

<p style="text-align: center;"><b>CITY OF PHOENIX PUBLIC TRANSIT DEPARTMENT PROCUREMENT POLICY/PROCEDURE</b></p>	<p>Pages 56</p>
	<p>Effective Jan. 14, 2009</p>
<p style="text-align: center;"><b>THIRD-PARTY CONTRACTING USING FTA FUNDS</b></p>	<p>Revised April 23, 2025</p>

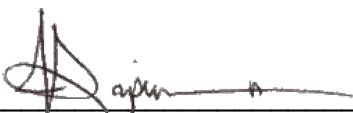
**PURPOSE.** This Policy/Procedure provides contracting guidance when the City of Phoenix’s Public Transit Department (“**Phoenix**” or “**Recipient**”) or its Subrecipients uses funds from the Federal Transit Administration (“**FTA**”) to finance procurements and third-party contracts in the Phoenix Urbanized Area. FTA Circular 4220.1G requires that Phoenix evaluate Federal statutory and regulatory requirements for relevance and applicability to each procurement.

**GENERAL INFORMATION.** Phoenix (the Recipient) and its Subrecipients must adhere to FTA’s regulations and reference the FTA website prior to using federal funds for a purchase. The FTA website, which is frequently revised with updated guidance, takes precedence over this Policy/Procedure. The Policy/Procedure contains many important topics relating to federally funded procurements.

**FUNCTION.** This Policy/Procedure assures that Recipient/Subrecipient address all areas pertaining to the FTA Triennial Review and the FTA Procurement System Review. Proper use of this Policy/Procedure will give reasonable assurance that Recipient and Subrecipients are complying with all FTA procurement regulations.

**AUTHORITY.** Federal Transit Laws, Title 49, United States Code, Chapter 53.

Procurement Policy/Procedure on Third-Party Contracting Using FTA Funds Approved by:

  
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 Jesús Sapien, Public Transit Director

Date: 4/23/2025

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## CHAPTER I

### FTA RESPONSIBILITIES

1. **FEDERAL OVERSIGHT.** The Federal Transit Administration (“FTA”) is one of ten operating administrations within the U.S. Department of Transportation (“DOT”).<sup>1</sup> FTA functions through a Washington, DC headquarters office, ten regional offices, and five metropolitan offices that assist public transportation agencies in all 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, Northern Mariana Islands, and American Samoa. Public transportation encompasses transportation by buses, subways, light rail, commuter rail, monorail, passenger ferry boats, trolleys, inclined railways, people movers, and vans. FTA provides financial assistance to develop new public transportation systems and improve, maintain, and operate existing systems. The City of Phoenix, as the “**Recipient**,” is responsible for all compliance and oversight activities to ensure that federally funded “**Subrecipients**” adhere to FTA guidelines and regulations. Recipient and Subrecipients are responsible for managing their programs and projects in accordance with Federal requirements, and FTA is responsible for ensuring that Recipient follows federal statutory and administrative requirements. Information for all program areas, and templates can be found on the City of Phoenix Public Transit’s Subrecipient Resources website at [Subrecipient Resources | City of Phoenix](#).
2. **BACKGROUND.** FTA assures that those federal assistance funds it provides to Recipient and Subrecipients are used prudently in a manner consistent with all applicable federal requirements. FTA’s enabling legislation contains several provisions pertaining to procurements undertaken by FTA and Recipient and Subrecipients. In addition, certain government-wide federal principles must be applied to assure fair and economical procurements when federal assistance is expended.
3. **DEFINITIONS.** All definitions in 49 U.S.C. § 5302 are applicable to this Procurement Policy/Procedure. The following additional definitions are:
  - A. “**Phoenix**” means the persons and other resources that comprise the City of Phoenix Public Transit Department as the Recipient of FTA funds.
  - B. “**Approval, Authorization, Concurrence, and Waiver**” refers to a written communication from an authorized Federal Government official, granting permission to the recipient to proceed with or refrain from a specific action.<sup>2</sup>
  - C. “**Best Value**” describes a competitive, negotiated procurement in which Recipient and Subrecipient reserve the right to select the most advantageous offer by evaluating and comparing factors in addition to cost or price. Such procurement enables Recipient and Subrecipient to purchase technical

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<sup>1</sup> For further information, see FTA’s website, available at: [transit.dot.gov](http://transit.dot.gov).

<sup>2</sup> FTA Best Practices Procurement Manual, Oct. 2016 edition.

superiority even if it means paying a premium price. (“Premium” is the difference between the price of the lowest priced proposal and the one that Recipient and Subrecipient believes offers the best value.) “Best Value” also means the expected outcome of an acquisition that provides Recipient and Subrecipient the greatest overall benefit in response to the requirement. This definition is intended neither to limit nor to dictate qualitative measures Recipient and Subrecipient may employ, except that those measures must be in support of the purposes of the federal public transportation program. Recipient and Subrecipient may award a contract to other than the lowest bidder if the award furthers an objective, including improved long-term operating efficiency and lowered long-term costs. To achieve “best value” in the context of acquisitions for public transportation purposes, Recipient and Subrecipient may include evaluation factors such as technical design, technical approach, delivery schedules, quality of proposed personnel, past performance, and/or management plan.<sup>3</sup>

- D. **“Cardinal Change”** means major deviation from the original purpose of the work or the intended method of achievement, or a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract.<sup>4</sup>
- E. **“Constructive Change”** means an act or omission by Recipient or Subrecipient, which in fact causes a change in the contract work.
- F. **“Design-Bid-Build”** means a construction project under which Recipient and Subrecipient commissions an architect or engineer to prepare drawings and specifications under a design-services contract, and separately contracts for construction by engaging the services of a contractor through sealed bidding or competitive negotiations to complete delivery of the project.
- G. **“Design-Build”** as delineated in 49 U.S.C. 5325(d)(1), means a project under which Recipient and Subrecipient enters into a contract with a seller, firm, or consortium of firms to design and build a public transportation system, or an operable segment of such system, that meets specific performance criteria, and may include: (1) an option to finance, or operate for a period of time, the system or segment; or (2) any combination of designing, building, operating, or maintaining such system or segment.
- H. **“Grant”** means the instrument by which FTA awards federal assistance to a specific recipient to support a particular project in which FTA does not take an active role or retain substantial control.
- I. **“Master Agreement”** means FTA’s official document containing substantially all FTA requirements, and other cross-cutting federal requisites, applicable to the recipient and its project. The Master Agreement is generally revised annually. The Master Agreement is incorporated by reference and made part of

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<sup>3</sup> FTA Circular 4220.1G ch. I, § 5(c).

<sup>4</sup> FTA Circular 4220.1G ch. I, § 5(d).

all FTA grants, cooperative agreements, and any of their amendments.

- J. **“Property”** means real property consisting of land and buildings, structures, or appurtenances on land, equipment, equipment, supplies, other expendable property, intellectual property, and intangible property.
  - K. **“Revenue Contract”** means a contract for which the primary purpose is either to produce revenues in connection with a public transportation related activity, or to create business opportunities involving the use of a FTA assisted asset.
  - L. **“Third-Party Contract”** means any purchase order or contract awarded by Recipient and Subrecipient to a vendor or contractor using federal financial assistance awarded by FTA. A third-party contract also includes purchases by credit card.
4. **FTA’S ROLE.** To ensure compliance with federal procurement requirements, FTA will continue to provide guidance and technical assistance consistent with its federal oversight responsibilities.
- A. **Reliance on Recipient and Subrecipient’s Self-Certification.** FTA will rely primarily on Recipient and Subrecipient’s “self-certification” that its procurement system meets FTA requirements and that Recipient and Subrecipient have the technical capacity to comply with Federal procurement requirements (usually provided annually in the first quarter of the federal fiscal year).
  - B. **Monitoring of Compliance.** FTA will monitor Recipient and Subrecipient’s compliance as part of its routine oversight responsibilities. If FTA becomes aware of circumstances that might invalidate Recipient and Subrecipient’s self-certification, FTA will investigate and recommend appropriate measures to correct whatever deficiency may exist.
  - C. **Third-Party-Contract Reviews.** FTA will rely on periodic, post-award reviews to ensure that Recipient and Subrecipient complies with federal requirements and standards. FTA reserves the right to conduct pre-award reviews as provided for in the Common Grant Rules.
  - D. **Procurement System Reviews.** FTA will perform procurement system reviews as part of its ongoing oversight responsibility. FTA may recommend “best practices” to assist Recipient and Subrecipient in improving its procurement practices.<sup>5</sup>
  - E. **Audits.** FTA may perform, contract for, or instruct Recipient and Subrecipient to obtain specific audits of particular third-party contracts to ascertain that payments were made in conformance with the terms of the contract, or for other purposes.

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<sup>5</sup> For more information, see FTA’s guidance on “Procurement Reviews,” available at: [Fiscal Year 2024 CORTAP Contractor Manual](#).

5. **RESOURCES.** FTA makes several resources available for reference:

- A. **Training and Technical Assistance.** FTA provides procurement training and technical assistance at both regional and national levels by offering various instructional courses, conducting regional technical assistance conferences, and providing assistance by a contractor on an as-needed basis.
- B. **FTA Master Agreement.** FTA's grants and cooperative agreements incorporate terms and conditions referred to as the Master Agreement. That document lists many FTA requirements and other crosscutting federal requisites applicable to Recipient and Subrecipient. Many of these requirements are related to third-party procurements.
- C. **FTA Comprehensive Review Contractor's Manual.** Under the U.S. Department of Transportation's Comprehensive Oversight Review and Technical Assistance Program ("**CORTAP**"), FTA has prepared the Comprehensive Review Contractor's Manual, which details federal expectations for assessing recipient management practices and provides technical assistance for compliance with program and administrative requirements.
- D. **FTA Best Practices Procurement Manual.** FTA provides written procurement guidance in its "Best Practices Procurement Manual." The manual is only a guidance document and is not the source of any FTA requirements. FTA cautions that relying solely on the manual may not ensure Recipient and Subrecipient meets all applicable FTA requirements.
- E. **Uniform Guidance.** FTA's Uniform Guidance refers to 2 CFR Part 200, which became effective for new awards and additional funding to existing awards on December 26, 2014.
- F. **FTA's Third-Party Procurement Help Line.** The "Help Line" is another resource through which Phoenix may submit questions on FTA's third-party acquisition policies and practices.

## CHAPTER II

### APPLICABILITY

1. **FTA ASSISTANCE.** This Procurement Policy/Procedure applies to any Recipient and Subrecipient contracts that have received or will receive FTA assistance.
2. **THIRD-PARTY CONTRACTS.** Third-party contractors are not directly covered by this Procurement Policy/Procedure, the Common Grant Rules at 49 CFR Parts 18 and 19, and FTA's "Best Practices Procurement Manual" in awarding their subcontracts, but each third-party contractor and subcontractor is required to comply with the clauses in its prime contracts, including requirements to extend those clauses to subcontractors at the lowest tier required.
  - A. **Categories of Third-Party Contracts.** Some variations in the applicability of this Procurement Policy/Procedure depend on the type of contract involved.

The provisions of this Procurement Policy/Procedure apply to most third-party capital contracts except as listed below:

- a. *Art.* Procurements of art are beyond the scope of this guidance. Recipients must not use FTA assistance to pay incremental costs of incorporating art or non-functional landscaping into facilities, including the costs of an artist on the design team under 49 U.S.C. 5323(h)(2). The acquisition of art is addressed in FTA Circular 9400.1A, "Federal Transit Administration Design and Art in Transit Projects" and in FTA's "Best Practices Procurement Manual."<sup>6</sup>
- b. *Real Property.* Procurements of real property are generally beyond the scope of this guidance. Real property acquisition is addressed in 49 CFR Part 24, "Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs," but the procurement provisions of this guidance applicable to construction will apply to procurements of buildings and other structures that require construction, alteration, or repair.<sup>7</sup>

#### 1. **Operations Contracts.**

- a. *Operations Contracts Financed with FTA Assistance.* The provisions of this guidance apply to contracts in support of operations financed with FTA assistance.<sup>8</sup>
- b. *Operations Contracts Financed Entirely Without FTA Assistance.* The

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<sup>6</sup> FTA Circular 4220.1G ch. IV, § 2(g).<sup>7</sup> FTA Circular 4220.1G ch. II, § 2(b)(2).

<sup>7</sup> FTA Circular 4220.1G ch. II, § 2(b)(2).

<sup>8</sup> FTA Circular 4220.1G ch. II, § 2(b)(2)(a).



provisions of this guidance do not apply to operations contracts that Recipient and Subrecipient finances entirely without FTA assistance. Notwithstanding any other provision of this guidance, if Recipient and Subrecipient enters into third-party contracts for operations or planning, it must comply with the requirements of 49 CFR Part 26, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs," which are applicable to those contracts, regardless of the allocation of FTA assistance to contracting or other purposes.<sup>9</sup>

2. **Revenue Contracts.** FTA provides broad latitude in determining the extent and type of competition appropriate for a particular revenue contract. These contracts are awarded using competitive selection procedures and principles, as necessary. For example, if more than one interested party is readily available, and the opportunity is limited and cannot accommodate most prospective parties (such as advertising space), then Recipient and Subrecipient shall make its selection through competition. If, however, only one party seeks access to a public transportation asset (such as a utility that might seek cable access in a light rail system), but Recipient and Subrecipient are willing and able to provide access to other parties that may develop an interest in using the asset, then competition would not be required because the opportunity to obtain access is open to all interested parties.<sup>10</sup>
3. **Joint Development.** Requirements must apply to the federally funded construction aspects of a joint development project. FTA will work with Recipient to craft approaches on a case-by-case basis that satisfy the statutory and regulatory requirements for competition while preserving the benefits of this innovative contracting strategy to the maximum possible extent.<sup>11</sup>
4. **Public Private Partnerships.** FTA will work with Recipient to craft approaches on a case-by-case basis that satisfy the statutory and regulatory requirements for competition while preserving the benefits of the innovative contracting strategy proposed to the maximum possible extent.<sup>12</sup>
5. **Transactions Involving Complex Financial Arrangements.** When an "arranger" constructs a transaction that will involve federally-funded assets, FTA requires competition to the extent permissible under the limitations of securities regulations. These principles have been applied to leveraged leasing projects in which FTA has previously participated.<sup>13</sup>

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<sup>9</sup> FTA Circular 4220.1G ch. II, § 2(b)(2)(b).

