cost estimate prepared prior to receipt of bids or proposals and did it contain the basis for the estimated cost?*

Review Response

- c. *Did the recipient develop a cost analysis for change orders or sole source procurements?*

Review Response

- d. *Did the recipient negotiate profit for sole source procurements and for every instance where a cost analysis was performed?*

Review Response

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, examine the recipient's policies and procedures. On site, review selected procurements to determine if the recipient developed an independent estimate prior to receipt of bids or proposals for procurement actions (including change orders and sole source procurements) above the Simplified Acquisition Threshold. The independent cost estimate (ICE) should be contained in the procurement file and be in writing. Determine if the ICE is dated to verify that it was completed prior to the receipt of bids or proposals. Determine if the ICE contains documentation of how the recipient arrived at the estimate. If the recipient required a breakdown of estimated costs, determine if the in-house independent cost estimate was broken down into similar cost elements.

Cost or Price Analysis

Review procurements over the Simplified Acquisition Threshold to determine if each cost or price analysis includes a written narrative of how the recipient determined the cost or price was fair and reasonable prior to a contract award. Determine if the analysis compared the prices or costs received to the ICE. In certain circumstances, the ICE may be much higher or lower than the costs or prices received. If this is the case for procurements reviewed, obtain documentation from the recipient on how it determined to move forward with the award.

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

Determine if a cost analysis was performed in accordance with the recipient's policies and procedures and 2 CFR Part 200.323 for: (1) procurements which require that offerors submit detailed elements of direct and indirect costs; (2) procurements where adequate price competition is lacking; (3) change orders; and/or (4) sole-source procurements. Determine if the cost analysis documented how a fair and reasonable profit was determined and if the extent of the analysis appears to be adequate to the size and complexity of the procurement. For sole source awards and in any other instance where a cost analysis was used, determine if profit was negotiated as a separate element of the price, taking into account aspects such as 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.

POTENTIAL DEFICIENCY DETERMINATIONS

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

DEFICIENCY CODE PSRERM10-1: Lacking independent cost estimate for change orders or sole source procurements

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office documentation that it has updated its procurement process to include development of independent cost estimates prior to receipt of sole source bids or proposals and change orders. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if the independent cost estimate is not dated, was dated after receipt of the bid or proposal, or there was no basis for how the estimate was derived.

DEFICIENCY CODE PSRERM10-2: Inadequate independent cost estimate

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office documentation that it has updated its procurement process to ensure the independent cost estimate is dated, was prepared prior to receipt of bids or proposals, and contains the basis for how the estimate was derived. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if a cost analysis was not prepared or was inadequate for change orders or sole source procurements over the Simplified Acquisition Threshold.

DEFICIENCY CODE PSRERM10-3: Cost analysis lacking for change orders or sole source procurements

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office documentation that it has updated its procurement process to include performing a cost analysis for change orders and sole source procurements. For the next change order, submit to the FTA regional office documentation that the required cost analysis was completed.

The recipient is deficient if, for noncompetitive awards or any other instance where a cost analysis was used, profit was not negotiated as a separate element.

DEFICIENCY CODE PSRERM10-4: Profit not negotiated when cost analysis required

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office documentation that it has updated its procurement process to include negotiating profit as a separate element for procurements requiring a cost analysis. For the next sole source procurement, submit to the FTA regional office documentation that the required cost analysis was completed.

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 a 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 many utility purchases), or a comparison with recent prices for similar goods and services.”

PSRERM11. Did the recipient include applicable federal clauses in FTA-funded procurements?

BASIC REQUIREMENT

Recipients must include and implement required clauses in its procurements.

APPLICABILITY

All recipients

DETAILED EXPLANATION FOR REVIEWER

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.

Generally, recipients may not modify an existing contract to include Federal clauses and so make it eligible for reimbursement with Federal funds. Recipients may; however, include Federal clauses in a purchase order made against its state's General Services Administration (GSA)-type 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 shown in Instructions for Reviewer below. Contracts must include all applicable FTA clauses. Incorporation of a clause by reference is permitted, however a general reference to FTA guidelines or clauses is not sufficient to incorporate a clause. A checklist of required clauses is provided in the Instructions for Reviewer. The checklist provides a citation for each required clause.

