

**ATTACHMENT Q**  
**PROCUREMENT GUIDANCE AND THIRD PARTY CONTRACT**  
**EXTRACTS FROM CIRCULAR 4220.1F**

**Attachment Q - Procurement Guidance and Third Party Contract- Extract from Circular 4220.1F**

**PROCUREMENT GUIDANCE – REFERENCE 4220.1F**

1. Sub-recipients are required to include specific required clauses in FTA-funded procurements, intergovernmental agreements (e.g., those involving states and other public entities), and sub-recipient agreements (contracts). The FTA Master Agreement identifies certain clauses that apply to third party contracts (see Attachment 2).
2. Contacts may not be modified after awarded to include Federal clauses and so make them eligible for procuring goods and services with Federal funds. However, state/ GSA-type contracts may be modified to add Federal clauses when purchase orders are issued against those state contracts. **Not all clauses apply to every contract.** The applicability of clauses depends on the size and type of contract.
3. Procurements above the micro-purchase thresholds (\$3,000, \$2,000 for construction projects) must include all applicable FTA clauses as part of the solicitation, purchase order, or contract. **A general reference to FTA guidelines is not sufficient to meet this requirement.**
4. Procurement transactions must be in a manner providing full and open competition. Sub-recipients are prohibited from restricting competition in federally supported procurement transactions. Some situations that restrict competition include, but are not limited to:
  - a. Unreasonable qualification requirements,
  - b. Unnecessary experience requirements,
  - c. Excessive bonding,
  - d. Noncompetitive pricing practices between firms,
  - e. noncompetitive awards to firms on retainer,
  - f. organizational conflicts of interest,
  - g. “brand name” only specifications,
  - h. or any arbitrary action in the procurement process.
5. Requests-for-Proposal shall identify all significant evaluation factors, including price or cost where required, and their relative importance;
6. Sub-recipients shall provide mechanisms for technical evaluation of the proposals received, determinations of responsible offers for the purpose of written or oral discussions, and selection for contract award.
7. Sub-recipients are required to ensure to the best of its knowledge and belief that none of its principals, affiliates, vendors, or third party contractors is suspended, debarred, ineligible, or voluntarily excluded from participation (receive funding) in Federally assisted transactions or procurements. FTA requires grantees to review the Excluded Parties Listing System (EPLS) before entering into any third party contract expected to equal or exceed \$25,000. The EPLS system may now be found on the System for Award Management (SAM) website. A good

practice is for the grantee to print the screen with the results of the search to include in the grant or procurement file.

## INDEPENDENT COST ESTIMATES

**Q.** When is an independent cost estimate needed?

**A.** The independent cost estimate is a tool to assist in determining the reasonableness or unreasonableness of the bid or proposal being evaluated and is required for all procurements regardless of dollar amount. FTA Circular 4220.1F, Ch. VI, Para. 6, **advises grantees to "perform a cost or price analysis in connection with every procurement action, including contract modifications . . . the starting point for these cost/price analyses is an independent cost estimate which is made before receiving bids or proposals."** The Best Practices Procurement Manual (BPPM), Section 5.2 - Cost and Price Analysis, suggests that the independent estimate can range from a simple budgetary estimate to a complex estimate based on inspection of the product itself and review of items like drawings, specifications and prior procurement data. The word "independent" does not imply that it is performed by someone other than the grantee. This could be the case, however, if the grantee does not have the expertise for a large complex procurement. The independent estimate is especially critical whenever there is no price competition (e.g., for architect-engineer procurements or where only one price proposal is received), 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 agency when all competitors are submitting unreasonably high cost proposals. (**Revised: August 21, 2009**)

**B.** The FTA Procurement Circular 4220.1F, on page VI-19 states:

"Grantees must perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals."

(Date)

## Independent Cost Estimate

For Rolling Bridge Jack

Description: RTEC is in need of a Rolling Bridge Jack with 9,000lb capacity. The model number requested was RJ9001. Below is a breakdown of the companies and price that helped determine the cost estimate for this purchase.

<u>Company &amp; Website</u>	<u>Quantity</u>	<u>Unit Price</u>
<i>Example #1 Website</i>	1	\$2,623
<i>Example #2 Website</i>	1	\$3,245
<i>Example #3 Website</i>	1	\$2,849

The average cost of the above quotes is \$2,905, this price does not include installation. However, companies can be contacted for this price.

Therefore, we believe that RTEC should be able to find the required rolling bridge jack for the price range of \$2,905-\$3,245. Standard installation will need to be included.

RTEC  
Price Analysis  
for Rolling Bridge Jack

**Form of Price Analysis used:**

- (1) **Adequate price competition** ✓
- (2) Prices set by law or regulation
- (3) Established catalog prices and market prices
- (4) Comparison to previous purchases
- (5) Comparison to a valid Grantee independent estimate
- (6) Value analysis

RTEC feels that the all following **adequate price competition** conditions have been met:

- (1) At least two responsible offerors respond to a solicitation. ✓
- (2) Each offeror must be able to satisfy the requirements of the solicitation. ✓
- (3) The offerors must independently contend for a contract to be awarded to the responsive and responsible offeror submitting the lowest evaluated price. ✓
- (4) Each offeror must submit priced offers responsive to the expressed requirements of the solicitation. ✓

**Summary:**

RTEC received three quotes for RJ9001 rolling bridge jack with a 9,000lb capacity and installation.

- All three Quotes for rolling bridge jack were in line with the Independent Cost Estimate price range of \$2,905-\$3,245.
- All quotes were for the same purchase of a RJ9001 rolling bridge jack with a 9,000lb capacity and installation
- Three responses were received as follow:

*Company Name #1 - \$3,218*  
*Company Name #2 - \$3,345*  
*Company Name #3 - \$3,882*

***All quotes are considered responsive and award is appropriately made to Company Name #1, Inc. (lowest quote) in the amount of \$3,218, which RTEC determines to be a fair and reasonable price.***

\_\_\_\_\_  
**Signature**

\_\_\_\_\_  
**Title**

\_\_\_\_\_  
**Date**

TRANSIT AGENCY NAME

Cost Analysis

for

Architecture & Engineering's Services for Transit Facility Renovations

**Summary of Comparisons of current estimated costs & comparison to a valid Grantee independent estimate:**

- (1) Actual costs previously incurred.  
**Cost Estimate-** See Independent cost estimate attached. The independent cost estimate for Architecture & Engineering's Services for Transit Facility Renovations was determined to be in the range of blank to blank. This was based on a history of previous costs charged to other transit providers for similar A&E Services.

<b>Previous Costs</b>	<b>Vendor Name</b>	<b>Agency Name</b>	<b>Type of Work</b>
<u>\$blank</u>	<u>Blank</u>	<u>Blank</u>	<u>Blank</u>
<u>\$blank</u>	<u>Blank</u>	<u>Blank</u>	<u>Blank</u>
<u>\$blank</u>	<u>Blank</u>	<u>Blank</u>	<u>Blank</u>

- (2) The most recent cost estimate for the same or similar items.

<b>Current Cost</b>	<b>Vendor Name</b>	<b>Agency Name</b>	<b>Type of Work</b>
<u>\$blank</u>	<u>Blank</u>	<u>Blank</u>	<u>Blank</u>

- (3) Current cost estimates from other possible sources providing the same or similar product or service.

<b>Current Costs Estimates</b>	<b>Vendor Name</b>	<b>Agency Name</b>
<b>Type of Work</b>		
<u>\$blank</u>	<u>Blank</u>	<u>Blank</u>
<u>Blank</u>		
<u>\$blank</u>	<u>Blank</u>	<u>Blank</u>
<u>Blank</u>		
<u>\$blank</u>	<u>Blank</u>	<u>Blank</u>
<u>Blank</u>		

**Summary:**

Agency Name received blank proposals/qualifications/bids for A&E Services for Transit Facility Renovations. Vendor name was determined to be the highest ranked proposal, most qualified, lowest bid and submitted a cost for their services in the amount of \$blank.