<sup>10</sup> FTA Circular 4220.1G, ch. II § 2(b)(3).

<sup>11</sup> FTA Circular 4220.1G ch. II, § 2(b)(4).

<sup>12</sup> FTA Circular 4220.1G ch. II, § 2(b)(5).

<sup>13</sup> FTA Circular 4220.1G ch. II, § 2(b)(6).

3. **FEDERAL LAWS AND REGULATIONS.** Recipient and Subrecipient must comply with applicable federal statutes, including federal transit laws at 49 U.S.C. Chapter 53 and associated federal regulations, which contain requirements applicable to FTA-assisted procurements.<sup>14</sup>
- A. **Uniform Administrative Requirements.** The government-wide regulations, 2 CFR Part 200 “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards”, establish the comprehensive Federal requirements applicable to FTA’s assistance programs.<sup>15</sup>
- B. **Federal Acquisition Regulation.** The Federal Acquisition Regulation (“**FAR**”), 48 CFR ch. 1, does not apply to federally-assisted procurements, absent federal laws or regulations to the contrary.<sup>16</sup>
- C. **Other Federal Requirements.** Recipient and Subrecipient must comply with applicable federal transit laws (and implementing regulations) not addressed in the Common Grant Rules, as well as other federal cross-cutting statutes and regulations that impact what Recipient and Subrecipient may acquire and other conditions that impact such acquisitions. The latest edition of FTA’s Master Agreement and Comprehensive Review Contractor’s Manual includes a comprehensive list of federal laws and regulations that may apply to a federally-assisted project (typically issued at the beginning of each federal fiscal year). Recipient and Subrecipient’s procurement procedures should conform to applicable federal law and regulations, or else Recipient must notify FTA for resolution of any deviations.<sup>17</sup>
4. **STATE AND LOCAL LAWS AND REGULATIONS.** Recipient and Subrecipient will use its own procurement procedures (which should reflect applicable state and local laws and regulations), provided that the procurements conform to applicable federal laws and regulations. If no state or local law addresses a particular aspect of procurement, federal direct procurement principles can often (but not always) provide useful guidance.<sup>18</sup>

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<sup>14</sup> FTA Circular 4220.1G ch. II, § 3.

<sup>15</sup> FTA Circular 4220.1G ch. II, § 3(a).<sup>16</sup> FTA Circular 4220.1G ch. II, § 3(b).

<sup>16</sup> FTA Circular 4220.1G ch. II, § 3(b).

<sup>17</sup> FTA Circular 4220.1G ch. II, § 3(c).

<sup>18</sup> FTA Circular 4220.1G ch. II, § 4.

## CHAPTER III

### **RECIPIENT AND SUBRECIPIENT RESPONSIBILITIES**

1. **WRITTEN STANDARDS OF CONDUCT.** Recipient and Subrecipient will maintain written standards of conduct governing the performance of Recipient and Subrecipient's employees engaged in the award and administration of contracts.<sup>19</sup>
  - A. **Personal Conflicts of Interest.** No employee, officer, agent, or board member (or that person's immediate family member or partner), or organization that employs or is about to employ any of the foregoing individuals, shall participate in the selection, award, or administration of a contract supported by FTA funds if a conflict of interest, real or apparent, could be involved. Such a conflict would arise when any of the above individuals has a financial or other interest in the firm selected for contract award.<sup>20</sup>
  - B. **Gifts.** Officers, employees, agents, or board members may neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements.<sup>21</sup>
  - C. **Violations.** ARIZ. REV. STAT. § 38-510 provides penalties for conflict-of-interest violations by Recipient and Subrecipient's employees.
  - D. **Recipient and Subrecipient Employee Code of Conduct.** Recipient's employees are subject to the City of Phoenix Ethics and Gift Policies (Phoenix City Code § 2-52), the City of Phoenix Non-Discrimination and Anti-Harassment Policy (Phoenix City Code § 2-54), and state statutes concerning conflicts of interest (Phoenix City Charter ch. XI and ARIZ. REV. STAT. tit. 38, ch. 3, art. 8).<sup>22</sup> Subrecipients may have similar policies in place for their own employees.
  - E. **Organizational Conflicts.** If Recipient and Subrecipient have a parent, affiliate, or subsidiary that is not a State or local government or Indian tribe, Recipient and Subrecipient also must have standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest mean that because of relationships with a parent company, affiliate, or subsidiary organization, Recipient and Subrecipient is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

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<sup>19</sup> FTA Circular 4220.1G ch. III, § 1.

<sup>20</sup> FTA Circular 4220.1G ch. III, § 1(a); and Master Agreement ver. 31 (May 2, 2024), § 4(a).

<sup>21</sup> FTA Circular 4220.1G ch. III, § 1(b); and Master Agreement ver. 31 (May 2, 2024), § 4(a)(2)(ii).

<sup>22</sup> See also the City of Phoenix Ethics Handbook, available at:

[phoenix.gov/citymanagersite/Documents/Ethics/Ethics\\_Handbook\\_Employee\\_Volunteers.pdf](https://phoenix.gov/citymanagersite/Documents/Ethics/Ethics_Handbook_Employee_Volunteers.pdf)

2. **PROCUREMENT CAPACITY.** Recipient and Subrecipient must certify that it has or will have the technical capacity to properly carryout and manage an FTA federal assistance award. As part of maintaining the necessary technical capacity to execute projects effectively, a Recipient and Subrecipient must ensure its procurement system complies with 2 CFR Part 200 and any applicable Federal, state, and local laws. If Recipient and Subrecipient lacks the internal expertise for specific procurement functions, it should obtain these services externally while taking measures to avoid organizational conflicts of interest (see 2 CFR 200.319(b)) that could compromise the procurement process and result in unfair competitive advantage..<sup>23</sup>
3. **IN-HOUSE AVAILABILITY.** If Recipient and Subrecipient lacks qualified personnel to undertake the various procurement tasks (e.g., drafting specifications, evaluating contracts, performing audits, etc.), then Recipient and Subrecipient must acquire the necessary services from outside sources. These sources should be unrelated to and independent of any potential bidder or offeror..<sup>24</sup>
  - A. **Written Procurement Procedures.** 2 CFR 200.318(a) requires all non-Federal entities, as recipients/subrecipients of Federal assistance, to maintain written procurement procedures. These procedures must ensure that procurements are conducted in a manner providing full and open competition, reflect objective standards and criteria, and adhere to applicable Federal, state, and local laws and regulations. Wherever this guide is silent on a topic, refer to Recipient and Subrecipient's Procurement Code and Administrative Regulations, and any applicable procurement policies and procedures..<sup>25</sup>
  - B. **Adequate Contract Provisions.** All third-party contracts must include provisions adequate to form a sound and complete agreement. This may require additional clauses to assure compliance with federal laws and regulations..<sup>26</sup>
  - C. **Industry Contracts.** Special care shall be taken when using an industry developed contract or contract that is proffered by a bidder or offeror. The contract may not contain the required federal clauses, and its terms may be unfavorable..<sup>27</sup>
  - D. **Record Keeping.** Under 2 CFR 200.334 – 200.338 and the FTA Master Agreement § 9, Recipient and Subrecipient must maintain adequate and readily accessible project performance and financial records on procurement transactions and project implementation. Such records must be kept for at least **three years** after final payment has been made and all other pending matters are

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<sup>23</sup> FTA Circular 4220.1G ch. III, § 3.

<sup>24</sup> FTA Circular 4220.1G ch. III, § 3.

<sup>25</sup> FTA Circular 4220.1G ch. III, § 3(a).

<sup>26</sup> FTA Circular 4220.1G ch. III, § 3(b).

<sup>27</sup> FTA Circular 4220.1G ch. III, § 3(c).

closed.<sup>28</sup>

- E. **Procurement Documentation.** Procurement documentation should be prepared, maintained, and distributed as necessary. FTA takes the position that the extent of documentation should be reasonable. These documents should be commensurate with the size and complexity of the procurement itself (e.g., a credit card purchase of low value might be accompanied by a receipt/bill that implies the required information). Substantial procurements, however, require more detailed documentation.<sup>29</sup>
- F. **Access to Records.** Whenever requested to do so, provide FTA and Department of Transportation (“DOT”) officials and the Comptroller General (or any of their representatives) the right to access, examine, and inspect all records, contracts, documents, and papers related to any federally-financed project.<sup>30</sup>
- G. **Use of Technology/Electronic Commerce.** Along with other technology Recipient and Subrecipient may choose to employ a well-structured electronic commerce system to conduct third-party procurements, provided that:
1. **Written Procedures.** Adequate written procedures are available prior to solicitation.<sup>31</sup>
  2. **Sufficient System Capacity.** The electronic system must have sufficient system capacity necessary to accommodate all Federal requirements, including applicable accessibility requirements, for full and open competition..<sup>32</sup>
  3. **Electronic Bidding and Reverse Auctions.** Although neither FTA nor the Office of Federal Procurement Policy have established a formal definition of “reverse auction” or formal procedures for reverse auctions for federal-assistance purposes, the U.S. Comptroller General has approved procedures for reverse auctions for procurements under the simplified acquisition threshold.<sup>33</sup>
  4. **AUDIT.** In addition to special audits FTA may initiate, Recipient and Subrecipient may initiate an audit of one or more specific third-party contracts as part of Recipient and Subrecipient’s management process. The firm conducting Recipient and Subrecipient’s federally-required single annual audit may recommend the audit of a specific third-party contract.<sup>34</sup>

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<sup>28</sup> FTA Circular 4220.1G ch. III, § 3(d).

<sup>29</sup> FTA Circular 4220.1G ch. III, § 3(d)(2).

<sup>30</sup> FTA Circular 4220.1G ch. III, § 3(d)(4).

<sup>31</sup> FTA Circular 4220.1G ch. III, § 3(e) (ii).

<sup>32</sup> FTA Circular 4220.1G ch. III, § 3(e)(i).

<sup>33</sup> FTA Circular 4220.1G ch. III, § 3(e)(iii)(b).

<sup>34</sup> FTA Circular 4220.1G ch. III, § 5.

- A. **Recipient and Subrecipient Auditors.** Recipient and Subrecipient may have sufficient qualified personnel that can perform audits of third-party contracts as needed. These audit personnel may choose to employ a qualified independent accounting firm or accountant to perform audit responsibilities.
- B. **Independent Auditors.** Recipient and Subrecipient may hire audit firms to perform audits required by the federal government, such as audits required by the Single Audit Act of 1984, as amended, and OMB Circular A–133, “Audits of States, Local Governments, and Non-Profit Organizations,” as revised. When the federal government requires other audits, Recipient and Subrecipient may engage independent auditors that are not performing other work for Recipient and Subrecipient.

## CHAPTER IV

### **RECIPIENT AND SUBRECIPIENT'S PROPERTY AND SERVICE NEEDS**

1. **DETERMINING RECIPIENT AND SUBRECIPIENT NEEDS.** To use federal assistance awarded by FTA to finance a procurement, adequate procedures for determining the type and amount of property and services that Recipient and Subrecipient needs to acquire shall be implemented.
  - A. **Eligibility.** Recipient and Subrecipient must ensure the property and services are eligible within the scope of a specific project with FTA funding.<sup>35</sup>
  - B. **Necessity.** Recipient and Subrecipient must review proposed procurements to avoid the purchase of property and services Recipient and Subrecipient does not need (including duplicative items and unnecessary options) under 2 CFR 200.318(d) based on reasonable expectations at the time that Recipient and Subrecipient plans to enter into the contract.<sup>36</sup>
    1. *Unnecessary Reserves.* The most recent versions of FTA Circulars 5010.1, 9030.1, and 9300.1 address spare ratios. Recipient and Subrecipient must not acquire more vehicles than needed for public transportation services.
    2. *Assignment Purposes.* Recipient and Subrecipient contracts only for its reasonably anticipated needs. Quantities or options to contracts added solely to allow assignment of those quantities or options to another party at a later date are prohibited. These limits on assignments, however, do not preclude joint procurements entered into simultaneously by two or more parties to obtain advantages unavailable for small procurements.
  - C. **Procurement Size.** Recipient and Subrecipient will consider consolidating or breaking out procurements to obtain a more economical purchase.<sup>37</sup>
    1. *Joint Procurements.* Recipient and Subrecipient should consider, wherever possible, entering into joint procurements with other similarly situated agencies. Participation in a joint procurement, however, does not relieve Recipient and Subrecipient from participating in the requirements and responsibilities it would have if it were procuring the property or services on its own.
    2. *Smaller Procurements.* Recipient and Subrecipient should consider, wherever possible, breaking out procurements to provide opportunities for small businesses and Disadvantaged Business Enterprises (“**DBEs**”) to participate. Recipient and Subrecipient should contract only for Recipient and

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<sup>35</sup> FTA Circular 4220.1G ch. IV, § 1(a).

<sup>36</sup> FTA Circular 4220.1G ch. IV, § 1(b).

<sup>37</sup> FTA Circular 4220.1G ch. IV, § 1(c).

Subrecipient's current and reasonably anticipated needs. Recipient and Subrecipient will not add quantities or options to a contract solely to allow assignment of these quantities or options. In contrast, larger procurements should not be split merely to gain eligibility to use small purchase procedures for federally assisted procurements.