INDICATORS OF COMPLIANCE

- a. *Did the recipient add clauses to a non-state type GSA contract after contract award?*

Review Response

- b. *Did the recipient obtain bid security, performance security, and payment security for applicable construction projects?*

Review Response

- c. *Did the recipient include Davis Bacon wage determinations in applicable construction projects?*

Review Response

INSTRUCTIONS FOR REVIEWER

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 table shown below:

Clause	Threshold	Citation
Bonding (a) A bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" must consist of a firm	For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept	2 CFR 200.325

Clause	Threshold	Citation
<p>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.</p> <p>(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.</p> <p>(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.</p>	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.	
Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate	For procurements over simplified acquisition	Appendix II to Part 200
Termination for cause and for convenience including the manner by which it will be effected and the basis for settlement	For procurements over \$10,000	Appendix II to Part 200
Equal Employment Opportunity	All contracts that meet the definition of "federally assisted construction contract" in 41 CFR Part 60-1.3	Appendix II to Part 200
Davis-Bacon Act	All prime construction contracts in excess of \$2,000	Appendix II to Part 200

Clause	Threshold	Citation
Contract Work Hours and Safety Standards Act	All contracts in excess of \$100,000 that involve the employment of mechanics or laborers	Appendix II to Part 200
Rights to Inventions Made Under a Contract or Agreement	Contracts that meet 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,"	Appendix II to Part 200
Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act	Contracts in excess of \$150,000	Appendix II to Part 200
<p>6002 of the Solid Waste Disposal Act</p> <p>When 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</p> <p>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</p>	For non-Federal entity that is a state agency or agency of a political subdivision of a state, contracts with purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000	2 CFR 200.322

Clause	Threshold	Citation
Notice to FTA and U.S. DOT Inspector General of information related to fraud, waste, abuse, or other legal matters	Applies to all contracts at all tiers expected to equal or exceed \$25,000. The recipient must require a prime contractor to "flow down" the requirement to subcontractors.	FTA Master Agreement (2019) §39(b)

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if required clauses were added to a FTA-funded procurement contract after contract award.

DEFICIENCY CODE PSRERM11-1: FTA clauses added after contract award

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office revised procurement procedures that address inclusion of all FTA-required third party contract clauses before 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 required security bonds were not obtained for an applicable FTA-funded construction procurement.

DEFICIENCY CODE PSRERM11-2: Bid security, performance security, or payment security not obtained

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office revised procurement procedures that addresses inclusion of all required bonding and security for FTA funded construction procurements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if required Davis-Bacon rates were not included in an applicable construction procurement.

DEFICIENCY CODE PSRERM11-3: Davis-Bacon rates not used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office revised procurement procedures that addresses inclusion of Davis-Bacon rates in all required FTA funded construction procurements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES

FTA Master Agreement (25), section 9(c)

Access to Recipient and Third Party Participant Records. The Recipient agrees, and assures that each Subrecipient, if any, will agree to: (1) Provide, and require its Third Party Participants at each tier to provide, sufficient access to inspect and audit records and information related to its Award, the accompanying Underlying Agreement, and any Amendments thereto to the U.S. Secretary of Transportation or the Secretary's duly authorized representatives, to the Comptroller General of the United States, and the Comptroller General's duly authorized representatives, and to the Recipient and each of its Subrecipients; (2) Permit those individuals listed above to inspect all work and materials related to its Award, and to audit any information related to its Award under the control of the Recipient or Third Party Participant within books,

records, accounts, or other locations; and (3) Otherwise comply with 49 U.S.C. § 5325(g), and federal access to records requirements as set forth in the applicable U.S. DOT Common Rules.

49 CFR 26.13 (b) What assurances must recipients and contractors make?

Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance: The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:

- (1) Withholding monthly progress payments;
- (2) Assessing sanctions;
- (3) Liquidated damages; and/or
- (4) Disqualifying the contractor from future bidding as non-responsible.

FTA Master Agreement (25), Sec. (3)(i)(6) Notice to Third Party Participants.