**All proposals/qualifications/bids are considered responsive and award is appropriately made to Vendor name (highest ranked proposal, most qualified, lowest bid) in the amount of \$blank which Agency name determines to be a fair and reasonable price.**

\_\_\_\_\_  
Signature- Transit Agency Name

\_\_\_\_\_  
Title - Transit Agency Name

\_\_\_\_\_  
Date

## PROCUREMENT PROCEDURES

### INTRODUCTION

The Mississippi Department of Transportation (MDOT) oversees procurement procedures for federal and state public transportation grant funds. This includes vehicles, equipment, real property, and other goods and service.

MDOT has developed a decentralized method of overseeing and monitoring the procurement activities of our sub-recipients customer transit agencies. In this role, MDOT does not attempt to substitute its judgment for that of the transit agency in any decision-making that occurs in the procurement process. Instead, MDOT's role is to ensure that the agency's procurement actions are internally-supported by the agency's own written procedures and that they are in full compliance with state laws and federal guidance.

Any serious compliance issues will be discussed with the MDOT Procurement Division and our legal Counsel, as necessary.

### AUTHORIZATION

#### Federal Authority

Procurement standards must meet or exceed the requirements of the *Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments* as found in 49 CFR Section 18.36 or the *Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals and Other Non-Profit Organizations* found in 49 CFR Sections 19.40 – 19.48.

The requirements for the pre-award and post-delivery audits of vehicles are contained in 49 CFR Part 663.

The requirements for the (Altoona) testing of bus models are contained in 49 CFR Part 665.

The requirements for the Disadvantaged Business Enterprises Program (DBE) as defined by the U.S. Department of Transportation (U.S.DOT) are found in 49 CFR Part 26.

49 CFR Part 28 relates to nondiscrimination on the basis of handicap in U.S. DOT programs and focuses on facilities. Requirements for transportation services for persons with disabilities are contained in 49 CFR Part 37.

All vehicles shall comply with the vehicle accessibility guidelines contained in 36 CFR 1192

Procedures for procuring architectural and engineering services are found in 40 USC Chapter 10, Subchapter VI.

## **State Authority**

For a description of MDOT's policies regarding standard federal requirements, the State Management Plan.

For a description of MDOT's rules regarding contracting and procurement requirements specific to public transit projects, see the project agreement.

See the department's Disadvantaged Business Enterprise program for complaint procedures.

Other agency procurement requirements are contained in the state guidance.

## **Federal Transit Administration Guidance**

Federal Transit Administration (FTA) guidance for using third party contracts is found in Circular 4220.1F.

Guidelines and management procedures for capital purchases are covered in FTA Circular 5010.1D, Grant Management Guidelines. Of particular interest for this manual chapter is circular Chapter II, "Management of Real Property, Equipment and Supplies" which also includes guidance on using property as non-federal match.

Additionally, individual program circulars have a section on procurement. A complete listing of FTA circulars is available on-line at FTA's web site.

The FTA Best Practices Procurement Manual provides suggestions and sample documents covering every phase of procurement.

## **ADMINISTRATIVE STANDARDS**

### **Introduction**

Transit agencies are required to have processes in place to ensure procurement activities follow all applicable laws and regulations and promote free and open competition.

The standards, policies and procedures must be adopted by the sub-recipients governing board.

### **Standards**

Standards should include but are not limited to:

- Procurement procedures that reflect applicable federal, state and local laws and regulations
- Contract administration that ensures contractor performance in accordance with terms, conditions, and specifications of the contracts or purchase orders
- Written code of standards of conduct

- Review procedures that avoid purchase of unnecessary or duplicative items
- Written procurement history record
- Written procedures to handle and resolve protests
- Written procurement selection procedures
- Use of intergovernmental agreements, federal excess and surplus property, and value engineering wherever possible
- Rolling stock/replacement parts procurements that do not exceed five years inclusive of options
- Cost or price analysis for procurement actions.

## SPECIAL CONSIDERATIONS

### Real Property

Special requirements pertain to the purchase of real property. FTA Circular 5010.1C *Grant Management guidelines* covers the acquisition of real property. (Note: Where MDOT is the designated recipient of funds – as in the Section 5311 Nonurbanized Area Program – all direct contact with FTA flows through the PTD.

*Appraisals.* To establish the value of the property, the Federal Transit Administration requires one appraisal and a review appraisal. FTA’s prior approval is required when the transit agency’s recommended offer of just compensation exceeds \$250,000, or when a property appraised at \$250,000 or more must be condemned. This process must be followed to purchase real property using FTA funds. For guidance on using property as local match, see FTA C 5010.1C, Chapter II, 2.a.(5), “In-Kind Contributions.”

There is an alternate procedure for a transit agency with a fully staffed real estate department that permits higher dollar thresholds before FTA prior concurrence is needed. To do this, an FTA real estate specialist must review and approve the processes used in acquiring and clearing real estate. Transit agencies may request a review through the MDOT Office. Refer to FTA C 5010.1C, Chapter II, 2.a.(3)(b) for additional information.

*Environmental Factors:* There are also environmental factors involved in the procurement of land or facilities. FTA must accept the documentation in support of a categorical exclusion, environmental assessment or environmental impact statement before property can be purchased. (Link to the Environmental Chapter when published.)

*Purchase and Titling:* The MDOT sub-recipient, not its contractor, must be the recorded owner of real property purchased with funds provided by the department.

The services of a titling company ensure that the transit agency is receiving a good title when it buys real property and that MDOT will have a valid lien against the property. The latter occurs by the transit agency signing a deed of trust in favor of the

Mississippi Department of Transportation. PTD is the office of record for the deed of trust.

PTD and the Office of General Council will provide technical assistance for all real estate transactions.

### **Procurement of Architectural and Engineering Services**

A qualifications-based, competitive proposal procedure (i.e., Brooks Act procedures) must be used when procuring architectural and engineering (A&E) services. Services subject to this requirement are program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services.

Prior to selecting an architect or engineer, a “Request for Qualifications” should be advertised in a publication with national circulation. Alternative, a transit agency could compile a central bidders list from discussions with other agencies that have awarded contracts for similar work.

Upon receipt of various statements of qualifications, the prospective bidders are ranked and price negotiations may begin with the next ranked candidate.

The Best practices Procurement Manual (Chapter 6.5) provides excellent and detailed information about retaining A&E firms.

PTD and the Contract Administration or LPA Division Services can augment local expertise in this area.

### **Construction**

This subheading includes:

- Pre-construction meetings
- Facility accessibility

*Pre-Construction Meeting.* A pre-construction meeting must be held between the transit agency, the construction company, and the architect or overseer of the construction phase. Knowledgeable district staff should attend also. The agenda for the meeting should include:

- Construction milestones
- Billing processes
- Contingencies

*Transportation Facility Accessibility:* Public entities constructing new facilities or altering existing facilities to be used for the provision of public transportation service must make the facility or alterations readily accessible to and useable by individuals

with disabilities. The facility accessibility regulations are contained in (49 CFR Part 37, Appendix D to Part 37.215) contains an explanation of the regulations.

Private entities must comply with the regulations of the Department of Justice that implement Title III of the Americans with Disabilities Act in constructing and altering transit facilities (49 CFR Part 28).

### **Subcontracts**

Before awarding a third party contract in excess of \$25,000, the transit agency must allow the MDOT to review and approve the contract documents. These contracts shall contain all required provisions required by state or federal law. These requirements flow down to all third party contractors and their contracts at every tier. All relevant clauses contained in the transit agency's most current grant agreement with MDOT should be copied into a transit agency's subcontracts.

Transit agencies must be prepared to monitor the successful contractor for compliance with these requirements. Additionally, the solicitation document and resulting contract should include "performance measures" by which the transit agency can judge the contractor's fulfillment of the contract requirements. Non-performance penalties/remedies are another topic to consider.

Such contracts often include clauses for renewal. Sound business practice dictates that before exercising such options, transit agencies should consider the contractor's performance and if the terms, conditions and price are still favorable to the agency.