- D. **Options.** Recipient and Subrecipient may include options in contracts to assure the future availability of property or services. An option is a unilateral right in a contract by which, for a specified time, Recipient and Subrecipient may elect to purchase additional equipment, supplies, or services called for by the contract or to extend the term of the contract.<sup>38</sup>
- E. **Lease vs. Purchase.** To receive the best value, Recipient and Subrecipient should review lease versus purchase alternatives for acquiring property under 2 CFR 200.318(d). Recipient and Subrecipient will consider all relevant factors, include current market conditions, and the expected useful service life of the asset.<sup>39</sup>
- F. **Specifications.** Recipient and Subrecipient will prepare specifications to meet its needs, while assuring that those specifications are not exclusionary, discriminatory, unreasonably restrictive, or otherwise in violation of federal laws and regulations. In general, specifications should include a clear description of the property or services to be procured and indicate how the offers will be evaluated during the procurement process.<sup>40</sup>

- 2. **FTA REQUIREMENTS AFFECTING RECIPIENT AND SUBRECIPIENT'S ACQUISITIONS.** Before using FTA assistance to support an acquisition of property or services, all applicable federal requirements must be fulfilled, whether or not addressed in the Common Grant Rules. FTA assistance may not be used to support acquisitions that fail to comply with all applicable federal requirements.<sup>41</sup> To facilitate inclusion of required clauses, Recipient's template of "FTA Clauses and Certifications" must be used and is available on the City's Subrecipient Resources website at [Subrecipient Resources | City of Phoenix](#). At the beginning of each calendar year, Recipient should conduct a comprehensive annual review to check that all federal requirements are up-to-date with the most current version of Circular 4220.1 and the latest edition of FTA's Master Agreement and Comprehensive Review Contractor's Manual to determine what requirements have been added, deleted, or changed. For any federally-funded solicitations and direct contracts facilitated by another City of Phoenix Department or Subrecipient (procurements for consulting, construction, cooperative purchasing, etc.), Phoenix will confirm that the current FTA Clauses and Certifications (all applicable certifications, such as lobbying) are included in the procurement, and all reviews for compliance with

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<sup>38</sup> FTA Circular 4220.1G ch. IV, § 1(d).

<sup>39</sup> FTA Circular 4220.1G ch. IV, § 1(e).

<sup>40</sup> FTA Circular 4220.1G ch. IV, § 1(f).

<sup>41</sup> FTA Circular 4220.1G ch. IV, § 2.



federal requirements has been performed, as it would for its own solicitations and direct contracts.

A. **Contractor Qualifications.** In addition to the Common Grant Rules that require awards to responsible contractors, FTA transit law limits third-party contractor awards to those contractors capable of successfully performing under the terms of the proposed contract.<sup>42</sup> Recipient and Subrecipient must determine if the third-party contractors meet the responsibility requirements stated in the solicitation and then state the specific basis for a responsibility determination in the procurement file (within the Solicitation Summary).

B. **Administrative Restrictions on Acquisitions of Property and Services.** Recipient and Subrecipient should apply federal requirements for project participants to the lowest tier necessary for compliance with the requirement and include the Federal requirements in each sub-agreement, lease, third-party contract, or other document pertaining to that participation. Recipient and Subrecipient may review the “Best Practices Procurement Manual” for further guidance on these requirements and the suggested wording for contract clauses.<sup>43</sup>

1. **Scope of the Project.** The property or services acquired must be within the scope of the accompanying federal statute and underlying federal grant or cooperative agreement. These restrictions are found in FTA’s enabling legislation and implementing regulations. Third-party contracts must be within the scope of the grant or cooperative agreement from which federal support will be derived.
2. **Period of Performance – Limits.** A third-party contract’s period of performance, including any extensions thereof, should not be any longer than minimally necessary to accomplish the purpose of the contract. Procurement files should contain Recipient and Subrecipient’s rationale for determining the performance period of each contract, including consideration of factors such as competition, pricing, fairness, and public perception. Recipient and Subrecipient shall use sound business judgment to establish performance periods and any extensions, irrespective of the length of time involved.
  - a. The five-year statutory limitation on rolling stock and replacement parts<sup>44</sup> does not extend to other contracts (such as property, services, leases, construction, revenue, etc.). Nevertheless, the duration of other contracts must be reasonable.
  - b. After the award of a third-party contract, any time extension not authorized by the contract’s original terms would, in effect, be an out-of-scope change

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<sup>42</sup> FTA Circular 4220.1G ch. IV, § 2(a) and 49 U.S.C. § 5325(j).

<sup>43</sup> FTA Circular 4220.1G ch. IV, § 2(b).

<sup>44</sup> See ch. IV, § 2(E)(9) below.

that requires a sole source justification and any other sole source procurement requirements. Contract extensions are either in-scope or out-of-scope contract changes. Out-of-scope changes are treated as new, sole source procurements.

3. ***Federal Cost Principles.*** Costs must conform to federal principles for allowable costs. In general, costs must be necessary and reasonable, allocable to the project, authorized, or not prohibited, by federal law and regulations, and in conformance with federal cost principles applicable to Phoenix. Office of Management and Budget (OMB) Guidance for Grants and Agreements, “Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A–87),” applies to project costs incurred by Recipient and Subrecipient.<sup>45</sup>
4. ***Payment Provisions.*** Recipient and Subrecipient may use its own funds to make payments on third-party contracts. Payment provisions should be carefully structured if seeking to use FTA funds, receive reimbursement with FTA funds, or dedicate local share funds to support those costs.
  - a. ***General.*** At the outset, Recipient and Subrecipient may use FTA assistance to support or reimburse those payments only if:
    1. Award Made. FTA has awarded federal assistance to Phoenix through a grant or cooperative agreement for the underlying project.
    2. Pre-Award Authority. FTA has provided pre-award authority for the underlying project through a *Federal Register* Notice.
    3. Letter of No Prejudice. FTA has issued a letter of no prejudice for the underlying project.
  - b. ***Advance Payments.*** Advance payments are payments made to the contractor before the contractor incurs costs in the performance of the contract. The following principles and restrictions apply:
    1. Use of FTA Funds Prohibited. The use of federal assistance is prohibited for paying a third-party contractor before the contractor has incurred the costs for which the payments would be attributable.
    2. Exceptions for Sound Business Reasons. FTA occasionally makes exceptions to its advance payment prohibitions, provided Recipient has obtained FTA’s prior written concurrence. If seeking to use FTA or local share funds to support advance payments, Phoenix must contact FTA’s Regional Office for their concurrence.

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<sup>45</sup> See 48 CFR ch. 1, subch. E, Part 31, Contract Cost Principles and Procedures.

- c. *Permitting Exceptions.* FTA takes the position that sound business reasons can justify its concurrence for permitting exceptions in certain circumstances:
1. Customary Advance Payments. FTA recognizes that advance payments are typically required for utility services and subscriptions to newspapers and magazines. Accordingly, Recipient and Subrecipient may use FTA assistance to support or reimburse the costs of such acquisitions. FTA concurrence is required only when advance payment or payments customarily required in the marketplace exceed \$100,000.
  2. Adequate Security for Payments. FTA recognizes that Recipient and Subrecipient may need advance payments for mobilization payments, start-up costs, and other 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.
- d. *Progress Payments.* Progress payments are payments for costs incurred by the contractor in the performance of the contract before the contract work has been completed. Recipient and Subrecipient may use FTA assistance to support progress payments, provided Recipient and Subrecipient obtains adequate security for those payments and has sufficient documentation to substantiate the work performed for which payment is requested.
1. Recipient and Subrecipient should obtain adequate security for progress payments. Adequate security may include taking title or obtaining a letter of credit or equivalent means to protect Recipient and Subrecipient's financial interest in the progress payment. Adequate security should reflect the practical realities of different procurement scenarios and factual circumstances.
  2. FTA acknowledges that taking title to work in progress may be undesirable in some circumstances. When considering what constitutes adequate security for a given procurement, Recipient and Subrecipient should always consider the costs associated with the security (e.g., bonds or letters of credit must be purchased in the commercial marketplace) and the impact that those costs have on the contract price, as well as the consequences of incomplete performance.
  3. The Common Grant Rules authorize progress payments for construction contracts to be made on a percentage of completion method, but the use of this payment method in non-construction contracts is prohibited.

5. **Performance Difficulties.** Recipient and Subrecipient should include clauses to reduce the chance of difficulties with contractors. FTA may also seek the inclusion of clauses described below:

a. **Changes.** All contracts should include changes and changed conditions provisions or clauses, except for routine supply contracts.

b. **Remedies.** The Common Grant Rule provides as follows:

1. Delay. Recipient and Subrecipient should use liquidated damages if it is reasonable to expect damages suffered from delayed contract completion, and that it would be difficult or impossible to determine the extent or amount of such damages. The contract must specify a reasonable rate and measurement period, and the procurement file should include a record of the calculation and rationale for the amount of damages established. Assessment for damages should be at a specific rate per day for each day beyond the contract's delivery date or performance period. It may be appropriate to use a measurement period other than "per day." Recipient and Subrecipient will credit any liquidated damages recovered to the project account involved, unless FTA permits otherwise.
2. Violation or Breach. Third-party contracts exceeding \$100,000 must include administrative, contractual, or legal remedies for violations or breaches of the contract by the third-party contractor.
3. Suspension of Work. FTA may require provisions pertaining to suspension of work.
4. Termination. Termination for cause and termination for convenience provisions must be included in contracts exceeding \$10,000.

C. Socio-Economic Requirements for Acquisition of Property and Services.

1. **Labor.**

- a. **Wage and Hour Requirements.** The contractor must compute the wages of every mechanic and laborer on the basis of a standard workweek of 40 hours. Work in excess of the standard workweek is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the workweek. These clauses are required to comply with § 102 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 3702, and Department of Labor ("DOL") regulations, "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety

Standards Act),” 29 CFR Part 5.<sup>46</sup>

- b. *Fair Labor Standards*. The Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., applies to employees performing work involving commerce.
  - c. *Veterans Employment*. Recipient and Subrecipient 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 § 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 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 former employee.
2. ***Environmental Protections***. Recipient and Subrecipient will comply with environmental requirements and implement them as necessary through third-party contracts.
- a. *Environmental Mitigation*. Contract provisions may be required to facilitate Recipient and Subrecipient’s compliance with environmental regulations it has agreed to implement.
  - b. *National Environmental Policy Act (“NEPA”)*. Certain acquisitions and the timing of certain acquisitions can adversely affect the environmental review process for a project constituting a major federal action.<sup>47</sup>
    - 1. Property. Recipient and Subrecipient should not enter into binding arrangements for acquisitions of property that may or would affect environmental impact determinations with respect to the underlying project or otherwise interfere with any required environmental impact reviews until applicable environmental impact determinations have been made.
    - 2. Services. Recipient and Subrecipient should obtain (from the contractor selected to prepare an environmental impact statement) a disclosure statement specifying that the contractor has no financial or other interest in the outcome of the project, per 40 CFR Part 1506, “Other Requirements of NEPA,” at § 1506.5(c).

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<sup>46</sup> The thresholds of \$2,000 for construction work and \$2,500 for non-construction work set forth in the Common Grant Rules have been increased by law so that these requirements apply only to federally-assisted contracts in excess of \$100,000.

<sup>47</sup> National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 – 4335, and joint FHWA/FTA regulations, “Environmental Impact and Related Procedures,” 23 C.F.R. Part 771 and 49 C.F.R. Part 622.

- c. *Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites.* The Federal Highway Administration (“**FHWA**”) and FTA have published implementing regulations, “Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites,” 23 CFR Parts 771 and 774, and 49 CFR Part 622.
- d. *Clean Air.* The Common Grant Rules specifically require each contract at any tier exceeding \$100,000 to be implemented without the contractor’s facilities being included in the “List of Violating Facilities,” as provided by the Environmental Protection Agency (“**EPA**”), but be in compliance with all applicable standards, orders, or regulations issued pursuant to the Clean Air Act, as amended.<sup>48</sup>
- e. *Clean Water.* The Common Grant Rules specifically require each contract at any tier exceeding \$100,000 to be implemented without the contractor’s facilities being included in the EPA “List of Violating Facilities,” but be in compliance with all applicable standards, orders, or regulations issued pursuant to § 508 of the Clean Water Act, as amended.<sup>49</sup>
- f. *Recycled Products.* The Resource Conservation and Recovery Act of 1976 requires Recipient and Subrecipient to provide a competitive preference to products and services that conserve natural resources, protect the environment, and are energy efficient.<sup>50</sup> Per 40 CFR Part 247 through Part 253, “Comprehensive Procurement Guidelines for Products Containing Recovered Materials,” third-party contracts of \$10,000 or more must specify a competitive preference for products containing recycled materials identified in those EPA guidelines. 2 CFR § 200.323 outlines the requirements for procuring recovered materials when using federal funds, mandating that the procuring governmental entities and their contractors prioritize purchasing items made with recoverable materials when the purchase price or the value of the quantity acquired during the preceding fiscal year exceeds a certain threshold.
- g. *Other Federal Environmental Requirements.* Recipient and Subrecipient may need contract provisions to facilitate Recipient and Subrecipient’s implementation of other federal laws and regulations. FTA’s Master Agreement and Comprehensive Review Contractor’s Manual includes a list of environmental laws and regulations that may affect the acquisition of a property or service to be financed with federal assistance. These laws and regulations encompass provisions that facilitate Recipient and

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<sup>48</sup> Section 306 of the Clean Air Act, as amended, 42 U.S.C. § 7414, and other applicable provisions of the Clean Air Act, as amended, 42 U.S.C. §§ 7401 – 7671q.

<sup>49</sup> Section 508 of the Clean Water Act, as amended, 33 U.S.C. § 1368, and other applicable requirements of the Clean Water Act, as amended, 33 U.S.C. §§ 1251 – 1377.

<sup>50</sup> 42 U.S.C. § 6962.