The Recipient agrees to include notice in each Third Party Agreement that: (i) Federal requirements that apply to the Recipient or the Award, the accompanying Underlying Agreement, and any Amendments thereto may change due to changes in federal law, regulation, other requirements, or guidance, or changes in the Recipient's Underlying Agreement including any information incorporated by reference and made part of that Underlying Agreement; and (ii) Applicable changes to those federal requirements will apply to each Third Party Agreement and parties thereto at any tier.

FTA Master Agreement (25), Sec. (3)(i)(5) Third Party Agreements.

To comply with federal requirements, the Recipient agrees to enter into a written Third Party Agreement with each Third Party Participant in its Underlying Agreement and must include all appropriate provisions stating the Third Party Participant's responsibilities to assure the Recipient's capability to comply with applicable federal requirements and guidance and specifying the responsibilities that the Third Party Participant will fulfill on the Recipient's behalf.

§381.7 Federal Grant, Guaranty, Loan and Advance of Funds Agreements

In order to insure a fair and reasonable participation by privately owned United States-flag commercial vessels in transporting cargoes which are subject to the Cargo Preference Act of 1954 and which are generated by U.S. Government Grant, Guaranty, Loan and/or Advance of Funds Programs, the head of each affected department or agency shall require appropriate clauses to be inserted in those Grant, Guaranty, Loan and/or Advance of Funds Agreements and all third party contracts executed between the borrower/grantee and other parties, where the possibility exists for ocean transportation of items procured, contracted for or otherwise obtained by or on behalf of the grantee, borrower, or any of their contractors or subcontractors. The clauses required by this part shall provide that at least 50 percent of the freight revenue and tonnage of cargo generated by the U.S. Government Grant, Guaranty, Loan or Advance of Funds be transported on privately owned United States-flag commercial vessels. These clauses shall also require that all parties provide to the Maritime Administration the necessary shipment information as set forth in §381.3. A copy of the appropriate clauses required by this part shall be submitted by each affected agency or department to the Secretary, Maritime Administration, for approval no later than 30 days after the effective date of this part. The following are suggested acceptable clauses with respect to the use of United States-flag vessels to be incorporated in the Grant, Guaranty, Loan and/or Advance of Funds Agreements as well as contracts and subcontracts resulting there from:

(a) Agreement Clauses. "Use of United States-flag vessels:

(1) Pursuant to Pub. L. 664 (43 U.S.C. 1241(b)) at least 50 percent of any equipment, materials or commodities procured, contracted for or otherwise obtained with funds granted, guaranteed, loaned, or advanced by the U.S. Government under this agreement, and which may be transported by ocean vessel, shall be transported on privately owned United States-flag commercial vessels, if available.

"(2) Within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, 'on-board' commercial ocean bill-of-lading in English for each shipment of cargo

described in paragraph (a)(1) of this section shall be furnished to both the Contracting Officer (through the prime contractor in the case of subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590."

(b) Contractor and Subcontractor Clauses. "Use of United States-flag vessels: The contractor agrees—

"(1) To utilize privately owned United States-flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to this contract, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels.

"(2) To furnish within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, 'on-board' commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (b) (1) of this section to both the Contracting Officer (through the prime contractor in the case of subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590.

"(3) To insert the substance of the provisions of this clause in all subcontracts issued pursuant to this contract."

29 CFR 3.1 Purpose and scope.

This part prescribes "anti-kickback" regulations under section 2 of the Act of June 13, 1934, as amended (40 U.S.C. 276c), popularly known as the Copeland Act. This part applies to any contract which is subject to Federal wage standards and which is for the construction, prosecution, completion, or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States.

29 CFR 3.11 Regulations part of contract. All contracts made with respect to the construction, prosecution, completion, or repair of any public building or public work or building or work financed in whole or in part by loans or grants from the United States covered by the regulations in this part shall expressly bind the contractor or subcontractor to comply with such of the regulations in this part as may be applicable. In this regard, see §5.5(a) of this subtitle.

§ 41.117 Buildings built with Federal assistance.

(a) Each DOT Operating Administration assisting in the financing, through Federal grants or loans, or guaranteeing the financing, through loan or mortgage insurance programs, of newly constructed buildings will ensure that any building constructed with such assistance is constructed in accord with seismic standards set out in § 41.120 of this part.