### **Monitoring**

PTD monitoring of procurement takes place in two different time frames. The Procurement Checklist Form and other documentation activities are tied to a specific purchase of an asset, piece of equipment or service. This information is retained in the PTD office.

During the annual transit agency compliance review, the monitor will look at policies and procedures a transit agency used to guide its procurements, as well as the written history documentation the transit agency maintains on-site.

## CHAPTER VI

### PROCEDURAL GUIDANCE FOR OPEN MARKET PROCUREMENTS

1. **COMPETITION REQUIRED.** Except as permitted by Federal law or regulations, the Common Grant Rules require a recipient of Federal assistance to use third party procurement procedures that provide full and open competition. The Federal Transit Administration's (FTA) enabling legislation at 49 U.S.C. Section 5325(a), also requires an FTA recipient to conduct all third party procurements financed under 49 U.S.C. Chapter 53 in a manner that provides full and open competition as determined by FTA. The recipient may make third party contract awards on the basis of:
  - a. **Solicitation by the Recipient.** Compliance with the solicitation procedures described in this Chapter will fulfill FTA requirements for "full and open competition."
  - b. **Unsolicited Proposals.** A recipient may also enter into a third party contract based on an unsolicited proposal, as defined in Chapter I of this circular, when authorized by applicable State or local law or regulation. Receipt of an unsolicited proposal does not, by itself, justify contract award without providing for full and open competition. Unless the unsolicited proposal offers a proprietary concept that is essential to contract performance, FTA expects the recipient to seek competition. To satisfy the requirement for full and open competition, FTA expects the recipient to take the following actions before entering into a contract resulting from an unsolicited proposal:
    - (1) **Receipt.** Publicize its receipt of the unsolicited proposal,
    - (2) **Adequate Description.** Publicize an adequate description of the property or services offered without improperly disclosing proprietary information or disclosing the originality of thought or innovativeness of the property or services sought,
    - (3) **Interest in the Property or Services.** Publicize its interest in acquiring the property or services described in the proposal,
    - (4) **Adequate Opportunity to Compete.** Provide an adequate opportunity for interested parties to comment or submit competing proposals, and
    - (5) **Contract Award Based on Proposals Received.** Publicize its intention to award a contract based on the unsolicited proposal or another proposal submitted in response to the publication.

If it is impossible to describe the property or services offered without revealing proprietary information or disclosing the originality of thought or innovativeness of the property or services sought, the recipient may make a sole source award to the offeror. A sole source award may not be based solely on the unique capability of the offeror to provide the specific property or services proposed.

- c. Prequalification. Prequalification lists are most commonly used in procurements of property involving lengthy evaluations needed to determine whether it satisfies the recipient's standards. The Common Grant Rule for governmental recipients permits a recipient to prequalify people, firms, and property for procurement purposes under the following standards:
  - (1) Lists. The recipient ensures that all prequalification lists it uses are current.
  - (2) Sources. The recipient ensures that all prequalification lists it uses include enough qualified sources to provide maximum full and open competition.
  - (3) Qualification Periods. The recipient permits potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date). FTA, however, does not require a recipient to hold a particular solicitation open to accommodate a potential supplier that submits property for approval before or during that solicitation. Nor must a recipient expedite or shorten prequalification evaluations of bidders, offerors, or property presented for review during the solicitation period.

Prequalification should not be confused with reviews of technical qualifications that are an essential process in two-step procurements and qualifications-based procurements, as discussed further in subsections 3.e and 3.f of this Chapter, respectively.

2. SOLICITATION REQUIREMENTS AND RESTRICTIONS. The Common Grant Rules require that each solicitation provide the following information:

- a. Description of the Property or Services. The solicitation and the contract awarded must include a clear and accurate description of the recipient's technical requirements for the property or services to be acquired in a manner that provides for full and open competition.
  - (1) What to Include. The description may include a statement of the qualitative nature of the property or services to be acquired. When practicable, the recipient should describe its requirements in terms of functions to be performed or level of performance required, including the range of acceptable characteristics or minimum acceptable standards. The Common Grant Rules for governmental recipients states that "Detailed product specifications should be avoided if at all possible." Both Common Grant Rules express a preference for performance or functional specifications, but do not prohibit the use of detailed technical specifications when appropriate.

- (2) Quantities Limited to the Recipient's Actual Needs. FTA limits Federal assistance to the amount necessary to support the quantity of property or extent of services the recipient actually needs at the time of acquisition. The recipient may not add quantities or options to contracts solely to allow assignments at a later date. FTA will not knowingly support the additional cost of contract rights to property or services excess to the recipient's immediate needs, even though the recipient may assign its excess contract rights to others.
- (3) Brand Name or Equal. When it is impractical or uneconomical to provide a clear and accurate description of the technical requirements of the property to be acquired, a "brand name or equal" description may be used to define the performance or other salient characteristics of a specific type of property. The recipient must identify the salient characteristics of the named brand that offerors must provide. When using a "brand name" specification, the recipient does not need to reverse-engineer a complicated part to identify precise measurements or specifications in order to describe its salient characteristics. FTA's "Best Practices Procurement Manual," (BPPM) contains additional information on preparation of specifications including examples with specific language.
- (4) Prohibitions. The Common Grant Rules prohibits solicitation requirements that contain features that unduly restrict competition. FTA recipients are also prohibited by 49 U.S.C. Section 5325(h) from using FTA assistance to support an exclusionary or discriminatory specification. Some situations considered to be impermissibly restrictive of competition include, but are not limited to, the following, all of which are identified in one or both Common Grant Rules:
- (a) Excessive Qualifications. Imposing unreasonable business requirements for bidders or offerors.
  - (b) Unnecessary Experience. Imposing unnecessary experience requirements for bidders and offerors.
  - (c) Improper Prequalification. Using prequalification procedures that conflict with the prequalification standards described in subsection 1.c of this Chapter.
  - (d) Retainer Contracts. Making a noncompetitive award to any person or firm on a retainer contract with the recipient if that award is not for the property or services specified for delivery under the retainer contract.
  - (e) Excessive Bonding. To encourage greater contractor participation in FTA assisted projects, FTA does not require the recipient to impose bonding requirements on its third party contractors other than construction bonding specified by the Common Grant Rules and this circular for construction. FTA discourages unnecessary bonding because it increases the cost of the contract and restricts competition, particularly by disadvantaged business enterprises. Bond companies exercise their discretion and assure their profits primarily by declining to undertake excessive risks. Consequently

many bidders have limited “bonding capacity.” Unnecessary performance bonding requirements reduce a prospective bidder’s or offeror’s capability to bid or offer a proposal on bonded work. Small businesses with short histories may have particular difficulty obtaining bonds as may be specified.

Nevertheless, even though bonding can be expensive, FTA recognizes that a recipient might find bid, performance, or payment bonds to be desirable. Because bonding requirements can limit contractor participation, FTA expects the recipient’s bonding requirements to be reasonable and not unduly restrictive. FTA, however, will not challenge State or local bonding requirements as unreasonably restrictive of competition, even though they might exceed Federal requirements. Nevertheless, if the recipient’s bonding policies result in such “excessive bonding” that it would violate the Common Grant Rules as restrictive of competition, FTA will not provide Federal assistance for those procurements. Thus if the recipient’s bonding policies far exceed those described in this subparagraph or are permissible under State or local law, the recipient should obtain FTA’s written concurrence to ensure the availability of Federal assistance for the project.