Subrecipient's ability to protect parks, recreation areas, wildlife or waterfowl refuges, wild and scenic rivers, coastal zones, wetlands, fisheries, endangered species, historic sites, and Indian sacred sites.

3. **Energy Conservation.** Contract provisions must facilitate compliance with mandatory energy efficiency standards and applicable state energy conservation plans issued per the Energy Policy and Conservation Act, as amended.<sup>51</sup>
4. **Preference for U.S. Property—Buy America.** Buy America regulations that apply to third-party procurements, published at 49 CFR Part 661, differ from federal "Buy American Act" regulations that apply to direct federal procurements.

*a. Shipments of Property—U.S. Flag Requirements.*

1. Shipments by Ocean Vessel. Third-party contract provisions should assure compliance with 46 U.S.C. § 55303 and maritime administration regulations, "Cargo Preference U.S. Flag Vessels," 46 CFR Part 381, which provide for the use of U.S. Flag vessels to ship at least 50% of any federally-assisted property to be transported.
  2. Shipments by Air Carrier. Third-party contracts involving shipments of federally-assisted property by air carrier will require provisions to assure compliance with the "Fly America" Act, 49 U.S.C. § 40118, and "Use of United States Flag Air Carriers," 41 CFR § 301, which provide for shipment by U.S. flag air carriers unless such carriers are not reasonably available within the standards of GSA's implementing regulations.
- b. Project Travel—Use of U.S. Flag Air Carriers.* Third-party contracts to acquire air travel services for people participating in a federally-assisted project require provisions facilitating compliance with the "Fly America" Act and "Use of United States Flag Air Carriers," 41 CFR § 301, which provide for the use of U.S. flag air carriers, unless U.S. flag air carriers are not reasonably available within the standards of the GSA's implementing regulations.

D. Technical Restrictions on the Acquisition of Property and Services.

1. **Intelligent Transportation Systems.** Intelligent transportation system ("ITS") property and services must comply with the National ITS Architecture and Standards to the extent required by 23 U.S.C. § 517(d) and FTA Notice, "FTA National ITS Architecture Policy on Transit Projects," 66 FR 1455 et seq., January 8, 2001, and later published policies or implementing directives

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<sup>51</sup> 42 U.S.C. § 6321 et seq.

FTA may issue. Consequently, third-party contracts involving ITS should include provisions to ensure compliance with federal requirements.

2. **Metric Measurements.** Property and services with dimensions expressed in metric measurements will be accepted to the extent practicable and feasible.
3. **Use of \$1 Coins.** To facilitate compliance with the Presidential \$1 Coin Act of 2005,<sup>52</sup> FTA-assisted property that requires the use of coins or currency in public transportation service (or supporting service) must be fully capable of accepting and dispensing \$1 coins.

#### E. Rolling Stock—Special Requirements.

1. **Accessibility.** Rolling stock must comply with the accessibility provisions of 49 CFR Part 37, “Transportation Services for Individuals with Disabilities (ADA),” and 36 CFR Part 1192 and 49 CFR Part 38, “Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles.”
2. **Transit Vehicle Manufacturer Compliance with DBE Requirements.** Per 49 CFR § 26.49, before a transit vehicle manufacturer (“TVM”) may submit a bid or proposal to provide vehicles to be financed with FTA assistance, the TVM must submit a certification that it has complied with FTA’s DBE requirements.
3. **Minimum Service Life.** FTA requires that Recipient and Subrecipient maintain satisfactory continuing control of FTA-assisted property. In the case of vehicles, especially buses, FTA has established minimum service-life policies. Consequently, contracts for vehicle acquisitions require provisions to facilitate compliance with those service-life policies. Recipient and Subrecipient will follow the most recent version of FTA Circulars 5010.1, 9030.1, and 9300.1 that address minimum service life for vehicles.
4. **Air Pollution and Fuel Economy.** Contracts to acquire rolling stock must contain provisions to facilitate Recipient and Subrecipient’s compliance with applicable federal air pollution control and fuel economy regulations.
5. **Pre-Award and Post-Delivery Review.** Contracts to acquire rolling stock require provisions to assure compliance with applicable requirements of 49 U.S.C. § 5323(m) and those provisions of 49 CFR Part 663, “Pre-Award and Post-Delivery Audits of Rolling Stock Purchases,” so long as they do not conflict with 49 U.S.C. § 5323(m).
6. **Bus Testing.** Contracts to acquire a new bus model or a bus with significant alterations to an existing model require provisions to assure compliance with applicable requirements of 49 U.S.C. § 5318, as amended, and 49 CFR Part

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<sup>52</sup> 31 U.S.C. § 5312(p).



665, “Bus Testing.”

7. ***In-State Dealers.*** Procurements of buses may not be limited to in-state dealers.
8. ***Basis for Award.*** Recipient and Subrecipient may award a contract for rolling stock based on: initial capital costs; performance, standardization, life cycle costs, and other factors, or selection through a competitive procurement process.<sup>53</sup>
9. ***Five-Year Limitation.*** A multi-year contract to purchase additional rolling stock and replacement parts may not have options that extend more than five years after the date of the original contract.<sup>54</sup> This means that a contract is limited to purchasing no more than Recipient and Subrecipient’s rolling stock or replacement parts needs for five years based on the effective date of the contract.<sup>55</sup>
10. ***Fast Act.*** Section 3019 of the FAST Act (Fixing America's Surface Transportation Act) changed purchasing procedures to offer more purchasing options for public transportation systems of varying sizes. Under the Act, multiple states and providers may purchase capital assets through cooperative interstate procurements. The FAST Act also created a pilot program to allow nonprofit organizations to enter into cooperative procurement contracts. Under these procurement procedures, transit agencies can lease equipment or facilities such as low- or no-emission components. Finally, the FAST Act established a Joint Procurement Clearinghouse to allow grantees to co-purchase rolling stock within a system that helps them identify procurement partners.

F. **Public Transportation Services—Special Requirements.** The following will affect how a third-party contractor implements its contract to provide services. Consequently, either the contract itself must include provisions assuring compliance with the following matters, or Recipient and Subrecipient must obtain the contractor’s agreement in another form, as a matter of contractor responsibility, to assure compliance with the following:

1. ***Protections for Public Transportation Employees.*** When Recipient and Subrecipient purchase public transportation services from a third-party

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<sup>53</sup> 49 U.S.C. § 5325(f).

<sup>54</sup> FTA Circular 4220.1G ch. IV, § 2(e)(9) (limit of five years for buses and seven years for rail).

<sup>55</sup> This does not mean Recipient and Subrecipient must obtain delivery, acceptance, or even fabrication in five or seven years. Instead, it means only that FTA limits a contract to purchasing no more than Recipient and Subrecipient’s material requirements for rolling stock or replacement parts for five or seven years based on the effective date of the contract.

- contractor, the terms of Recipient and Subrecipient's certification to the Department of Labor of employee protective arrangements will apply to the work of employees under the contract that are covered by the certification. For this reason, contracts involving the employment of public transportation employees are covered by the protections of 49 U.S.C. § 5333(b), also referred to as "13(c)," and 29 CFR Part 215, "Section 5333(b), Federal Transit Law." The Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., also applies to public transportation employees performing work involving commerce.
2. ***Drug and Alcohol Testing.*** A contractor providing services involving the performance of safety sensitive functions must comply with 49 U.S.C. § 5331 Part 40, "Procedures for Transportation Workplace Drug and Alcohol Testing Programs," and 49 CFR Part 655, "Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations."
  3. ***Accessibility.*** Facilities and vehicles used in the provision of public transportation services must comply with 49 CFR Part 37, "Transportation Services for Individuals with Disabilities (ADA)," and 36 CFR Part 1192 and 49 CFR Part 38, "Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles."
  4. ***Protection of Animals.*** A contractor performing services involving the use of animals must comply with the Animal Welfare Act.<sup>56</sup>
  5. ***Charter Service Restrictions.*** A contractor performing services using FTA assisted facilities or equipment may not use those facilities or that equipment to support any charter service operations except as permitted by 49 U.S.C. § 5323(d) and 49 CFR Part 604, "Charter Service."
  6. ***School Bus Restrictions.*** A contractor performing services using FTA assisted facilities or equipment may not use those facilities or that equipment to support exclusive school bus operations except as permitted by 49 CFR Part 605, "School Bus Operations," to the extent consistent with 49 U.S.C. §§ 5323(f) and (g).
- G. ***Art.*** Recipients/subrecipients must not use FTA assistance to pay incremental costs of incorporating art or non-functional landscaping into facilities, including the costs of an artist on the design team under 49 U.S.C. 5323(h)(2)..<sup>57</sup>
- H. ***Architectural/Engineering (A&E) and Related Service—Special Requirements.*** In connection with projects related to or leading to construction, an FTA recipient must use qualifications-based competitive proposal procedures,

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<sup>56</sup> 7 U.S.C. §§ 2131 et seq. and 9 CFR Subchapter A, Parts 1, 2, 3, and 4, "Animal Welfare."

<sup>57</sup> FTA Circular 4220.1G ch. IV, § 2(g).

pursuant to the Brooks Act,<sup>58</sup> when contracting for architectural and engineering services, to include not only traditional A&E services, but also program management, engineering, construction management, feasibility studies, and preliminary engineering, designing, surveying, mapping, or related services.<sup>59</sup> FTA clarifies that its interpretation of authorizing the use of qualifications-based procurement procedures is for those services only when they support or are connected or related to real property. Recipient and Subrecipient should not use qualifications-based procurement procedures for services that are not in support of or connected or related to real property, except to the extent FTA expressly permits otherwise in writing.

## I. Construction—Special Requirements.

1. **Bonding.** Bonds are required for all construction contracts exceeding \$250,000, except to the extent FTA determines that the federal interest is adequately protected through other arrangements. FTA's bonding policies are as follows:
  - a. **Bid Guarantee.** Recipient and Subrecipient should require a bid guarantee from each bidder equivalent to five percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will honor its bid upon acceptance.
  - b. **Performance Bond.** Recipient and Subrecipient should require a performance bond on the part of the contractor for 100% 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 the contract.
  - c. **Payment Bond.** Recipient and Subrecipient should specify a standard payment bond on the part of the contractor for 100% of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all people supplying labor and material in execution of the work provided for in the contract. Payment bonds in the following amounts are adequate to protect FTA's interest and Recipient and Subrecipient will accept a local bonding policy that meets the following minimums:
    1. Less Than \$1 Million. Fifty percent of the contract price if the contract price is not more than \$1 million.

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<sup>58</sup> 40 U.S.C. ch. 11.

<sup>59</sup> See 49 U.S.C. § 5325(b); see also FTA Circular 4220.1G ch. IV § 2(h)(2) (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).

2. More Than \$1 Million but Less Than \$5 Million. Forty percent of the contract price if the contract price is more than \$1 million, but not more than \$5 million.
  3. More Than \$5 Million. Two and one half million dollars if the contract price is more than \$5 million.
- d. *Acceptable Sureties.* A non-governmental recipient is required to obtain construction bonds from companies holding certificates of authority as acceptable sureties pursuant to 31 CFR Part 223, "Surety Companies Doing Business with the United States."<sup>60</sup> FTA strongly encourages each governmental recipient to require similarly acceptable sureties.
  - e. *Local Bonding.* FTA will accept a local bonding policy that meets the minimums set forth above. FTA reserves the right to approve bonding that does not meet these minimums if the local bonding policy adequately protects the federal interest. For less stringent bonding requirements, on a specific class of projects or particular project, Phoenix will submit the policy and rationale to FTA for approval.
  - f. *Excessive Bonding.* FTA approval is not required for more stringent local bonding policies, but if Recipient and Subrecipient bonding policies result in "excessive bonding" prohibited under the Common Grant Rules as restrictive of competition, FTA will not provide federal assistance for those procurements. Consequently, if Recipient and Subrecipient bonding policies exceed those described in this sub-section, Recipient and Subrecipient must obtain FTA's written concurrence to assure the availability of Federal assistance.
2. **Seismic Safety.** Contracts for the construction of new buildings or additions to existing buildings must be constructed in accordance with 49 CFR Part 41, "Seismic Safety," at §§ 41.117 and 41.120.
  3. **Value Engineering.** Recipient and Subrecipient should use value engineering clauses in contracts for construction projects. FTA will not approve a "New Starts" grant application for final design funding or a full funding grant agreement until value engineering is complete. Some contractual arrangements (e.g., design-build contracts) may inherently include value engineering concepts and principles. Where this is the case, FTA does not require separate value engineering proposals, contract changes, or other processes.

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<sup>60</sup> For a current list of approved sureties, see Department of the Treasury's Listing of Approved Sureties (Department Circular 570), available at [fiscal.treasury.gov/surety-bonds/circular-570.html](https://fiscal.treasury.gov/surety-bonds/circular-570.html).

4. **Equal Employment Opportunity.** Construction contracts must include provisions requiring compliance with 41 CFR Parts 60 et seq., “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.”<sup>61</sup>
5. **Prevailing Wages.** Davis-Bacon Act prevailing wage protections apply to laborers and mechanics employed on FTA-assisted construction, alteration, or repair projects. Thus, for contracts at any tier exceeding \$2,000, Recipient and Subrecipient should include provisions requiring compliance with the Davis-Bacon Act, as supplemented by DOL regulations.<sup>62</sup> The Davis-Bacon Act requires contractors to pay wages to laborers and mechanics at a rate not less than the minimum wages specified in a wage determination made by the Secretary of Labor. In addition, contractors are required to pay wages not less than once a week. Recipient and Subrecipient should include a copy of the current prevailing wage determination issued by DOL in each contract solicitation, and the award of a contract must be conditioned upon acceptance of the wage determination.<sup>63</sup>
6. **Anti-Kickback.** For all third-party construction and repair contracts at any tier, Recipient and Subrecipient should include provisions for compliance with the Copeland “Anti-Kickback” Act,<sup>64</sup> as amended, and implementing DOL regulations. The Act provides that each contractor shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which that individual is otherwise entitled.
7. **Construction Safety.** Recipient and Subrecipient should include provisions to ensure safety at construction sites so that no laborer or mechanic shall be required to work in surroundings or under working conditions that are unsanitary, hazardous, or dangerous. Notably, the threshold for construction safety protections increased to \$100,000 from \$2,000 as set forth in the Common Grant Rules, so that a federally-assisted construction contract must exceed \$100,000 before these construction safety requirements apply to that contract.<sup>65</sup>
8. **Labor Neutrality.** Contracts may not require or prohibit the use of any project

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<sup>61</sup> Implementing Executive Order No. 11246, “Equal Employment Opportunity,” September 24, 1965, as amended by Executive Order No. 11375, “Amending Executive Order No. 11246 Relating to Equal Employment Opportunity,” October 13, 1967.