(b) This section applies to new buildings and additions to existing buildings financed in whole or in part through Federal grants or loans administered by DOT Operating Administrations, or through guaranteed financing through loan or mortgage insurance programs administered by DOT Operating Administrations.

(c) Any building constructed with Federal financial assistance, after July 14, 1993 must be designed and constructed in accord with seismic standards approved by the DOT Operating Administration under § 41.120 of this part in order to be eligible for Federal financial assistance.

(d) For buildings built with Federal financial assistance, a certification of compliance with the seismic design and construction requirements of this part is required prior to the furnishing of such assistance. Such statements of compliance may include engineer's and architect's authenticated verifications of seismic design codes, standards, and practices used in the design and construction of the building, construction observation reports, local or state building department plan review documents, or other documents deemed appropriate by the DOT Operating Administration.

49 USC 5323 (d) Condition on Charter Bus Transportation Service.—(1) Agreements.

Financial assistance under this chapter may be used to buy or operate a bus only if the applicant, governmental authority, or publicly owned operator that receives the assistance agrees that, except as

provided in the agreement, the governmental authority or an operator of public transportation for the governmental authority will not provide charter bus transportation service outside the urban area in which it provides regularly scheduled public transportation service. An agreement shall provide for a fair arrangement the Secretary of Transportation considers appropriate to ensure that the assistance will not enable a governmental authority or an operator for a governmental authority to foreclose a private operator from providing intercity charter bus service if the private operator can provide the service.

49 CFR 40.11 What are the general responsibilities of employers under this regulation?

(a) As an employer, you are responsible for meeting all applicable requirements and procedures of this part. (b) You are responsible for all actions of your officials, representatives, and agents (including service agents) in carrying out the requirements of the DOT agency regulations. (c) All agreements and arrangements, written or unwritten, between and among employers and service agents concerning the implementation of DOT drug and alcohol testing requirements are deemed, as a matter of law, to require compliance with all applicable provisions of this part and DOT agency drug and alcohol testing regulations. Compliance with these provisions is a material term of all such agreements and arrangements.

49 USC 5323 (f) School bus Transportation.- (1)Agreements.

Financial assistance under this chapter may be used for a capital project, or to operate public transportation equipment or a public transportation facility, only if the applicant agrees not to provide schoolbus transportation that exclusively transports students and school personnel in competition with a private schoolbus operator. This subsection does not apply—

(A) to an applicant that operates a school system in the area to be served and a separate and exclusive schoolbus program for the school system; and (B) unless a private school bus operator can provide adequate transportation that complies with applicable safety standards at reasonable rates.

49 USC 5333 (b) Employee Protective Arrangements.

(1) As a condition of financial assistance under sections 5307–5312, 5316,[1]5318, 5323(a)(1), 5323(b), 5323(d), 5328,[1] 5337, and 5338(b) of this title, the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. The agreement granting the assistance under sections 5307–5312, 5316,[1] 5318, 5323(a)(1), 5323(b), 5323(d), 5328,[1] 5337, and 5338(b) shall specify the arrangements.

40 USC 3702(b) Contract Requirements

A contract described in section 3701 of this title, and any obligation of the Federal Government, a territory of the United States, or the District of Columbia in connection with that contract, must provide that—

(1) a contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall not require or permit any laborer or mechanic, in any workweek in which the laborer or mechanic is employed on that work, to work more than 40 hours in that workweek, except as provided in this chapter; and (2) when a violation of clause (1) occurs, the contractor and any subcontractor responsible for the violation are liable—(A) to the affected employee for the employee's unpaid wages; and (B) to the Government, the District of Columbia, or a territory for liquidated damages as provided in the contract.

49 CFR 26.29 What prompt payment mechanisms must recipients have?

(a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment you make to the prime contractor.

(b) You must ensure prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. You must use one of the following methods to comply with this requirement: (1) You may decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors. (2) You may decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. (3) You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor

to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after your payment to the prime contractor.