- (f) Brand Name Only. Specifying only a “brand name” product without allowing offers of “an equal” product, or allowing “an equal” product without listing the salient characteristics that the “equal” product must meet to be acceptable for award.
- (g) In-State or Local Geographic Restrictions. Specifying in-State or local geographical preferences, or evaluating bids or proposals in light of in-State or local geographic preferences, even if those preferences are imposed by State or local laws or regulations. In particular, 49 U.S.C. Section 5325(i) prohibits an FTA recipient from limiting its bus purchases to in-State dealers. Exceptions expressly mandated or encouraged by Federal law include the following:
  - 1 Architectural Engineering (A&E) Services. Geographic location may be a selection criterion if an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project.
  - 2 Licensing. A State may enforce its licensing requirements, provided that those State requirements do not conflict with Federal law.
  - 3 Major Disaster or Emergency Relief. Federal assistance awarded under the Stafford Act, 42 U.S.C. Section 5150, to support contracts and agreements for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities permits a preference, to the extent feasible and practicable, for organizations, firms, and individuals residing or doing business primarily in the area affected by a major disaster or emergency.

- (h) Organizational Conflicts of Interest. Engaging in practices that result in organizational conflicts of interest as prohibited by the Common Grant Rules:
- 1 Occurrence. An organizational conflict of interest occurs when any of the following circumstances arise:
    - a 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.
    - b Unequal Access to Information. The contractor has an unfair competitive advantage through obtaining access to nonpublic information during the performance of an earlier contract.
    - c 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.
  - 2 Remedies. FTA expects the recipient to analyze each planned acquisition in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible, and avoid, neutralize, or mitigate potential conflicts before contract award.
- (i) Restraint of Trade. Supporting or acquiescing in noncompetitive pricing practices between firms or between affiliated companies. Questionable practices would include, but not be limited to submissions of identical bid prices for the same products by the same group of firms, or an unnatural pattern of awards that had the cumulative effect of apportioning work among a fixed group of bidders or offerors.
- (j) Arbitrary Action. Taking any arbitrary action in the procurement process.
- b. Evaluation Factors. The solicitation must identify all factors to be used in evaluating bids or proposals.
- c. Contract Type Specified. The recipient's specifications should state the type of contract that will be awarded.
- (1) Typical Contract Types. Contract types may include, but are not limited to, the following:
- (a) Firm Fixed Price. A firm fixed price contract includes a price that remains fixed irrespective of the contractor's cost experience in performing the contract. A firm fixed price contract may include an economic price adjustment provision, incentives, or both.

- (b) Cost Reimbursement. A cost-reimbursement contract provides for payment of the contractor's allowable incurred costs, to the extent prescribed in the contract. Allowable costs may include incentives if the recipient believes they can prove helpful. Cost-reimbursement contracts are suitable for use only when the uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed price contract.
- (2) Prohibited or Restricted Contract Types. The Common Grant Rule for governmental recipients provides more guidance on contract type than does the Common Grant Rule for non-governmental recipients, which merely authorizes the recipient to select the type of contract it will use (for example, fixed price, cost reimbursement, purchase order, or incentive contract) if it is appropriate for the particular procurement and promotes the best interests of the program or project involved.

The following contract types are restricted or prohibited:

- (a) Cost Plus a Percentage of Cost—Prohibited. The Common Grant Rules expressly prohibits the use of the cost plus a percentage of cost method of contracting.
- (b) Percentage of Construction Cost—Prohibited. The Common Grant Rules expressly prohibits the use of the percentage of construction cost method of contracting.
- (c) Time and Materials—Restricted. The Common Grant Rule for governmental recipients permits the use of time and material contracts only:
  - 1 When to Use. After determining that no other contract type is suitable; and
  - 2 Firm Ceiling Price. If the contract specifies a ceiling price that the contractor may not exceed except at its own risk.

FTA strongly encourages non-governmental recipients to use similar procedures.

- d. Other Federal Requirements Affecting the Property or Services to be Acquired. The solicitation and resulting contract must identify those Federal requirements that will affect contract scope and performance. *See*, Chapter IV, subsection 2.b of this circular, and FTA's latest Master Agreement for references to Federal requirements established following publication of this circular.
- e. Other Federal Requirements Affecting the Bidder or Offeror and the Contractor. The solicitation and resulting contract must identify all Federal requirements that a bidder or offeror must fulfill before and during contract performance. *See*, Chapter IV, subsection 2.a of this circular and FTA's latest Master Agreement that may reference more Federal requirements.

- f. Award to Other Than the Low Bidder. If the recipient intends to reserve its right to award to other than the low bidder or offeror, that information should be stated in the solicitation document.
  - g. Rejection of All Bids or Offers. If the recipient intends to reserve its right to reject all bids or offers, that information should be stated in the solicitation document.
3. METHODS OF PROCUREMENT. The recipient should use competitive procedure(s) appropriate for the acquisition undertaken. The procedures used must comply with State and local law as well as with Federal requirements. Federal restrictions vary with the type of procurement method used. The following guidance is based on the requirements of the Common Grant Rule for governmental recipients, supplemented by FTA policies that address the needs of FTA recipients.
- a. Micro-Purchases. Consistent with the Federal Acquisition Regulation (FAR), FTA considers micro-purchases to be those purchases of \$3,000 or less.
    - (1) When Appropriate. If permitted by State and local law, the recipient may acquire property and services valued at \$3,000 or less without obtaining competitive quotations. These purchases are exempt from FTA's Buy America requirements. Davis-Bacon prevailing wage requirements, however, will apply to construction contracts exceeding \$2,000, even though the recipient uses micro-purchase procurement procedures. FTA does not intend to imply that the recipient must treat any purchase of \$3,000 or less as a micro-purchase. The recipient may set lower thresholds for micro-purchases in compliance with State and local law, or otherwise as it considers appropriate.
    - (2) Procedures. The following procedures apply to micro-purchases:
      - (a) Competition. The recipient should distribute micro-purchases equitably among qualified suppliers.
      - (b) Prohibited Divisions. The recipient may not divide or reduce the size of its procurement merely to come within the micro-purchase limit.
      - (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.
  - b. Small Purchases. The Common Grant Rule for governmental recipients authorizes governmental recipients to use relatively simple and informal small purchase procedures as follows:

- (1) When Appropriate. Small purchase procedures may be used to acquire services, supplies, or other property valued at more than the micro-purchase threshold (currently, \$3,000) but less than the Federal simplified acquisition threshold at 41 U.S.C. Section 403(11), currently \$100,000. (FTA recognizes the small purchase threshold to be the same as the simplified acquisition threshold.) *Also see*, Chapter II, Subsection 3.b. These purchases are also exempt from FTA's Buy America requirements. FTA does not intend to imply that any purchase of \$100,000 or less must be treated as a small purchase. The recipient may set lower thresholds for small purchases in compliance with State and local law, or otherwise as it considers appropriate.
- (2) Procedures. When using small purchase procedures:
  - (a) Competition. The recipient must obtain price or rate quotations from an adequate number of qualified sources.
  - (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.
- c. Sealed Bids (Formal Advertising). The Common Grant Rule for governmental recipients acknowledges sealed bidding to be a generally accepted procurement method in which bids are publicly solicited, and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the invitation for bids, is lowest in price.
  - (1) When Appropriate. The Common Grant Rule for government recipients states a preference for the sealed bids procurement method for acquiring property, construction, and other services. Sealed bid procurements should be used when the following circumstances are present:
    - (a) Precise Specifications. A complete, adequate, precise, and realistic specification or purchase description is available.
    - (b) Adequate Sources. Two or more responsible bidders are willing and able to compete effectively for the business.
    - (c) Fixed Price Contract. The procurement generally lends itself to a firm fixed price contract.
    - (d) Price Determinative. The successful bidder can be selected on the basis of price and those price-related factors listed in the solicitation including, but not limited to, transportation costs, life cycle costs, and discounts expected to be taken. Apart from responsibility determinations discussed in later sections of this Chapter, contractor selection may not be determined on the basis of other factors whose costs cannot be measured at the time of award.