<sup>62</sup> 40 U.S.C. §§ 3141 et seq., and implementing DOL regulations “Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction,” 29 CFR Part 5.

<sup>63</sup> See also ch. IV, § (2)(C)(1)(a) above for Wage and Hour Requirements.

<sup>64</sup> 18 U.S.C. § 874; 29 CFR Part 3.

<sup>65</sup> Section 4104(c) of the Federal Acquisition Streamlining Act of 1994, 40 U.S.C. § 3701(b)(3)(A)(iii).

labor agreement (“**PLA**”), unless special circumstances require the use of a PLA to avert an imminent threat to public health or safety. Contractors or subcontractors may, however, voluntarily enter into PLAs.<sup>66</sup>

9. **Preference for U.S. Property.** For any third-party contract exceeding \$150,000, FTA’s “Buy America Requirements,” 49 CFR Part 661,<sup>67</sup> require contractors to provide property produced or manufactured in the United States per FTA’s regulations, unless a waiver authorized by those regulations has been granted. A contractor that provides services must comply with FTA’s Buy America regulations in connection with any new property it acquires to fulfill its contractual responsibilities.

10. **Accessibility.** Facilities and vehicles used in the provision of public transportation services must be in compliance with 49 CFR Part 37, “Transportation Services for Individuals with Disabilities (ADA),” and 36 CFR Part 1192 and 49 CFR Part 38, “Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles.”

J. **Research, Development, Demonstration, Deployment, and Special Studies—Special Requirements.** Procurements of research-type services can involve circumstances that bring special federal requirements into effect. Among these are:

1. **Patent Rights.** Irrespective of the status of Recipient, Subrecipient, or third-party contractor, the Common Grant Rules require provisions invoking the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms,” except to the extent the Federal Government requires otherwise. Except in the case of an “other agreement” in which the Federal Government has agreed to take more limited rights, the Federal Government is entitled to a non-exclusive royalty-free license to use the invention, or patent to the invention, for its purposes.
2. **Rights in Data.** In general, FTA’s purpose in providing federal assistance for a research, development, demonstration, or special studies project is to increase transportation knowledge, rather than limit the benefits of the project-to-project participants. Therefore, except to the extent that FTA determines otherwise in writing, FTA imposes the following rights in data requirements for federally-assisted research, development, demonstration, or special studies projects.
  - a. **Publication Restrictions.** Except for its own internal use, neither Recipient and Subrecipient nor a third-party contractor may publish or reproduce subject data in whole or in part, or in any manner or form, without the prior

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<sup>66</sup> Executive Order No. 13502, “Use of Project Labor Agreements for Federal Construction Projects,” February 6, 2009.

<sup>67</sup> 49 U.S.C. § 5323(j)(13).

written consent of the Federal Government, unless the Federal Government has previously released or approved the release of such data to the public.

- b. ***Distribution of Data.*** Recipient and Subrecipient and their third-party contractors must agree that, in addition to the rights in data and copyrights that they must provide to FTA in accordance with the Common Grant Rules, FTA may make available to any FTA recipient, subrecipient, third-party contractor, or third-party subcontractor either FTA's license in the copyright to the subject data or a copy of the subject data. If the project is not completed for any reason whatsoever, all data developed under the project shall become subject data and shall be delivered as FTA may direct. The foregoing provisions do not apply to contracts for adaptations of automatic data processing equipment or to data provided in support of FTA capital projects.
  - c. ***Exceptions.*** FTA, however, may determine in certain circumstances that it is in the public interest to take only those rights in data provided by the Common Grant Rules.
3. ***Export Control.*** If data developed in the course of a third-party contract is subject directly or indirectly to U.S. export control regulations, that data may not be exported to any countries or any foreign persons, without first obtaining the necessary federal license or licenses and complying with any applicable U.S. export control regulations.<sup>68</sup>
  4. ***Protection of Human Subjects.*** A third-party contractor performing services involving the use of human subjects must comply with National Research Act.<sup>69</sup>
  5. ***Protection of Animals.*** A third-party contractor performing services involving the use of animals must comply with Animal Welfare Act.<sup>70</sup>
- K. ***Audit Services.*** In general, audit services financed with FTA assistance must be procured in accordance with the standard procedures of this guidance. The following considerations, however, are especially important in procurements of audit services:
1. ***Single Audit Act.*** The agency that expends \$500,000 or more in Federal awards in a single year is expected to procure audit services to fulfill the requirements of the Single Audit Act of 1984, as amended, and OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations,"

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<sup>68</sup> 15 CFR Part 730

<sup>69</sup> 42 U.S.C. §§ 289 et seq., and 49 CFR Part 11, "Protection of Human Subjects."

<sup>70</sup> 7 U.S.C. §§ 2131 et seq., and 9 CFR Subchapter A, Parts 1, 2, 3, and 4, "Animal Welfare."

as revised.

- a. *Organizational Conflict of Interest*. It is essential that any auditor selected be independent of Recipient and Subrecipient.
  - b. *Eligibility of Costs*. Recipient and Subrecipient may charge costs for audits required by OMB Circular A–133 to its project as direct or indirect costs as permitted by the Federal Cost Principles applicable to Recipient and Subrecipient. If Recipient and Subrecipient expends less than \$500,000 in federal awards in a single year, it is not required to arrange for this audit and may not seek financing for the costs of such an audit with federal funds.
2. **Other Project Audits**. A recipient that seeks an audit of a specific third-party contract should consider the implications of the following before procuring audit services.
- a. *Organizational Conflict of Interest*. It is essential that any auditor selected be independent of Recipient and Subrecipient.
  - b. *Verification of Indirect Costs*. Federal verification of a contractor's indirect cost rates, such as provisional overhead/burden and General and Administrative (“**G&A**”) rates may be required. Some information sought may be available through undisputed audits that have been previously performed by other recipients and should be used.
  - c. *Duplication of Services*. Recipient should contact FTA, and Subrecipient should contact Recipient, before engaging such services to preclude duplication and to ensure the eligibility of the particular services for federal participation. This is particularly important in connection with the procurement of A&E services. It is essential not to undertake duplicative audits likely to produce disparate indirect cost rates. Recipient should seek guidance from the cognizant federal agency that approved the third-party contractor's indirect cost rates before Recipient and Subrecipient negotiates audit contract agreements.
  - d. *Eligibility of Costs*. Costs of any third-party contract audits and proposal evaluations are eligible for reimbursement by FTA as a direct or indirect charge per applicable Federal cost principles. FTA reserves the right to disallow payments for duplicative audit charges.



## CHAPTER V

### **SOURCES TO OBTAIN PROPERTY AND SERVICES**

1. **FORCE ACCOUNT.** “Force account” means Recipient and Subrecipient’s own labor forces and equipment. To assure that Recipient and Subrecipient will have adequate technical capacity to perform its public transportation and contracting responsibilities in connection with the project, FTA’s grant or cooperative agreement secures FTA the right to determine the extent to which Recipient and Subrecipient may use federal assistance to participate in force account costs.
2. **SHARED USE.** Whenever feasible and economical, Recipient and Subrecipient should enter into agreements for shared use of common goods and services.
3. **JOINT PROCUREMENT.** FTA uses the term “joint procurement” to mean a method of contracting in which two or more purchasers agree from the outset to use a single solicitation document and enter into a single contract with a vendor for delivery of property or services in a fixed quantity, even if expressed as a total minimum and total maximum. Unlike other cooperative contracts, such as a state or local government purchasing schedules, a joint procurement is not drafted for the purpose of accommodating the needs of other parties that may later want to participate in the benefits of that contract. Whenever feasible and economical, enter into state and local intergovernmental agreements for procurements for common goods or services. Procuring goods and services jointly with other agencies facilitates better pricing through larger purchases. When doing so, Recipient and Subrecipient should include all federal requirements, necessary clauses, and requisite certifications in the resulting joint solicitation and contract documents, and implement them properly.
4. **STATE PURCHASING SCHEDULES.** State purchasing schedules or other state contracts may also be available. These permit subordinate government agencies to buy from established state schedules like the General Services Administration (“GSA”) schedules that federal agencies use. It is FTA’s position that Recipient and Subrecipient may acquire property or services through these contracts, provided all parties agree to append the required federal clauses in the first purchase order or other document that effectuates Recipient and Subrecipient’s procurement. All federal requirements, required clauses, and certifications must be included in the resulting joint solicitation and contract documents. If the property is not Buy America compliant, FTA must provide a waiver before proceeding.
5. **FEDERAL EXCESS AND SURPLUS PROPERTY.** Recipient and Subrecipient should use federal excess and surplus property managed by the GSA when feasible and economical rather than procuring new property. For text on the eligibility of activities and organizations to obtain supplies and services through GSA’s personal property utilization and disposal programs, there are Federal Property Management Regulations, 41 CFR Parts 101–42 through 101–46, 101–48, and 101–49.
6. **FEDERAL SUPPLY SCHEDULES.** The use of GSA’s Federal Supply Schedules is

restricted to those agencies with specific legislative authority to use them.

- A. **All FTA and Federal Requirements Apply.** Recipient and Subrecipient may acquire property or services through GSA Federal Supply Schedules, provided all parties agree to append the required federal clauses in the first purchase order or other document that effectuates Recipient and Subrecipient's procurement. When doing so, Recipient and Subrecipient should include all federal requirements, required clauses, and certifications (including Buy America) in the resulting joint solicitation and contract documents.
- B. **Limited Use of Federal Supply Schedules.** Recipient and Subrecipient, a local government, is authorized by law to use GSA schedules to acquire information technology ("IT") and mitigate disasters. The term "State and Local Government" does not include contractors or grantees of state or local governments.
1. **Information Technology.** Recipient and Subrecipient are eligible, within limits established by law, to procure IT of various types through GSA's Cooperative Purchasing Program, Federal Supply Schedule 70.<sup>71</sup>
  2. **Disaster Recovery.** Recipient and Subrecipient may use any GSA schedules to purchase property and services in advance of a major disaster declared by the President or in the aftermath of an emergency event. Recipient and Subrecipient should restrict use of purchased property or services to disaster recovery activities.<sup>72</sup>
  3. **Local Preparedness Acquisition.** Within limits established by law, Recipient and Subrecipient may acquire law enforcement, security, and certain related items of various types through GSA's Cooperative Purchasing Program Federal Supply Schedule 84 or any amended or later version of that federal supply classification group.<sup>73</sup>
- C. **Competition and Price Reasonableness.** When using GSA schedules to acquire property or services, Recipient and Subrecipient will have fulfilled the Common Grant Rules' competition requirements if it seeks offers from at least three sources. When using a price published on a GSA schedule, Recipient and Subrecipient must consider whether the GSA price is reasonable and may also seek a lower price than that published on the GSA schedules.

7. **EXISTING CONTRACTS.** The use of existing contracts may prove an advantageous

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<sup>71</sup> The shortcut to GSA's website with information about cooperative purchasing is [www.gsa.gov/cooperativepurchasing](http://www.gsa.gov/cooperativepurchasing).

<sup>72</sup> More information is available at: [gsa.gov/portal/category/100743](http://gsa.gov/portal/category/100743).

<sup>73</sup> See § 2 of the Local Preparedness Acquisition Act, Pub. L. 110-248, June 26, 2008, amended 40 U.S.C. § 502(c) by adding ¶ 2. See also: [gsa.gov/buying-selling/purchasing-programs/gsa-schedules/schedule-buyers/state-and-local-governments/1122-program](http://gsa.gov/buying-selling/purchasing-programs/gsa-schedules/schedule-buyers/state-and-local-governments/1122-program).

means of acquiring needed property or services.

**A. Permissible Uses.**

1. ***Exercise of Options.*** Recipient and Subrecipient may use options with the following limitations:
  - a. *Consistency with the Contract.* Recipient and Subrecipient should exercise an option in accordance with terms and conditions of the option in the initial contract.
  - b. *Price.* Recipient and Subrecipient should not exercise an option unless it has determined that the option price is better than prices available in the market or that the option is the more advantageous offer at the time the option is exercised.
  - c. *Awards Treated as Sole Source Procurements.* The following actions constitute sole source awards (which are permitted only if Recipient and Subrecipient provide sufficient justifications under FTA's standards for such awards):
    1. Failure to Evaluate the Options before Awarding the Underlying Contract. When Recipient and Subrecipient have not evaluated options as part of the award, the exercising of such options is, in effect, a sole source procurement.
    2. Negotiating a Lower Option Price. Exercising an option after a lower price has been negotiated also constitutes a sole source procurement.
2. ***Assignment of Rights.*** Recipient and Subrecipient may assign contractual rights to purchase property and services to another city if the original contract contains an appropriate assignability clause that provides for the assignment of all or a portion of the specified deliverables as originally advertised, competed, evaluated, and awarded, or other appropriate assignment provisions. Some refer to this process as "Piggybacking."
3. ***Scope of Procurement.*** Recipient and Subrecipient should assure that the entity from which it intends to acquire contractual rights to purchase property or services has not improperly expanded the procured quantity of property or services beyond the scope of that contract's limits. For example, if the supplies or services were solicited, competed, and awarded through the use of an indefinite-delivery-indefinite-quantity contract, then both the solicitation and contract award must contain both a minimum and maximum quantity that represented the reasonably foreseeable needs of the affected parties.
  - a. *Fair and Reasonable Price.* Whenever Recipient and Subrecipient obtains contractual rights through assignment, it may exercise them after first

determining the contract price remains fair and reasonable, and all federal requirements are in the contract's clauses. If a price analysis already exists, Recipient and Subrecipient should perform a second price analysis. However, the contract price or prices originally established must still be fair and reasonable.