49 USC 5325(k) Veterans Employment.

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

(3) The term “capital project” means a project for— (A) acquiring, constructing, supervising, or inspecting equipment or a facility for use in public transportation, expenses incidental to the acquisition or construction (including designing, engineering, location surveying, mapping, and acquiring rights-of-way), payments for the capital portions of rail trackage rights agreements, transit-related intelligent transportation systems, relocation assistance, acquiring replacement housing sites, and acquiring, constructing, relocating, and rehabilitating replacement housing; (B) rehabilitating a bus; (C) remanufacturing a bus; (D) overhauling rail rolling stock; (E) preventive maintenance; (F) leasing equipment or a facility for use in public transportation; (G) a joint development improvement that— (i) enhances economic development or incorporates private investment, such as commercial and residential development; (iii) provides a fair share of revenue that will be used for public transportation; (iv) provides that a person making an agreement to occupy space in a facility constructed under this paragraph shall pay a fair share of the costs of the facility through rental payments and other means; and (v) may include— (I) property acquisition; (II) demolition of existing structures; (III) site preparation; (IV) utilities; (V) building foundations; (VI) walkways; (VII) pedestrian and bicycle access to a public transportation facility; (VIII) construction, renovation, and improvement of intercity bus and intercity rail stations and terminals; (IX) renovation and improvement of historic transportation facilities; (X) open space; (XI) safety and security equipment and facilities (including lighting, surveillance, and related intelligent transportation system applications); (XII) facilities that incorporate community services such as daycare or health care; (XIII) a capital project for, and improving, equipment or a facility for an intermodal transfer facility or transportation mall; and (XIV) construction of space for commercial uses; (H) the introduction of new technology, through innovative and improved products, into public transportation; (I) the provision of nonfixed route paratransit transportation services in accordance with section 223 of the Americans with Disabilities Act of 1990, but only for grant recipients that are in compliance with applicable requirements of that Act, including both fixed route and demand responsive service, and only for amounts— (i) not to exceed 10 percent of such recipient’s annual formula apportionment under sections 5307 and 5311; or (ii) not to exceed 20 percent of such recipient’s annual formula apportionment under sections 5307 and 5311, if, consistent with guidance issued by the Secretary, the recipient demonstrates that the recipient meets at least 2 of the following requirements: (I) Provides an active fixed route travel training program that is available for riders with disabilities, (II) Provides that all fixed route and paratransit operators participate in a passenger safety, disability awareness, and sensitivity training class on at least a biennial basis. (III) Has memoranda of understanding in place with employers and the American Job Center to increase access to employment opportunities for people with disabilities. (J) establishing a debt service reserve, made up of deposits with a bondholder’s trustee, to ensure the timely payment of principal and interest on bonds issued by a grant recipient to finance an eligible project under this chapter; (K) mobility management— (i) consisting of short-range planning and management activities and projects for improving coordination among public transportation and other transportation service providers carried out by a recipient or subrecipient through an agreement entered into with a person, including a governmental entity, under this chapter (other than section 5309); but (ii) excluding operating public transportation services; (L) associated capital maintenance, including— (i) equipment, tires, tubes, and material, each costing at least .5 percent of the current fair market value of rolling stock comparable to the rolling stock for which the equipment, tires, tubes, and material are to be used; and (ii) reconstruction of equipment and material, each of which after reconstruction will have a fair market value of at least .5 percent of the current fair market value of rolling stock comparable to the rolling stock for which the equipment and material will be used; (M) associated transit improvements; or

(N)technological changes or innovations to modify low or no emission vehicles (as defined in section 5339(c)) or facilities.

FTA Master Agreement (25) Section 34. Safe Operation of Motor Vehicles. (a) Seat Belt Use. The Recipient agrees to implement Executive Order No. 13043, "Increasing Seat Belt Use in the United States," April 16, 1997, 23 U.S.C. § 402 note, (62 Fed. Reg. 19217), by: 90 (1) Adopting and promoting on-the-job seat belt use policies and programs for its employees and other personnel that operate company-owned vehicles, company-rented vehicles, or personally operated vehicles; and (2) Including a "Seat Belt Use" provision in each third party agreement related to the Award.