- (e) Discussions Unnecessary. Discussions with one or more bidders after bids have been submitted are expected to be unnecessary as award of the contract will be made based on price and price-related factors alone. This contrasts with Competitive Proposal procedures in which discussions with individual offerors are expected to be necessary and may take place at any time after receipt of proposals. However, a pre-bid conference with prospective bidders before bids have been received can be useful.
- (2) Procurement Procedures. The following procedures apply to sealed bid procurements:
- (a) Publicity. The invitation for bids is publicly advertised.
  - (b) Adequate Sources. Bids are solicited from an adequate number of known suppliers.
  - (c) Adequate Specifications. The invitation for bids, including any specifications and pertinent attachments, describes the property or services sought in sufficient detail that a prospective bidder will be able to submit a proper bid.
  - (d) Sufficient Time. Bidders are allowed sufficient time to prepare bids before the date of bid opening.
  - (e) Public Opening. All bids are publicly opened at the time and place prescribed in the invitation for bids.
  - (f) Fixed Price Contract. A firm fixed price contract is usually awarded in writing to the lowest responsive and responsible bidder, but a fixed price incentive contract or inclusion of an economic price adjustment provision can sometimes be appropriate. When specified in the bidding documents, factors such as transportation costs and life cycle costs affect the determination of the lowest bid; payment discounts are used to determine the low bid only when prior experience indicates that such discounts are typically taken.
  - (g) Rejection of Bids. Any or all bids may be rejected if there is a sound, documented business reason.

FTA strongly encourages non-governmental recipients to use similar procedures.

- d. Competitive Proposals (Request for Proposals). The Common Grant Rule for governmental recipients acknowledges the use of competitive proposals to be a generally accepted procurement method when the nature of the procurement does not lend itself to sealed bidding and the recipient expects that more than one source will be willing and able to submit an offer or proposal.
- (1) When Appropriate. Competitive proposals should be used when any of the following circumstances are present:

- (a) Type of Specifications. The property or services to be acquired are described in a performance or functional specification; or if described in detailed technical specifications, other circumstances such as the need for discussions or the importance of basing the contract award on factors other than price alone are present.
  - (b) Uncertain Number of Sources. Uncertainty about whether more than one bid will be submitted in response to an invitation for bids and the recipient lacks the authority or flexibility under State or local law to negotiate the contract price if it receives only a single bid.
  - (c) Price Alone Not Determinative. Due to the nature of the procurement, contract award need not be based exclusively on price or price-related factors. In different types of negotiated acquisitions, the relative importance of cost or price may vary. When the recipient's material requirements are clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirements, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection and supersede low price.
  - (d) Discussions Expected. Separate discussions with individual offeror(s) are expected to be necessary after they have submitted their proposals. This contrasts with Sealed Bids (Formal Advertising) procedures in which discussions with individual bidders are not likely to be necessary, as award of the contract will be made based on price and price-related factors alone.
- (2) Procurement Procedures. The following procedures apply to procurements by competitive proposals:
- (a) Publicity. The request for proposals is publicly advertised.
  - (b) Evaluation Factors. All evaluation factors and their relative importance are specified in the solicitation; but numerical or percentage ratings or weights need not be disclosed.
  - (c) Adequate Sources. Proposals are solicited from an adequate number of qualified sources.
  - (d) Evaluation Method. A specific method is established and used to conduct technical evaluations of the proposals received and to determine the most qualified offeror.
  - (e) Price and Other Factors. An award is made to the responsible offeror whose proposal is most advantageous to the recipient's program with price and other factors considered.

- (f) Best Value. If permitted under its State or local law, the recipient may award the contract to the offeror whose proposal provides the greatest value to the recipient. To do so, the recipient's solicitation must inform potential offerors that the award will be made on a "best value" basis and identify what factors will form the basis for award. The evaluation factors for a specific procurement should reflect the subject matter and the elements that are most important to the recipient. Those evaluation factors may include, but need not be limited to, technical design, technical approach, length of delivery schedules, quality of proposed personnel, past performance, and management plan. The recipient should base its determination of which proposal represents the "best value" on an analysis of the tradeoff of qualitative technical factors and price or cost factors. Apart from the statutory requirement that the contract must support the recipient's public transportation project consistent with applicable Federal laws and regulations, FTA does not require any specific factors or analytic process.

FTA strongly encourages non-governmental recipients to use similar procedures.

- e. Two-Step Procurement Procedures. If permitted by State and local law, the recipient may use two-step procurement procedures in both sealed bid and competitively negotiated procurements, provided the opportunity for full and open competition is retained.
  - (1) Review of Technical Qualifications and Approach. The first step is a review of the prospective contractors' technical approach to the recipient's request and technical qualifications to carry out that approach. The recipient then may narrow the competitive range to prospective contractors that demonstrate a technically satisfactory approach and have satisfactory qualifications.
  - (2) Review of Bids and Proposals Submitted by Qualified Prospective Contractors. The second step consists of soliciting and reviewing complete bids (sometimes referred to as "two-step sealed bidding") or proposals (as in "competitive negotiations"), including price, submitted by each prospective contractor determined to be qualified. Absent exceptional circumstances, the recipient should attempt to solicit bids or proposals from at least three qualified prospective contractors. Unlike qualifications-based procurement procedures required for A&E services, and other contracts covered by 49 U.S.C. Section 5325(b) discussed in subsection 3.f of this Chapter, FTA expects the recipient to consider all bid or proposal prices submitted as well as other technical factors, rather than limiting reviews to the most qualified bidder or offeror.
- f. Architectural Engineering (A&E) Services and Other Services. FTA's enabling legislation at 49 U.S.C. Section 5325(b)(1) requires the use of the qualifications-based procurement procedures contained in the "Brooks Act," 40 U.S.C. Sections 1101 through 1104, to acquire A&E services, but also for program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping and related services. The nature of the work to be performed and its relationship to

construction, not the nature of the prospective contractor, determine whether qualifications-based procurement procedures may be used as described below.

- (1) Qualifications-Based Procurement Procedures Required. The recipient must use qualifications-based procurement procedures not only when contracting for A&E services, but also for other services listed in 49 U.S.C. Section 5325(b)(1) that are directly in support of, directly connected to, directly related to, or lead to construction, alteration, or repair of real property. For example, a contractor performing program management, project design, construction management, or engineering services in which that contractor would select the finished products to be acquired for an FTA assisted construction project must be selected through qualifications-based procurement procedures.
- (2) Qualifications-Based Procurement Procedures Prohibited. Unless FTA determines otherwise in writing, a recipient may not use qualifications-based procurement procedures to acquire other types of services if those services are not directly in support of, directly connected to, directly related to, or do not lead to construction, alteration, or repair of real property. Even if a contractor has performed services listed herein in support of a construction, alteration, or repair project involving real property, selection of that contractor to perform similar services not relating to construction may not be made through the use of qualifications-based procurement procedures.

A project involving construction does not always require that qualifications-based procurement procedures be used. Whether or not qualifications-based procurement procedures may be used depends on the actual services to be performed in connection with the construction project. For example, the design or fabrication of message signs, signals, movable barriers, and similar property that will become off-the-shelf items or will be fabricated and delivered as final end products for installation in an FTA assisted construction project are not services for which qualifications-based procurement procedures may be used. Nor is actual construction, alteration, or repair to real property the type of services for which qualifications-based procurement procedures may be used.

- (3) Qualifications-Based Procurement Procedures. The following procedures apply to qualifications-based procurements:
  - (a) Qualifications. Unlike other two-step procurement procedures in which price is an evaluation factor, an offeror's qualifications are evaluated to determine contract award.
  - (b) Price. Price is excluded as an evaluation factor.
  - (c) Most Qualified. Negotiations are first conducted with only the most qualified offeror.
  - (d) Next Most Qualified. Only after failing to agree on a fair and reasonable price may negotiations be conducted with the next most qualified offeror. Then, if necessary, negotiations with successive offerors in descending

order may be conducted until contract award can be made to the offeror whose price the recipient believes is fair and reasonable.