- b. *Piggybacking Worksheet (Appendix B.16 of FTA's "Best Practices Procurement Manual")*. Recipient and Subrecipient should use the "Piggybacking Worksheet" to assist with properly documenting the contract file. Recipient and Subrecipient are responsible for Buy America compliance for the transaction and for execution of all of the required pre-award and post-delivery Buy America audit certifications. Recipient and Subrecipient can review FTA's Pre-Award and Post-Delivery Handbooks for copies of the applicable certifications.
  - c. *Pooling*. Combining efforts in procurements may result in better pricing through larger purchases (i.e., "pooling"). Joint procurements or cooperative procurements are considered better than procurements through assignments because assignments do not combine buying power when prices are negotiated and may limit Recipient and Subrecipient's choices to the unpurchased quantity of property and services remaining on another agency's contract. However, if two or more parties jointly solicit and award an IDIQ (indefinite delivery – indefinite quantity) contract, then that contract must have a total minimum and maximum.
  - d. *Recipient and Subrecipient's Needs*. Recipient and Subrecipient should contract only for its reasonably anticipated needs, and not build excess capacity into contracts simply for the purpose of assigning rights to others.
- B. **Impermissible Uses**. A contract may not be improperly expanded beyond its original scope to support federally assisted acquisitions. The following actions are prohibited:
- 1. ***Improperly Expanded Scope***. Recipient and Subrecipient should not use federal assistance to acquire property or services through another contract whose scope has been improperly expanded.
  - 2. ***Improperly Expanded Quantity***. Recipient and Subrecipient should not expand the quantity of property or services to be delivered under contract beyond the scope of the contract's limits solely to assign those contract rights to another agency.
    - a. An addition of work (property or services) that is beyond the scope of the original contract constitutes a Cardinal Change. Such practices are sometimes informally referred to as "tag-ons" whose use is prohibited, and this applies to the original buyer as well as to others.

- b. Before attempting any change in quantity of major items (e.g., buses, rail cars), Recipient and Subrecipient should review its contract clauses to ensure that they allow for such changes. In the case of rolling stock, an out-of-scope change is a change in quantity or a substitution of major end items not contemplated in the original competition. An out-of-scope change would include changing the engine, or changing from a high-floor vehicle to a low-floor vehicle. However, changes to seating fabrics and colors, exterior paint schemes, signage, floor coloring, and other similar changes are permissible “in-scope” changes.
- 8. **OPEN MARKET.** The vast majority of Recipient and Subrecipient’s acquisitions may be accomplished through procurements in the open market.

## CHAPTER VI

### **PROCEDURAL GUIDANCE FOR OPEN MARKET PROCUREMENTS**

1. **COMPETITION REQUIRED.** Except as permitted by federal law or regulations, third-party procurement transactions must be conducted in a manner providing full and open competition. Contracts are awarded on the basis of:
  - A. **Solicitation by Recipient and Subrecipient.** Compliance with the solicitation procedures described in this chapter will fulfill FTA requirements for “full and open competition.”
  - B. **Prequalification.** Recipient and Subrecipient may pre-qualify people, firms, or products for participation in its procurements provided that:
    1. **Lists.** Recipient and Subrecipient ensure that all prequalification lists used in acquiring property and services are current.
    2. **Sources.** Recipient and Subrecipient ensure that all prequalification lists include enough qualified sources to ensure maximum full and open competition.
    3. **Qualification Periods.** Recipient and Subrecipient permit potential offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date). It is unnecessary to accelerate or to truncate evaluations for prequalification. Recipient and Subrecipient are not required to hold a particular solicitation open to accommodate a potential offeror that submits a person, firm, or product for approval before or during that solicitation.
    4. **Separate From Technical Qualifications.** Prequalification, as discussed here, is separate from reviews of technical qualifications that are an essential step in two-step procurement processes.
2. **SOLICITATION REQUIREMENTS AND RESTRICTIONS.** The solicitation and the resulting contract must set forth a clear and accurate description of the technical requirements for the property or services to be procured. Each solicitation must provide for the following:
  - A. **Goods/Services Description.** The description may include a statement of the qualitative nature of the property or services to be procured. Whenever practicable, the description should express requirements in terms of functions to be performed or the level of performance required, including the range of acceptable characteristics or minimum acceptable standards. If at all possible, Recipient and Subrecipient should use performance specifications instead of detailed technical specifications.
  - B. **Quantities Limited to Recipient and Subrecipient’s Actual Needs.** FTA will

not knowingly participate in the cost of excess property or services merely to permit assignment of rights to others.

- C. **Brand Name or Equal.** When it is impractical or uneconomical to make a clear and accurate description of the technical requirements of the property that Recipient and Subrecipient seek to acquire, Recipient and Subrecipient should use a “brand name or equal” description to define the performance or other salient characteristics of a specific type of property. However, the solicitation must state the salient characteristics of the named brand that offerors must provide (i.e., those qualities of an item that are essential to ensure that the intended use of the item can be satisfactorily realized).<sup>74</sup>
- D. **Prohibitions.** Solicitation requirements may not have features that unduly restrict competition. FTA is prohibited from using federal funds to support an exclusionary or discriminatory specification. Examples of such requirements appear in one or both Common Grant Rules, and include the following:
1. **Unreasonable Qualifications.** Unreasonable requirements placed on bidders or offerors in order for them to qualify to do business.
  2. **Unnecessary Experience.** Unnecessary experience requirements.
  3. **Retainers.** Making noncompetitive awards without further justification to any person or firm on a retainer contract with Recipient and Subrecipient.
  4. **Excessive Bonding.** FTA does not require any bonding for rolling stock, services, maintenance operations, or any contracts other than construction. Because bonding requirements can limit contractor participation, FTA expects the recipient’s bonding requirements to be reasonable and not unduly restrictive. Although FTA may decline federal assistance for the project, FTA will not challenge state or local bonding requirements as unreasonably restrictive of competition.
  5. **Brand Name Only.** Specifying only a “brand name” product instead of allowing an offer of “or equal” product, or allowing an “or equal” product without specifying the brand name product’s salient characteristics.
  6. **In-State or Local Geographic Restrictions.** Specifying statutorily or administratively imposed in-state or local geographical preferences, or evaluating offers in light of in-state or local geographic preferences. Specifically, Recipient and Subrecipient should not limit bus purchases to in-state dealers. Exceptions expressly mandated or encouraged by federal law

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<sup>74</sup> See FTA’s “Best Practices Procurement Manual” for preparation of specifications and for template contract language, available at: [transit.dot.gov/sites/fta.dot.gov/files/docs/funding/procurement/8286/fta-best-practices-procurement-and-lessons-learned-manual-2016.pdf](https://transit.dot.gov/sites/fta.dot.gov/files/docs/funding/procurement/8286/fta-best-practices-procurement-and-lessons-learned-manual-2016.pdf).

include the following:

- a. *Architecture and Engineering Services.* Geographic location may be a selection-criteria provided an appropriate number of qualified firms are eligible to compete for the contract, given the nature and size of the project.
  - b. *Licensing.* State licensing laws may be enforced, provided that those state requirements do not conflict with federal law.
  - c. *Disaster Projects.* Recipient and Subrecipient may show a preference to firms and individuals located in the area affected by a major disaster or emergency for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities.<sup>75</sup>
7. ***Organizational Conflict of Interest.*** An organizational conflict of interest can result in unfair competitive situations:
- a. *Occurrence.* An organizational conflict of interest occurs when any of the following circumstances arise:
    1. Lack of Impartiality or Impaired Objectivity. When the contractor is unable, or potentially unable, to render impartial assistance or advice to Recipient and Subrecipient due to other activities, relationships, contracts, or other circumstances.
    2. Unequal Access to Information. The contractor has an unfair competitive advantage by obtaining access to nonpublic information during the performance of an earlier contract.
    3. Biased Ground Rules. The contractor has developed specifications, evaluation factors, or similar documents for the current procurement during performance of an earlier procurement.
  - b. *Remedy.* Upcoming procurements must be carefully analyzed for possible conflicts of interest to identify, avoid, and mitigate them as early as possible. Recipient and Subrecipient should try separating job functions. For example, Recipient and Subrecipient will exclude a contractor from competing for contract awards of the execution of the work if that contractor develops or drafts specifications, plans, requirements, statements of work, invitations for bids, and/or requests for proposals (except if the contractor is participating in a consortia, joint venture, or other innovative contractual arrangement in which Recipient and Subrecipient contemplates award of both development and execution

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<sup>75</sup> Such activities are awarded federal assistance under the Stafford Act, 42 U.S.C. § 5150.



functions to the same entity).

8. ***Restraint of Trade.*** Engaging in noncompetitive pricing practices between firms or between affiliated companies.

9. ***Arbitrary Action.*** Taking any arbitrary action in the procurement process.

E. **Evaluation Factors.** Recipient and Subrecipient should identify all factors for evaluating bids or proposals.

F. **Prohibited or Restricted Contract Types.**

1. ***Cost Plus a Percentage of Cost Prohibited.*** Recipient and Subrecipient should not, under any circumstances, use the cost-plus-a-percentage-of-cost or cost-plus-a-percentage-of-construction-cost contracting methods.

2. ***Time and Materials Restricted.*** Recipient and Subrecipient may use time-and-material-type contracts only if:

a. ***Restricted Use.*** After a determination that no other type of contract is suitable.

b. ***Firm Ceiling Price.*** The contract specifies a ceiling price that the contractor shall not exceed except at its own risk.

G. **Other Federal Requirements Affecting the Property or Services to be Acquired.** Recipient and Subrecipient should identify those federal requirements that will impact contract scope and performance. Recipient and Subrecipient will review the latest Master Agreement and Comprehensive Review Contractor's Manual for any additional requirements.

H. **Other Federal Requirements Affecting the Bidder/Offeror and Contractor.** Recipient and Subrecipient should identify all federal requirements that a bidder or offeror must fulfill before and during contract performance. Recipient and Subrecipient will review the latest Master Agreement and Comprehensive Review Contractor's Manual for any additional requirements.

3. **METHODS OF PROCUREMENT.** Recipient and Subrecipient should use the competitive procedures best suited to the circumstances of the contract action sought, consistent with its needs to fulfill its requirements efficiently. FTA has established the following standards for various procurement methods.

A. **Micro-Purchases.** FTA considers micro-purchases to be purchases of \$10,000 or less.<sup>76</sup> (However, Davis-Bacon prevailing wage and hour restrictions apply to construction contracts exceeding \$2,000.) Recipient and Subrecipient are

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<sup>76</sup> OMB Memorandum OM-18-18 (does not apply to Buy America).

allowed to set thresholds lower than FTA's standard for this procurement method.

1. FTA permits purchases below this threshold without obtaining competitive quotations, and those purchases are exempt from Buy America requirements, but Recipient and Subrecipient must provide equitable distribution among qualified suppliers, and not split procurements to avoid competition.
2. Recipient and Subrecipient must document a determination that the price is fair and reasonable and describe the method of this determination. It is unnecessary to describe the rationale for the procurement method, selection of contract type, and reasons for contractor selection or rejection.
3. Recipient and Subrecipient may document micro-purchases through various means. For example, the official tasked to review and authorize payment of a credit card bill may add a statement to that bill such as: "I have examined the expenditures reflected in this bill and determined that each expenditure reflects a reasonable price based on market prices offered by the vendors to the general public." Recipient and Subrecipient should supplement that statement by: (1) stapling a preprinted sheet to the bill, (2) stamping the bill with a rubber stamp imprinting the statement, or (3) asking the credit card provider to print an appropriate statement on each bill that the reviewing official may sign.

B. **Small Purchases.** Simpler and less formal procurement methods are used for securing services, supplies, or other properties that cost more than the micro-purchase threshold, but do not cost more than the simplified acquisition threshold (i.e., \$250,000). Recipient and Subrecipient should obtain price or rate quotations from an adequate number of qualified sources. Recipient and Subrecipient are allowed to set lower thresholds as they deem fit for this procurement method. These purchases are also exempt from FTA's Buy America requirements. FTA permits purchases below this threshold without obtaining competitive quotations, and those purchases are exempt from Buy America requirements. Recipient and Subrecipient should obtain quotes from an adequate number of qualified sources, and not split procurements to avoid competition.

C. **Sealed Bids (Formal Advertising).** This is a procurement method where Recipient and Subrecipient publicly solicits bids and awards a firm-fixed-price contract (lump sum or unit price) to the responsible bidder whose bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest in price.

1. **When Appropriate.** This is the preferred method for procuring construction and other property if the factors below are present. For sealed bidding to be feasible, the following conditions should exist:
  - a. *Specifications.* A realistic, complete, clear, and accurate 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. *Firm-Fixed-Price Contract*. The procurement lends itself to a firm-fixed-price contract.
  - d. *Price*. Recipient and Subrecipient can make the selection of the successful bidder on the basis of price and those price-related factors included in the solicitation.
  - e. *Discussions*. No discussion occurs with bidders.
2. **Procurement Requirements**. Recipient and Subrecipient applies the following requirements:
- a. *Publicity*. Recipient and Subrecipient will publicly advertise the invitation for bids.
  - b. *Adequate Sources*. Recipient and Subrecipient will solicit bids from an adequate number of known suppliers, providing them sufficient time to prepare bids prior to the date set for opening the bids.
  - c. *Specifications*. Recipient and Subrecipient will describe the items or services that it seeks so that the bidder may properly respond, including any specifications and pertinent attachments.
  - d. *Bid Opening*. Recipient and Subrecipient will open all bids at the time and place prescribed in the invitation for bids.
  - e. *Firm-Fixed-Price Contract*. Recipient and Subrecipient will award a firm-fixed-price contract in writing to the lowest responsive and responsible bidder. When specified in the bidding documents, Recipient and Subrecipient should consider factors such as discounts, transportation costs, and life-cycle costs to determine which bid is lowest. Recipient and Subrecipient will use payment discounts only to determine the low bid when prior experience indicates that contractors usually take advantage of such discounts.
  - f. *Rejection of Bids*. Recipient and Subrecipient will reject any or all bids if you have a sound, documented business reason.