FTA Master Agreement (25) Section 34. Safe Operation of Motor Vehicles. (b) Distracted Driving, Including Text Messaging While Driving. The Recipient agrees to comply with: (1) Executive Order No. 13513, "Federal Leadership on Reducing Text Messaging While Driving," October 1, 2009, 23 U.S.C. § 402 note, (74 Fed. Reg. 51225); (2) U.S. DOT Order 3902.10, "Text Messaging While Driving," December 30, 2009; and (3) The following U.S. DOT Special Provision pertaining to Distracted Driving: (i) Safety. The Recipient agrees to adopt and enforce workplace safety policies to decrease crashes caused by distracted drivers, including policies to ban text messaging while using an electronic device supplied by an employer, and driving a vehicle the driver owns or rents, a vehicle Recipient owns, leases, or rents, or a privately-owned vehicle when on official business in connection with the Award, or when performing any work for or on behalf of the Award; (ii) Recipient Size. The Recipient agrees to conduct workplace safety initiatives in a manner commensurate with its size, such as establishing new rules and programs to prohibit text messaging while driving, re-evaluating the existing programs to prohibit text messaging while driving, and providing education, awareness, and other outreach to employees about the safety risks associated with texting while driving; and (iii) Extension of Provision. The Recipient agrees to include the preceding Special Provision of section 34(b)(3)(i) – (ii) of this Master Agreement in its third party agreements, and encourage its Third Party Participants to comply with this Special Provision, and include this Special Provision in each third party subagreement at each tier supported with federal assistance.

PSRERM12. 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

DETAILED EXPLANATION FOR REVIEWER

Competitors sometimes protest the issuance of changes when they believe that a new competitive procurement process should have been used for the changed work. The criterion is whether the change was within the scope of the original competition, i.e., what the competitors should have anticipated to be within the scope of the competition. An important factor to be considered is whether the original solicitation adequately advised offerors of the potential for the type of changes during the course of the contract that in fact occurred, or whether the modification is of a nature which potential offerors would reasonably have anticipated under the changes clause.

INDICATORS OF COMPLIANCE

- a. *Did the recipient ensure that executed change orders were within the scope of the original contract and its grant award?*

Review Response

- b. *Did the recipient ensure that executed change orders were reasonable for completion of the project scope?*

Review Response

INSTRUCTIONS FOR REVIEWER

During the site visit, examine selected contract files for contracts that had significant change orders issued. This will be an expanded sample from the selection for the baseline review.

Determine if the 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.

POTENTIAL DEFICIENCY DETERMINATION

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

DEFICIENCY CODE PSRERM12-1: 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 the 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."

PSRERM13. If the recipient included options in an FTA-funded procurement, did it base the number of options 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

DETAILED EXPLANATION FOR REVIEWER

Recipients may include options in contracts that reflect reasonably foreseeable needs. 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, or some other calculable method. 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 exceed the recipient's reasonably foreseeable needs, the recipient may not assign those options to other recipients.

INDICATOR OF COMPLIANCE

- a. Did the recipient exercise options at a different price than it had evaluated for those options?*

Review Response

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, examine the recipient's policies and procedures to determine if the recipient describes the use of options. Request a list of options that the recipient exercised during the review period; this includes options for additional property or equipment, or options extending the term of a contract. During the site visit, examine selected contract files that included options. If the recipient evaluated the options at the time of initial contract award, examine the contract files to determine if it exercised the options at the same price that was included in the initial contract.

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 DETERMINATION

The recipient is deficient if it exercised an option at a different price than noted in the award.

DEFICIENCY CODE PSRERM13-1: Exercised option differed from awarded option

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office procedures for complying with FTA requirements when exercising options.

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.”

PSRERM14. Did the recipient adhere to the time limitations on placing orders against the contracts?

BASIC REQUIREMENT

Contracts, including options, for the procurement of buses or replacement parts must not extend for more than five years after the date of the original contract or seven years for rail rolling stock. For cooperative procurement contracts, the contract duration can be for no more than a two-year initial term, with no more than three optional extensions of not more than one year each.

APPLICABILITY

All recipients

DETAILED EXPLANATION FOR REVIEWER

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.

For cooperative procurement contracts, the contract duration can be for no more than a two-year initial term, with no more than three optional extensions of not more than one year each. A cooperative procurement contract means a contract between a state or an eligible nonprofit entity and one or more vendors under which the vendors agree to provide an option to purchase rolling stock and related equipment to multiple grantee participants.