- (e) Effect of State Laws. To the extent that a State has, before August 10, 2005, adopted by law, an equivalent State qualifications-based-procurement requirement for acquiring architectural, engineering, and design services, State procedures, rather than Federal “Brooks Act” procedures (40 U.S.C. Sections 1101 through 1104), may be used.
- (4) Audits and Indirect Costs. As required by 49 U.S.C. Section 5325(b)(2), the following requirements apply to a third party contract for program management, architectural engineering, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related services:
- (a) Performance of Audits. The third party contract or subcontract must be performed and audited in compliance with FAR Part 31 cost principles.
  - (b) Indirect Cost Rates. The recipient and the third party contractor, its subcontractors and subrecipients, if any, must accept FAR indirect cost rates for the one-year applicable accounting periods established by a cognizant Federal or State government agency, if those rates are not currently under dispute.
  - (c) Application of Rates. After a firm’s indirect cost rates established as described in subparagraph 3.f(4)(b) above are accepted, those rates will apply for purposes of contract estimation, negotiation, administration, reporting, and payments, not limited by administrative or de facto ceilings.
  - (d) Prenotification; Confidentiality of Data. Before requesting or using cost or rate data described in subparagraph 3.f(4)(c) above, a recipient must notify the affected firm(s). That data must be kept confidential and may not be accessible by or provided by the agency or group of agencies that share cost data under this subparagraph, except by written permission of the audited firm. If prohibited by law, that cost and rate data may not be disclosed under any circumstances. FTA recognizes that many States have “Open Records” laws that may make it difficult to maintain confidential cost or rate data. As a result, before requesting or using a firm’s cost or rate data, not only should a recipient notify the affected firm, but it must also obtain permission to provide that data in response to a valid request under applicable State law. The confidentiality requirements of 49 U.S.C. 5325(b)(2)(D) cannot be waived, even if those confidentiality requirements conflict with State law or regulations.
- g. Design-Bid-Build. The design-bid-build procurement method requires separate contracts for design services and for construction.

- (1) Design Services. For design services, the recipient must use qualifications-based procurement procedures, in compliance with applicable Federal, State and local law and regulations.
  - (2) Construction. Because the recipient may not use qualifications-based procurement procedures for the actual construction, alteration or repair of real property, the recipient generally must use competitive procedures for the construction. These may include sealed bidding or competitive negotiation procurement methods, as appropriate.
- h. Design-Build. The design-build procurement method consists of contracting for design and construction simultaneously with contract award to a single contractor, consortium, joint venture, team, or partnership that will be responsible for both the project's design and construction. FTA's enabling legislation expressly authorizes the use of FTA capital assistance to support design-build projects "after the recipient complies with Government requirements," 49 U.S.C. Section 5325(d)(2).
- (1) Procurement Method Determined by Value. First, the recipient must separate the various contract activities to be undertaken and classify them as design or construction, and then calculate the estimated total value of each. Because both design and construction are included in a single procurement, the FTA expects the recipient to use the procurement method appropriate for the services having the greatest cost, even though other necessary services would not typically be procured by that method.
    - (a) Construction Predominant. The construction costs of a design-build project are usually predominant so that the recipient would be expected to use competitive negotiations or sealed bids for the entire procurement rather than the qualification-based "Brooks Act" procurement procedures. Specifically, when construction costs will be predominant, unless FTA determines otherwise in writing, an FTA recipient may not use qualifications-based procurement procedures to acquire architectural engineering, program management, construction management, feasibility studies, preliminary engineering, design, architectural and engineering, surveying, mapping, or related A&E services unless required by State law adopted before August 10, 2005.
    - (b) Design Services Predominant. In the less usual circumstance in which the cost of most work to be performed will consist of costs for architectural and engineering, program management, construction management, feasibility studies, preliminary engineering, design, architectural engineering, surveying, mapping, or related A&E services, FTA expects the recipient to use qualifications-based procurement procedures based on the "Brooks Act," 40 U.S.C. Sections 1101 through 1104, as described in subsection 3.e of this Chapter.
  - (2) Selection Processes. The recipient may structure its design-build procurement using one or more steps as described below:

- (a) One-Step Method. The recipient may undertake its design-build procurement in a single step.
- (b) Two-Step Method. Another procurement method the recipient may use for large design-build projects is a two-step selection process as authorized for Federal Government use by 41 U.S.C. Section 253m. This method consists of:
  - 1 Review of Technical Qualifications and Approach. The first step is a review of the prospective contractors' technical qualifications and technical approach to the project. The recipient may then narrow the competitive range to those prospective contractors with satisfactory qualifications that demonstrate a technically satisfactory approach.
  - 2 Review of Complete Proposals. The second step consists of soliciting and reviewing complete proposals, including price, submitted by prospective contractors first determined to be qualified.

By using this two-step method, it will not be necessary for the recipient to undertake extensive proposal reviews, nor will prospective offerors need to engage in expensive proposal drafting. This two-step selection procedure is separate and distinct from prequalification and is but one procurement method available to the recipient.

- i. Other Than Full and Open Competition. Normally, the recipient must provide for full and open competition when soliciting bids or proposals. The Common Grant Rule for governmental recipients, however, acknowledges that under certain circumstances, a recipient may conduct procurements without providing for full and open competition.
  - (1) When Appropriate. A recipient may use noncompetitive proposals only when the procurement is inappropriate for small purchase procedures, sealed bids, or competitive proposals, and at least one of the following circumstances are present:
    - (a) Adequate Competition. After soliciting several sources, FTA expects the recipient to review its specifications to determine if they are unduly restrictive or if changes can be made to encourage submission of more bids or proposals. After the recipient determines that the specifications are not unduly restrictive and changes cannot be made to encourage greater competition, the recipient may determine the competition adequate. A cost analysis must be performed in lieu of a price analysis when this situation occurs.
    - (b) Sole Source. 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. 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.

- 1 Unique Capability or Availability. The property or services are available from one source if one of the conditions described below is present:
  - a Unique or Innovative Concept. The offeror demonstrates a unique or innovative concept or capability not available from another source. 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 has not in the past been available to the recipient from another source.
  - b Patents or Restricted Data Rights. Patent or data rights restrictions preclude competition.
  - c Substantial Duplication Costs. In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components thereof, 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.
  - d Unacceptable Delay. In the case of a follow-on contract for the continued development or production of a highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in unacceptable delays in fulfilling the recipient's needs.
- 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.

- (c) Unusual and Compelling Urgency. The Common Grant Rule for governmental recipients permits the recipient to limit the number of sources from which it solicits bids or proposals when a recipient has such an unusual and urgent need for the property or services that the recipient would be seriously injured unless it were permitted to limit the solicitation. The recipient may also limit the solicitation when the public exigency or emergency will not permit a delay resulting from competitive solicitation for the property or services.
- (d) Associated Capital Maintenance Item Exception Repealed. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) repealed the special procurement preference previously authorized for associated capital maintenance items. Thus, any sole source procurement of associated capital maintenance items must qualify for an exception under the same standards that would apply to other sole source acquisitions.
- (e) Authorized by FTA. The Common Grant Rules provides Federal agencies authority to permit a recipient to use noncompetitive proposals. Under this authority, FTA has made the following determinations:
  - 1 Team, Consortium, Joint Venture, Partnership. With some exceptions, when FTA awards a grant agreement or enters into a cooperative agreement with a team, consortium, joint venture, or partnership, or provides FTA assistance for a research project in which FTA has approved the participation of a particular firm or combination of firms in the project work, the grant agreement or cooperative agreement constitutes approval of those arrangements. In such cases, FTA expects the recipient to use competition, as feasible, to select other participants in the project. It can sometimes be difficult to determine whether a bidder or offeror is submitting its bid or offer as a team or other group with committed parties. The Recipient should clarify with the bidder or offeror how other entities included in its bid or offer are to be treated.
  - 2 FAR Standards. To ensure that the recipient has flexibility equal to that of Federal contracting officers, FTA authorizes procurement by noncompetitive proposals in all of the circumstances authorized by FAR Part 6.3. In addition to circumstances discussed in the Common Grant Rules, the FAR authorizes less than full and open competitive procurements in one or more of the following circumstances:
    - a Statutory Authorization or Requirement. To comply with Department of Transportation (DOT) appropriations laws that include specific statutory requirements, with the result that only a single contractor can perform certain project work.