**D. Competitive Proposals/Request for Proposals (RFP).**

- 1. **When Appropriate**. In particular, Recipient and Subrecipient will use this method when conditions are inappropriate for the use of sealed bids.

Competitive proposals are appropriate when:

- a. *Specifications.* Adequate specifications are unavailable to describe fully the specific goods or services.
  - b. *Adequate Sources.* Two or more offerors are willing to complete.
  - c. *Price.* Due to the nature of the procurement, the contract should not be based exclusively on price or price-related factors.
  - d. *Discussions.* Discussions with the offeror(s) may be necessary.
2. **Procurement Requirements.** When using this procurement method, the following requirements apply:
- a. *Publicity.* Recipient and Subrecipient will publicize requests for proposals.
  - b. *Evaluation Factors.* Recipient and Subrecipient will identify all evaluation factors in the procurement documents along with their relative importance, but the solicitation does not need to disclose numerical or percentage ratings or weights.
  - c. *Adequate Sources.* Recipient and Subrecipient will solicit proposals from an adequate number of qualified sources.
  - d. *Evaluation Method.* Recipient and Subrecipient will implement a method for conducting technical evaluations of the proposals received and for selecting awardees.
  - e. *Price.* Recipient and Subrecipient will make the award to the responsible firm whose proposal is most advantageous to Recipient and Subrecipient's program with price and other factors considered.
  - f. *Value.* In determining which proposal is most advantageous, Recipient and Subrecipient may award to the offeror whose proposal offers the greatest value to Recipient and Subrecipient. This decision should be based upon an analysis of a tradeoff of qualitative technical factors and price/cost to decide which proposal represents the "best value" to Recipient and Subrecipient.
  - g. *Basis.* Solicitations must inform potential offerors that the award will be made on a "best value" basis and indicate the basis for award.

E. **A&E and Other Services.** FTA requires the use of qualifications-based competitive proposal procedures as set forth in the "Brooks Act."

1. **When Required.** Recipient and Subrecipient should use qualifications-based

competitive proposal procedures for projects directly in support of, directly connected to, directly related to, or that lead to construction, alteration, or repair of real property. Recipient and Subrecipient will use these procedures not only when contracting for architectural and engineering services, but also for program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related services.

2. ***When Prohibited.*** Recipient and Subrecipient should only use qualifications-based competitive proposal procedures for the procurement of the services, such as program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related services if those services are directly in support of, directly connected to, directly related to, or lead to construction, alteration, or repair of real property.
3. ***Other Procurements.*** Recipient and Subrecipient should not use qualifications-based procurement procedures to obtain other types of services if those services are not related to, directly in support of, directly connected to, directly related to, or lead to construction, alteration, or repair of real, even if those services would be provided by a firm that also provides architectural and engineering services.
4. ***Qualifications-Based Proposal Requirements.*** When using this procurement method, Recipient and Subrecipient must do the following:
  - a. ***Qualifications.*** Recipient and Subrecipient will evaluate an offeror's qualifications.
  - b. ***Price.*** Recipient and Subrecipient will exclude price as an evaluation factor.
  - c. ***Most Qualified.*** Recipient and Subrecipient will conduct negotiations with only the most qualified offeror.
  - d. ***Next Most Qualified.*** Failing agreement on price, Recipient and Subrecipient will negotiate with the next most qualified offeror and, if necessary, negotiate with successive offerors in descending order until awarding a contract to the offeror whose price seems fair and reasonable.
  - e. ***Effect of State Laws.*** To the extent the State of Arizona adopts by law an equivalent qualifications-based-procurement method for acquiring architectural, engineering, and design services, Recipient and Subrecipient may use that state method instead of the federal "Brooks Act" procedures.<sup>77</sup>

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<sup>77</sup> 40 U.S.C. §§ 1101 – 1104.

5. ***Audits and Indirect Costs.*** Recipient and Subrecipient must comply with the following requirements when awarding a contract for program management, architectural engineering, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related services:
- a. ***Performance of Audits.*** Recipient and Subrecipient will perform an audit on a contract or subcontract in compliance with FAR Part 31 cost principles.
  - b. ***Indirect Cost Rates.*** Recipient and Subrecipient, as well as any third-party contractor and its subcontractors, will accept for one year the indirect cost rates established per the FAR applicable accounting periods by a cognizant federal or state government agency, if such rates are not currently under dispute.
  - c. ***Application of Rates.*** After accepting a firm's indirect cost rates as described above, Recipient and Subrecipient will apply such rates for the purposes of contract estimation, negotiation, administration, reporting, and contract payment, without limits by administrative or de facto ceilings.
  - d. ***Pre-notification and Confidentiality of Data.*** Recipient and Subrecipient will notify any affected firm when requesting or using cost and rate data. Such data shall be confidential and shall not be accessible or provided by the group of agencies sharing cost data under this subparagraph, except by written permission of the audited firm. Before requesting or using a firm's cost or rate data, not only should Recipient and Subrecipient 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 laws or regulations.
6. ***Design-Bid-Build.*** Recipient and Subrecipient should use this procurement method when they choose to contract separately for design and construction of their project. Recipient and Subrecipient will procure design services by qualifications-based methods. Recipient and Subrecipient may procure construction services through sealed bidding or competitive negotiations. Recipient and Subrecipient will procure design and construction services in a manner that conforms to applicable local law and to all applicable federal requirements.
7. ***Design-Build.*** Recipient and Subrecipient will use this procurement method when Recipient and Subrecipient seek to award the contract to a single contractor that will be responsible for both the project's design and construction, after Recipient and Subrecipient have complied with government requirements. To determine which sourcing method is

appropriate, Recipient and Subrecipient should separate the various contract activities to be undertaken and classify them as design or construction, and then calculate the estimated total value of each. Recipient and Subrecipient will 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. Recipient and Subrecipient should expect the construction portion of a design-build procurement to be predominant and, in that case, use normal procurement methods in lieu of qualification-based competitive proposals (the Brooks Act method).

- a. Recipient and Subrecipient will procure design-build services through qualifications-based, competitive proposal procedures per the Brooks Act when the preponderance of the work to be performed is for architectural and engineering program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related A&E services.
- b. Except to the extent FTA determines otherwise in writing, Recipient and Subrecipient should not use qualifications-based competitive proposal procedures to procure design-build services when the preponderance of the work to be performed are services other than those listed above, unless required by state law.
- c. Specifically, except to the extent FTA determines otherwise in writing, Recipient and Subrecipient should not use qualifications-based competitive proposal procedures to acquire other types of services, even if a firm that provides A&E services is also a potential source to perform those other types of services.
- d. A two-phase selection procedure for large design-build projects allows Recipient and Subrecipient's procurement officer to solicit proposals for design-build projects in two steps, the first is a review of technical qualifications and technical approach to the project, and the second is a complete proposal including price. The procurement officer can narrow the competitive range in the first step without a requirement for extensive proposal review on Recipient and Subrecipient's part or expensive proposal drafting on potential contractors' parts. This selection procedure is separate and distinct from prequalification.

F. **Other Than Full and Open Competition.** Normally, Recipient and Subrecipient should provide for full and open competition in soliciting offers and awarding contracts, but under certain circumstances, Recipient and Subrecipient may award a contract without providing for full and open competition.

1. **When Appropriate.** Recipient and Subrecipient should use procurement by noncompetitive proposals only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and

at least one of the following circumstances applies:

- a. ***Inadequate Competition.*** This applies after solicitation of a number of sources, competition is determined inadequate. Before determining that competition is inadequate, however, Recipient and Subrecipient should review specifications to determine if they were unduly restrictive or whether there were other reasons Recipient and Subrecipient could remedy to encourage submission or additional bids or proposals. Recipient and Subrecipient will perform a cost analysis in lieu of a price analysis in this situation.
  - b. ***Sole Source.*** This applies when required supplies or services are available from only one responsible source and no other type of supplies or services will satisfy Recipient and Subrecipient's requirements. Additionally, when Recipient and Subrecipient requires an existing contractor to make a change to its contract that is beyond the scope of that contract, Recipient and Subrecipient will make a sole source award that must be justified.
    1. **Unique Capability and Availability.** This applies when the offeror demonstrates a unique or innovative concept or capability not available from another source. Recipient and Subrecipient should consider patent or data rights restrictions. In such circumstances, it is likely that award to another contractor would result in substantial duplication of costs that are not expected to be recovered through competition or unacceptable delays in fulfilling the recipient's needs.
    2. **Single Offer.** Upon receiving a single bid or proposal in response to a solicitation, Recipient and Subrecipient will determine if competition was adequate. Recipient and Subrecipient should review the specifications for undue restrictiveness and consider surveying potential sources that chose not to submit an offer. Just because Recipient and Subrecipient received only one bid or proposal does not automatically mean competition was inadequate since unrelated factors could cause potential sources not to submit a bid or proposal. Recipient and Subrecipient will continue processing sole source procurement only if Recipient and Subrecipient determines that competition was inadequate due to prospective contractors choosing not to participate for reasons beyond Recipient and Subrecipient's control. The resulting determination will be documented in the procurement file.
2. ***Unusual and Compelling Urgency.*** This applies when Recipient and Subrecipient's need for the supplies or services is of such an unusual and compelling urgency that Recipient and Subrecipient would be seriously injured unless permitted to limit the number of sources from which it solicits bids or proposals, or when the public emergency for the requirement will not permit a delay resulting from competitive solicitation.



3. **Authorized by FTA.** Federal agencies have the authority to permit Recipient and Subrecipient to use noncompetitive proposals. Under this authority, FTA has made the following determinations:
- a. *Team, Partnership, Joint Venture, Consortia, and Research.* Whenever FTA has full knowledge of a particular firm or combination of firms as participants or third-party contractors, or a research project in which FTA has approved the participation of a particular firm or combination of firms, the grant agreement or cooperative agreement constitutes approval of arrangements in which Recipient and Subrecipient did not select participants through full and open competition. Recipient and Subrecipient should use competition, as feasible, to select the other participants in the project.
  - b. *FAR Standards.* 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 Rule, the FAR recognizes the following circumstances justify less than full and open competitive procurements:
    - 1. Statutory Authorization or Requirement. FTA's enabling legislation has not yet specified third-party contracting with specific entities. Specific statutory requirements, however, have been included in DOT appropriations acts with the result that only a single contractor is able to perform the contract.
    - 2. National Emergency. To maintain a facility, producer, manufacturer, or other supplier available for furnishing supplies or services in case of a national emergency or to achieve industrial mobilization.
    - 3. Research. To establish or maintain an essential engineering, research, or development capability to be provided by an educational or other non-profit institution or a federally funded research and development center.
    - 4. Protests, Claims, Disputes, and Litigation. To acquire the services of an expert or neutral person for any current or anticipated litigation or dispute.
    - 5. 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 the written directions of a foreign government reimbursing Recipient and Subrecipient for the cost of the acquisition of the supplies or services for such government.

6. National Security. When the disclosure of Recipient and Subrecipient's needs would compromise the national security.
  7. Public Interest. When Recipient and Subrecipient determines that it is not in the public interest in the acquisition concerned.
4. **When Prohibited**. Less than full and open completion is unjustified on the basis of:
    - a. *Failure to Plan*. Recipient and Subrecipient's lack of advance planning.
    - b. *Limited Funding Availability*. Concerns related to the amount of funds available to Recipient and Subrecipient (e.g., funds will expire) for the property or services.
  5. **Required Procedures**.
    - a. *Limited Sources*. If Recipient and Subrecipient does not provide for full and open competition, then they must solicit offers from as many potential sources as is practicable under the circumstances.
    - b. *Sole Source*. Recipient and Subrecipient may accomplish and process this type of procurement through the solicitation of a proposal from only one source, or after solicitation of a number of sources, if Recipient and Subrecipient determines that competition is inadequate. Recipient and Subrecipient will document this sole source justification in writing in the procurement file.<sup>78</sup> Recipient and Subrecipient should process modifications and change orders as a sole source procurement for any contract change that is not within the scope of the original contract.
    - c. *Cost Analysis*. Recipient and Subrecipient will prepare or obtain a cost analysis verifying the proposed cost data, the projections of the data, and the evaluation of the costs and profits.
  4. **ELIGIBLE COSTS**. Property and services must be eligible for federal reimbursement under federal cost principles before Recipient and Subrecipient may use FTA funds to support Recipient and Subrecipient costs.<sup>79</sup> Costs or prices based on estimated costs for contracts under grants or cooperative agreements will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with federal cost principles, but Recipient and Subrecipient may use their own cost principles if they comply with applicable federal cost principles.
  5. **COST AND PRICE ANALYSIS**. Perform an independent cost estimate (**ICE**) and

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<sup>78</sup> See § 3(F)(1)(b) above.

<sup>79</sup> 2 CFR Part 220, 2 CFR Part 225, 2 CFR Part 230, or FAR Part 31.

cost/price analysis in connection with every procurement action, including contract modifications (such as amendments, change orders, purchase orders, task orders, etc.) if those modification costs have not already undergone an ICE and cost/price analysis. The method and degree of analysis depends on the facts surrounding procurement situation, but as a starting point, Recipient and Subrecipient should make independent estimates before receiving offers.