INDICATOR OF COMPLIANCE

- a. *Are the periods of performance for the recipient's non-rolling stock contracts reasonable?*

Review Response

INSTRUCTIONS FOR REVIEWER

For any non-rolling stock procurement reviewed that exceeds five years, determine if the recipient has justification to demonstrate that the contract term is reasonable.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if a non-rolling stock contract period of performance is unreasonable.

DEFICIENCY CODE PSRERM14-1: Contract(s) period of performance is unreasonable.

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office revised procurement procedures that include how it will establish reasonable contract terms for non-rolling stock items. The recipient must submit to the FTA regional office with an assurance that unexecuted options will not be executed on an existing contract where the contract term is unreasonable. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES

FTA Circular 4220.1F Chapter 2. b.3.b

The recipient's other third party contracts (such as property, services, leases, construction, revenue, and so forth) are not encumbered by Federal requirements restricting the maximum periods of performance. Nevertheless, the duration of the recipient's other contracts must be reasonable.

PSRERM15. 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

DETAILED EXPLANATION FOR REVIEWER

There are some items for which it is customary to pay prior to receipt of products or services. Advance payments falling into this category would include such things as utility services, insurance premiums, and subscriptions to newspapers and magazines. FTA concurrence is required only when advance payment or payments *customarily required* in the marketplace exceed \$100,000.

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, performance and payment bonding, or obtaining a letter of credit or taking equivalent measures to protect the recipient's financial interest in the progress payment.

Payments should not be based on project milestones unless the contractor and recipient can substantiate the actual costs incurred in connection with each milestone.

INDICATOR OF COMPLIANCE

- a. *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 based on actual costs incurred?*

Review Response

INSTRUCTIONS FOR REVIEWER

Close attention should be paid if the recipient used a vendor-supplied agreement for a procurement. Many vendor agreements contain payment provisions that would be categorized as advance payments, such as a provision requiring a payment upon contract execution. Use of vendor agreements are common for technology-based projects.

Examine selected contract files 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.

POTENTIAL DEFICIENCY DETERMINATION

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

DEFICIENCY CODE PSRERM15-1: 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 and await further instructions. 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.

GOVERNING DIRECTIVES

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 payments 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.”

PSRERM16. Did the recipient use a cost plus percentage of cost contract?

BASIC REQUIREMENT

Recipients are prohibited from using a cost plus percentage of cost contract.

APPLICABILITY

All recipients

DETAILED EXPLANATION FOR REVIEWER

2 C.F.R. 200 expressly prohibits the use of the cost plus a percentage of cost and percentage of construction cost methods of contracting.

The cost-plus-percentage of a cost is a type of contract that requires the buyer to reimburse all legitimate project costs towards the seller. Aside from reimbursing costs, the buyer also needs to pay a percentage cost as stipulated and agreed-upon in the contract. This type of contract raises the additional fee as the cost of the contract rises and does not provide any incentive to the contractor to control the project cost.

A percentage of construction cost contract is similar. This method of contracting may be requested by project/construction managers or A&E firms and would include a provision that ties their fixed fee or profit to a percentage of construction cost.

Change orders on construction projects are another type of procurement action where the request for a cost plus a percentage of cost arrangement may be made by a contractor. Recipients should exercise caution in change order negotiations to ensure that cost plus percentage of cost change orders are not used.

INDICATOR OF COMPLIANCE

- a. *Did the recipient use a cost plus percentage of cost or a cost plus percentage of construction cost method of contracting for any FTA funded procurement?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, review the procurement listing to identify project management/construction management contracts, construction contracts, and change orders to construction contracts for review during the site visit. Review procurement policies and procedures to determine if this method of contracting is described or prohibited.

During the site visit, ask the procurement representatives if this type of contracting is utilized. Examine selected procurement files to determine the type of contracting method used. Pay special attention to cost proposals, payment terms, and change order cost negotiations records for any provisions that tie a predetermined fee to actual contract costs.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if the cost plus percentage of cost or the cost plus percentage of construction cost method of contracting was used.

DEFICIENCY CODE PSRERM16-1: Cost plus percentage of cost contracting used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office documentation that it has revised its procurement policies and procedures and has established a system to ensure that the cost plus percentage of cost method of contracting will not be used for FTA funded procurements.

GOVERNING DIRECTIVE

2 C.F.R. 200 § 200.323 Contract cost and price

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

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