- b National Emergency. To maintain a facility, producer, manufacturer, or other supplier available to provide supplies or services in the event of a national emergency or to achieve industrial mobilization.
  - c Research. To establish or maintain an educational or other non-profit institution or a federally funded research and development center that has or will have an essential engineering, research, or development capability.
  - d Protests, Disputes, Claims, Litigation. To acquire the services of an expert or neutral person for any current or anticipated protest, dispute, claim, or litigation.
  - e International Arrangements. When precluded by the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or when prohibited by the written directions of a foreign government reimbursing the recipient for the cost of the acquisition of the supplies or services for that government.
  - f National Security. When the disclosure of the recipient's needs would compromise the national security.
  - g Public Interest. When the recipient determines that full and open competition in connection with a particular acquisition is not in the public interest.
- (2) When Prohibited. Less than full and open competition is not justified based on:
- (a) Failure to Plan. The recipient's lack of advance planning, or
  - (b) Limited Availability of Federal Assistance. Concerns about the amount of Federal assistance available to support the procurement (for example, expiration of Federal assistance previously available for award).
- (3) Procurement Procedures. When less than full and open competition is available to the recipient, the Common Grant Rule for governmental recipients directs the recipient to:
- (a) Potential Sources. Solicit offers from as many potential sources as is practicable under the circumstances.
  - (b) Sole Source Justification. If the recipient decides to solicit an offer from only one source, the recipient must justify its decision adequately in light of the standards of subparagraph 3.i(1)(b) of this Chapter. FTA expects this sole source justification to be in writing.

- (c) Cost Analysis. Prepare or obtain a cost analysis verifying the proposed cost data, the projections of the data, and the evaluation of the costs and profits.
  - (d) Preaward Review. Submit the proposed procurement to FTA for preaward review if FTA so requests.
- 4. ELIGIBLE COSTS. Property and services must be eligible for Federal participation under the standards of the Federal cost principles applicable to the recipient before the recipient may use FTA assistance to support its costs (2 CFR Part 220, 2 CFR Part 225, 2 CFR Part 230, or FAR Part 31). A recipient may use its own cost principles that comply with applicable Federal cost principles. FTA assistance may support contract costs or prices based on estimated costs only if the costs incurred or cost estimates included in negotiated prices comply with applicable Federal cost principles, and the property or services are eligible for Federal assistance under the terms of the underlying grant or cooperative agreement.
- 5. ADJUSTMENTS TO PROJECT COSTS. MAP-21 amended 49 U.S.C. Section 5309(1) to permit FTA to approve an adjustment of the final net capital project cost of a new fixed guideway capital project or core capacity improvement project to include the cost of eligible activities not included in the original project if FTA determines that the original project has been completed at a cost that is significantly below the original estimate.
- 6. COST ANALYSIS AND PRICE ANALYSIS. The Common Grant Rules requires the recipient to perform a cost analysis or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis depends on the facts and circumstances surrounding each procurement, but as a starting point, the recipient must make independent estimates before receiving bids or proposals.
  - 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.
    - (1) Federal Cost Principles. Federal cost principles contain many requirements about the allowability and allocability of costs.
    - (2) Profit. FTA expects the recipient to negotiate profit as a separate element of the cost for each contract in which there has been no price competition, and in all acquisitions in which the recipient performs or acquires a cost analysis. To

establish a fair and reasonable profit, the recipient needs to consider the complexity of the work to be performed, the risk undertaken by the contractor, the contractor's investment, the amount of subcontracting, the quality of the contractor's record of past performance, and industry profit rates in the surrounding geographical area for similar work.

- b. Price Analysis. If the recipient determines that competition was adequate, a price analysis, rather than a cost analysis, is required to determine the reasonableness of the proposed contract price. As discussed previously in subsection 3.a of this Chapter, the price analysis for micro-purchases may be limited. Similarly, the recipient may use an abbreviated price analysis for small purchases in most cases. One method to record this price analysis is through the use of a preprinted form on which a contracting officer (or other responsible person) can annotate a finding of fair and reasonable pricing and check off the most common reasons why this would be so, such as catalog or market prices offered in substantial quantities to the general public, regulated prices (for example, for many utilities purchases), or a comparison with recent prices for similar goods and services.
- c. Guidance on Cost and Price Analysis. FTA recognizes that some recipients may have difficulty obtaining the information necessary to conduct a proper cost or price analysis. Although neither FTA nor DOT may change the Common Grant Rules' requirements for cost or price analysis, FTA continues to seek a fair, practical solution to this problem consistent with the flexibility provided to Federal contracting officers under the FAR. The recipient may use the following resources as guidance in preparing cost or price analyses:
  - (1) FTA's "Best Practices Procurement Manual," Chapter 5,
  - (2) The National Transit Institute Course, "Cost or Price Analysis and Risk Assessment,"
  - (3) Pricing Guide for FTA Grantees, FTA Web Site:  
[http://www.fta.dot.gov/documents/Helpline\\_Price\\_Guide.doc](http://www.fta.dot.gov/documents/Helpline_Price_Guide.doc).
  - (4) FAR Part 31, Contract Cost Principles and Procedures, and
  - (5) Defense Contract Audit Agency Audit Manual. *See*, the DCAA Web site:  
<http://www.dcaa.mil>.

Note, however, that the requirements of FAR Part 31 and the Defense Contract Audit Agency Audit Manual may differ from restrictions applicable to an FTA recipient. Each FTA recipient must comply with those Federal laws and regulations directly applicable to it.

7. EVALUATIONS. The following standards apply:
  - a. General. When evaluating bids or proposals submitted, FTA expects the recipient to consider all evaluation factors specified in its solicitation documents, and evaluate the bids or offers only on the evaluation factors included in those

solicitation documents. The recipient may not modify its evaluation factors after bids or proposals have been submitted without re-opening the solicitation.

- b. Options. In awarding the contract that will include options, the following standards apply:
  - (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.
  - (2) Evaluation Not Required. The recipient need not evaluate bids or offers for any option quantities when the recipient determines that evaluation would not be in its best interests. An example of a circumstance that may support a recipient's determination not to evaluate bids or offers for option quantities is when the recipient is reasonably certain that funds will not be available to permit it to exercise the option.
- c. Evaluators. In addition to evaluators with experience in technical or public policy matters related to the procurement, other evaluators may also include auditors and financial experts to the extent that the recipient determines would be necessary or helpful. Although many FTA recipients assign evaluation duties to their own personnel, a recipient lacking qualified personnel within its organization may contract for the evaluation services it needs. If the recipient does contract for evaluation services, the procurement standards of this circular will apply to those contracts and to those contractors selected to perform procurement evaluation functions on behalf of the recipient.

- 8. CONTRACT AWARD. The following provisions apply to third party contract awards:
  - a. Award to Other Than the Lowest Bidder or Offeror. Federal transit law at 49 U.S.C. Section 5325(c) authorizes the recipient to award a contract to other than the lowest bidder if the award furthers an objective consistent with the purposes of 49 U.S.C. Chapter 53, including improved long-term operating efficiency and lower long-term costs. The recipient may also award a contract to other than the offeror whose proposal is lowest, when stated in the evaluation factors of the solicitation. In both cases, the recipient should include a statement in its solicitation document reserving the right to award the contract to other than the low bidder or offeror.
  - b. Award Only to a Responsible Bidder or Offeror. SAFETEA-LU amended 49 U.S.C. Section 5325 to require FTA assisted contract awards be made only to "responsible" contractors possessing the ability, willingness, and integrity to perform successfully under the terms and conditions of the contract. Responsibility is a procurement issue that is determined by the recipient after receiving bids or proposals and before making contract award. FTA expects the prospective contractor to demonstrate affirmatively to the recipient that it qualifies as "responsible" under the standards of 49 U.S.C. Section 5325, and that its proposed subcontractors also qualify as "responsible."

To designate a prospective contractor “responsible” as required by 49 U.S.C. Section 5325, FTA expects the recipient, at a minimum, to determine and ensure that the prospective contractor satisfies the following criteria described herein. In addition to being otherwise qualified and eligible to receive the contract award under applicable laws and regulations, a responsible contractor must fulfill the following criteria:

- (1) Integrity and Ethics. Have a satisfactory record of integrity and business ethics, in compliance with 49 U.S.C. Section 5325(j)(2)(A),
- (2) Debarment and Suspension. Be neither debarred nor suspended from Federal programs under DOT regulations, “Nonprocurement Suspension and Debarment,” 2 CFR Parts 180 and 1200, or under the FAR at 48 CFR Chapter 1, Part 9.4,
- (3) Affirmative Action and DBE. Be in compliance with the Common Grant Rules’ affirmative action and FTA’s Disadvantaged Business Enterprise requirements,
- (4) Public Policy. Be in compliance with the public policies of the Federal Government, as required by 49 U.S.C. Section 5325(j)(2)(B),
- (5) Administrative and Technical Capacity. Have the necessary organization, experience, accounting, and operational controls, and technical skills, or the ability to obtain them, in compliance with 49 U.S.C. Section 5325(j)(2)(D),
- (6) Licensing and Taxes. Be in compliance with applicable licensing and tax laws and regulations,
- (7) Financial Resources. Have, or can obtain, sufficient financial resources to perform the contract, as required by 49 U.S.C. Section 5325(j)(2)(D),
- (8) Production Capability. Have, or can obtain, the necessary production, construction, and technical equipment and facilities,
- (9) Timeliness. Be able to comply with the required delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments, and
- (10) Performance Record. Be able to provide:
  - (a) Current Performance. A satisfactory current performance record, and
  - (b) Past Performance. A satisfactory past performance record in view of its records of long-time performance or performance with a predecessor entity, including:

- 1 Sufficient Resources. Key personnel with adequate experience, a parent firm with adequate resources and experience, and key subcontractors with adequate experience and past performance,
- 2 Adequate Past Experience. Past experience in carrying out similar work with particular attention to management approach, staffing, timeliness, technical success, budgetary controls, and other specialized considerations as described in the recipient's solicitation, and
- 3 Past Deficiencies Not the Fault of the Bidder or Offeror. A prospective bidder or offeror that is or recently has been seriously deficient in contract performance is presumed to be nonresponsible, unless the recipient determines that the circumstances were properly beyond the bidder or offeror's control, or unless the bidder or offeror has taken appropriate corrective action. Past failure to apply sufficient tenacity, perseverance, and effort to perform acceptably is strong evidence of nonresponsibility. Failure to meet the quality requirements of a contract is a significant factor to consider in determining satisfactory performance. FTA expects the recipient to consider the number of the bidder or offeror's contracts involved and the extent of deficient performance in each contract when making this determination.

Before entering into a full funding contract for a fixed guideway project, the recipient must now consider the prospective contractor's past performance in estimating costs and ridership as reported in the Contractor Performance Assessment Reports, as required by 49 U.S.C. Section 5325(j)(2)(C).

- c. Rejection of Bids and Proposals. Depending on the type of recipient, the following applies:
  - (1) Governmental Recipients. The Common Grant Rule for governmental recipients asserts the recipient's right to reject all bids submitted in response to an invitation for bids or request for proposals.
  - (2) Non-Governmental Recipients. The Common Grant Rule for non-governmental recipients authorizes the recipient to reject any and all bids and proposals when it is in the recipient's interest to do so.
- d. Extent and Limits of Contract Award. A selection of a contractor to participate in one aspect of a project does not, by itself, constitute a sole source selection of the contractor's wholly owned affiliates to perform other work in connection with the project.

## Procurement Checklist

Agency: _____ <input type="checkbox"/> 5311 <input type="checkbox"/> 5310 <input type="checkbox"/> 5316 <input type="checkbox"/> 5317			
Purchase Request: <input type="checkbox"/> Equipment <input type="checkbox"/> Supplies <input type="checkbox"/> Services			
Item(s): _____			
Estimated Total Cost: _____			
Describe Purpose: _____ _____ _____ _____			
Note: *Purchases \$500 or less may be purchased locally without quotes.			

  

<b>I. <u>\$501 to \$5,000 – (no bid required)</u></b>	<b>YES</b>	<b>NO</b>	<b>N/A</b>
1. Written documentation of agency/organization’s informal procurement methods	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Copy of the price or rate quote	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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<b>II. <u>\$5,001 to \$50,000 – (at least two written quotes required)</u></b>	<b>YES</b>	<b>NO</b>	<b>N/A</b>
1. Copy of written request to MDOT to purchase equipment, property, supplies or services \$5,001 - \$50,000	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
➤ Copies Quotes solicited from at least (2) two or more suppliers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
➤ The quote has clearly and accurately described the technical requirements	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
➤ The project has clearly set for the requirements the vendor must fulfill	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
➤ The project has made positive efforts to utilize disadvantaged business enterprises	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Copy of the cost breakdown for the proposed project	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Purchasing Schedule	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Written notice to proceed (and recommendations) from MDOT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. Copy of the Third Party Contract (with required contract clauses)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. Written notice for processing changes in purchase orders to MDOT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

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<b>III. <u>\$50,001.00 and above (bid required)</u></b>	<b>YES</b>	<b>NO</b>	<b>N/A</b>
1. Copy of written request to MDOT to purchase equipment, property, supplies or services \$50,001 and above	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
➤ Advertising for competitive bids once a week for (2) consecutive weeks in a regular newspaper (published in the	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

When procuring property, supplies, equipment or services under and FTA formula grant the MDOT and all sub-recipients will follow State procurement procedures. This checklist is intended to ensure proper procurement of any purchase meeting the minimum threshold.

county or municipality in which such agency or governing authority is located

	YES	NO	N/A
➤ Proposed purchase terms, conditions, technical specifications and bid advertisement(s) to MDOT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
a. Bid requests advertised in at least one newspaper with general daily circulation within the project's service area	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
b. Bid requests mailed directly to potential bidders throughout the service area	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
➤ Copy of the Request for Proposal (RFP)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
➤ Copy of RFP evaluation of proposal	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
➤ Copy of explanation of the basis for selection of contractor – including evaluation criteria and results of the grantee's technical evaluation	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
➤ Copy of a list of all proposals received	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
➤ Copy of a cost breakdown for the proposed contract	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
➤ Copy of the bid advertisement	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
➤ Copy of the final bid specifications	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Written notice to proceed (and recommendations) from MDOT (prior to the execution of an agreement between the sub-recipient and the selected bidder)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
➤ Recommendation(s) made by the project as to bid award	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
➤ Copies of the bids submitted along with any pertinent correspondence relating to exceptions to the approved specifications	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Documentation of agency procedures for processing change orders in equipment purchased	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. Documentation/notice to MDOT for change orders (that affect the contract price)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

When procuring property, supplies, equipment or services under and FTA formula grant the MDOT and all sub-recipients will follow State procurement procedures. This checklist is intended to ensure proper procurement of any purchase meeting the minimum threshold.

## Procurement Checklist Verification Form

### PTD USE ONLY

Purchase Request:    Equipment    Supplies    Services

Agency: \_\_\_\_\_

Contract No: \_\_\_\_\_

Project:    5311    5310    5316    5317

Grant No: \_\_\_\_\_

Procurement Request					
Type	No. of Units	Vendor/Supplier/ Contractor and Location	Federal Cost	Local Cost	Total Cost
<b>Total</b>					

Comments:

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Reviewed By \_\_\_\_\_

Approved By \_\_\_\_\_

Date \_\_\_\_\_

Date \_\_\_\_\_

When procuring property, supplies, equipment or services under and FTA formula grant the MDOT and all sub-recipients will follow State procurement procedures. This checklist is intended to ensure proper procurement of any purchase meeting the minimum threshold.