- A. **Independent Cost Estimate.** Before issuing a solicitation or procuring a direct contract (including any cooperative purchasing agreement), Recipient and Subrecipient should develop an ICE for the supplies or services to be purchased. The ICE can range from a simple budgetary estimate to a complex estimate based on the type of procurement. The ICE can then assist in a determination of reasonableness or unreasonableness of price and/or the estimated costs to do the job.<sup>80</sup>
- B. **Cost Analysis.** Recipient and Subrecipient should perform a cost analysis whenever the offeror is required to submit the elements (e.g., labor hours, overhead, materials, etc.) of the estimated cost. Recipient and Subrecipient will also perform this analysis whenever adequate price competition is lacking and for sole source procurements and cooperative purchasing agreements. This analysis requirement further applies to contract modifications (such as amendments, change orders, purchase orders, task orders, etc.) if those modification costs have not already undergone an ICE and cost/price analysis.
  - 1. All costs must be allowable and allocable consistent with federal cost principles.
  - 2. Recipient and Subrecipient will 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 a cost analysis is performed or acquired. To establish a fair and reasonable profit, Recipient and Subrecipient should 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.
- C. **Price Analysis.** If competition was adequate, Recipient and Subrecipient will do a price analysis instead of a cost analysis to determine the reasonableness of the proposed contract price.
  - 1. Price analyses for micro-purchases may be limited. Recipient and Subrecipient may use an abbreviated price analysis for small purchases in

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<sup>80</sup> See Procurement System Review Contractor's Manual, Fiscal Year 2024, § VIII, P10 for FTA's guidance for developing independent cost estimates, available at: [https://www.transit.dot.gov/sites/fta.dot.gov/files/2024-03/Fiscal-Year-2024-Contractor-Manual\\_0.pdf](https://www.transit.dot.gov/sites/fta.dot.gov/files/2024-03/Fiscal-Year-2024-Contractor-Manual_0.pdf).

most cases.

2. One way to document the price analysis is to use a preprinted checklist on which a procurement officer (or other responsible person) can annotate a finding of fair and reasonable pricing and indicate the reasons, such as catalog or market prices offered in substantial quantities to the general public, regulated prices (e.g., utilities purchases), or comparison with recent prices for similar goods and services.

**D. Indirect Cost Rates, Profit, and Incentive Payments.** FTA has established the following policies for determining appropriate indirect cost rates, profit, and incentive payments.

1. **Indirect Cost Rates.** If the third-party contractor or subcontractor does not have an approved government indirect cost rate agreement, Recipient and Subrecipient should use the dollar value of the contract to determine how that rate is verified:
  - a. *Contracts of \$5 Million or Less.* FTA will accept audit recommendations of the contractor's certified public accountant, or indirect cost information in the contractor's annual statement to their stockholders, shareholders, or owners, or examples of acceptance of their rates by other government agencies within the last six months.
  - b. *Contracts Exceeding \$5 Million.* Recipient and Subrecipient should obtain a verification of the contractor's rates from the Defense Contract Audit agency another Federal cognizant audit agency, or an accounting firm that has been approved to perform audits for the Federal Government.
2. **Incentive Payments.** FTA treats Recipient and Subrecipient's incentive payments to contractors that provide accurate cost and ridership estimates in connection with a new fixed guideway capital project as eligible costs. FTA also treats Recipient and Subrecipient's incentive payments to contractors that enable a new fixed guideway capital project to be completed for less than its original estimated cost as eligible costs.

**E. Guidance.** Recipient and Subrecipient should use the following as guidance in preparing cost or price analyses:

1. FTA's "Best Practices Procurement Manual," ch. 5.
2. The National Transit Institute Course, "Risk Assessment and Basic Cost or Price Analysis."
3. Pricing Guide for FTA Grantees.<sup>81</sup>

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<sup>81</sup> Available at: [transit.dot.gov/sites/fta.dot.gov/files/docs/Helpline\\_Price\\_Guide.doc](https://transit.dot.gov/sites/fta.dot.gov/files/docs/Helpline_Price_Guide.doc).

6. **EVALUATIONS.** Recipient and Subrecipient should follow these standards:

A. **General.** Recipient and Subrecipient will evaluate bids and offers in accordance with the all the evaluation factors set forth in the IFBs or RFPs. Recipient and Subrecipient may only use those evaluation factors described in those procurement documents to determine the award. Recipient and Subrecipient will not modify evaluation factors after receiving bids or proposals.

B. **Options.** In awarding the basic contract:

1. **Evaluation Required.** Recipient and Subrecipient will evaluate offers for any option quantities or periods contained in a solicitation when Pheonix has determined, prior to soliciting offers, that it is likely to exercise the options.

2. **Evaluation Not Required.** It is unnecessary to evaluate offers for any option quantities when Recipient and Subrecipient determines that such an evaluation would not be in its own best interest (and senior officials have approved this determination). An example is when a reasonable certainty exists that funds will be unavailable to permit exercise of the option.

C. **Evaluators.** If Recipient and Subrecipient's staff is unavailable for assignment of proposal evaluation and procurement administration duties, then Recipient and Subrecipient will contract for those services. Assigned persons, and the method in which they are contracted, must comply with FTA and Recipient and Subrecipient procurement standards.

7. **CONTRACT AWARD.** The following provisions apply to third-party contract awards:

A. **Award to Other Than the Lowest Bidder or Offeror.** Recipient and Subrecipient will award when it furthers an objective consistent with this guidance, including improved long-term operating efficiency and lowered long-term costs.<sup>82</sup>

B. **Award to a "Responsible" Contractor.** Recipient and Subrecipient may award a contract financed with federal funds only to a contractor that is capable of successfully performing under the terms and conditions of the contract.<sup>83</sup> To determine responsibility, Recipient and Subrecipient will consider the following criteria in evaluating offers before awarding the contract:

1. **Integrity.** The contractor's integrity and business ethics.

2. **Debarment/Suspension.** The contractor's status with respect to DOT regulations, "Government-wide Debarment and Suspension (Non-

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<sup>82</sup> 49 U.S.C. § 5325(c) and 49 U.S.C. ch. 53

<sup>83</sup> SAFETEA-LU amended 49 U.S.C. § 5325

procurement)."84

3. **Affirmative Action and DBE.** The contractor's compliance with FTA's DBE requirements.
4. **Public Policy.** The contractor's compliance with public policy.<sup>85</sup>
5. **Administrative and Technical Resources.** The contractor's organization, experience, accounting, operational controls, and technical resources (or ability to obtain them).
6. **Licensing and Taxes.** The contractor's compliance with applicable tax and licensing laws and regulations.
7. **Financial Resources.** The contractor's financial resources or ability to obtain them.
8. **Production Capability.** The contractor's production, construction, and technical equipment and facilities, or ability to obtain them.
9. **Timeliness.** The contractor's ability to perform the required delivery or performance schedule, considering existing commitments.
10. **Performance.** The contractor's current and past performance.
  - a. *Sufficient Resources.* Key personnel, parent firm, subcontracts, etc.
  - b. *Adequate Past Experience.* Similar work with particular attention to management approach, staffing, timeliness, technical success, budgetary controls, and other specialized considerations as described in the solicitation.
  - c. *Past Deficiencies Not the Fault of Offeror.* A prospective offeror that is or recently has been seriously deficient in contract performance is presumed to be nonresponsible, unless Recipient and Subrecipient determine that the circumstances were properly beyond the offeror's control, or unless the offeror has taken appropriate corrective action. Past failure to apply sufficient tenacity, perseverance, and effort to perform acceptably is strong evidence of nonresponsibility. Recipient and Subrecipient should consider the number of the offeror's contracts involved and the extent of deficient performance in each contract when making this determination.

C. **Rejection of Offers.** Recipient and Subrecipient may reject all bids submitted in response to formal advertising or sealed bid procurements, even though the

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<sup>84</sup> 2 CFR Parts 180 and 1200, or under the FAR at 48 CFR ch. 1, Part 9.4

<sup>85</sup> 49 U.S.C. § 5325(j)(2)(B)

offerors might have had an expectation that one of them would receive a contract.

## CHAPTER VII

### **RESOLVING CONTRACTUAL AND ADMINISTRATIVE ISSUES**

1. **ADMINISTRATIVE PRACTICE.** Recipient and Subrecipient are responsible for resolving all contractual and administrative issues arising out of procurements, including source evaluation and selection, as well as protests of awards, disputes, and claims. Recipient and Subrecipient will use alternative dispute resolution procedures whenever appropriate in accordance with good administrative practices and sound business judgment. FTA will not substitute its judgment for that of Recipient and Subrecipient unless the matter is primarily a federal concern. Nevertheless, FTA can become involved in administrative decisions when Recipient and Subrecipient's protest decisions are appealed to FTA, and particularly when Recipient and Subrecipient seek to use FTA funds to support the costs it incurs when entering into settlements or resolving protests, disputes, claims, or litigation.<sup>86</sup>
2. **PROTESTS.**
  - A. **Recipient and Subrecipient's Role and Responsibilities.** Recipient and Subrecipient should take initial actions for settling protests of third-party contract awards.
    1. **Protest Procedures.** Protests shall be handled in accordance with Recipient and Subrecipient's Procurement Code and regulations. Recipient and Subrecipient's actions depend on the type and timing of the protest.
    2. **Responsibilities to FTA.** Phoenix shall do the following:
      - a. **Timely Notification.** Subrecipient must notify Phoenix by way of letter (enclosing all documentation) of any protests. Phoenix will then notify the FTA by way of a letter (from the Public Transit Director or designee), enclosing a copy of the protest when a Recipient and Subrecipient's FTA-funded third-party contract is protested. Phoenix must keep FTA informed about the status of the protest. This information should also be provided in the Department's Milestone Progress Report that Phoenix submits to FTA, and at Phoenix's next "Project Management Oversight" review with FTA. Also, Recipient and Subrecipient will provide adversely affected proposers with notification of the protest, and a copy of the protest.
      - b. **Access to Information.** If requested, Phoenix will provide FTA with copies of all protest-related supporting documents.
  - B. **FTA's Role and Responsibilities.** FTA has established an appeals process it may use to review, in limited circumstances, for protests of Recipient and Subrecipient's procurement decisions.

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<sup>86</sup> FTA Circular 4220.1G ch. III, § 7.



## **1. Requirements for the Protester.**

- a. *Protester Must Qualify as an “Interested Party.”* To qualify for FTA review, the appeal must be requested by an “interested party,” which is a party that is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award or failure to award the third-party contract at issue.
- b. *Exhaustion of Administrative Remedies.* The protester must pursue and complete Recipient and Subrecipient’s administrative procedures to resolve the protest before appealing Recipient and Subrecipient’s decision to FTA.
- c. *Five-Day Limit for Appeal.* The FTA must receive the protester’s appeal within five working days of the date the protester learned or should have learned of an adverse final decision by Recipient and Subrecipient.

## **2. Extent of FTA Review.** FTA reviews third-party-contract protests in the following situations:

- a. *Procedural Issues.* Recipient and Subrecipient fails to follow its protest procedures or to review a complaint or protest.
- b. *Violations of Federal Law or Regulations.* FTA will exercise discretionary jurisdiction over those cases deemed to involve issues important to FTA’s overall public transportation program. FTA will refer violations of other federal laws to the appropriate federal authority.
- c. *Violations of State or Local Law or Regulations.* FTA will refer violations of state or local law to the appropriate state or local authority.

## **3. CHANGES AND MODIFICATIONS.**

- A. **Recipient and Subrecipient’s Role and Responsibilities.** Recipient and Subrecipient are responsible for issuing, evaluating, and making necessary decisions pertaining to any change orders, constructive change, or modifications that it may have invoked.
  1. **Approval and Justification.** Recipient and Subrecipient will receive approval from authorized officials and provide sufficient cost justification for all change orders.
  2. **Cost Restrictions.** To be eligible for FTA assistance under the grant or cooperative agreement, Recipient and Subrecipient will ensure that the cost of the modification, change order, or constructive change is allowable, within the scope of the grant or cooperative agreement, allocable, and reasonable for the completion of project scope.

- B. **FTA's Role and Responsibilities.** FTA does not participate in, but reserves the right to review, Recipient and Subrecipient's supporting documentation.

#### 4. **DISPUTES.**

- A. **Recipient and Subrecipient's Role and Responsibilities.** Recipient and Subrecipient will evaluate and resolve third-party-contract disputes. If Recipient and Subrecipient intend to request FTA's permission to use federal assistance to support payments to a third-party contractor, or even intends to request increased funding for that purpose, Recipient and Subrecipient must do the following:

1. **Adequate Documentation.** Recipient and Subrecipient will adequately include in its project files all pertinent facts, events, negotiations, applicable laws, and a legal evaluation of the likelihood of success in any potential litigation proceeding. Recipient and Subrecipient should ensure that its documentation provides sufficient information to serve as the basis for FTA concurrence in the compromise or settlement of the claim.
2. **Audit.** Recipient and Subrecipient should consider conducting or obtaining a formal audit to substantiate each part of a large contract dispute before entering into a settlement. In those instances, the audit should occur in accordance with "Generally Accepted Auditing Standards" as defined by the American Institute of Certified Public Accountants. Also, Recipient and Subrecipient should consider undertaking an audit or similar analysis before settlement of a smaller dispute.
3. **Notification to FTA.** Recipient and Subrecipient will provide to Phoenix a list of all outstanding claims exceeding \$100,000 and a list of all claims settled during the reporting period as part of each quarterly progress report. Recipient and Subrecipient must include a brief description and reasons for each claim. Phoenix will notify FTA of any current or prospective litigation relating to any third-party contract.

- B. **FTA's Role and Responsibilities.** FTA does not, in general, become involved in the negotiation of the resolution of a dispute, but reserves the right to do so as follows:

1. **Determine Reasonableness.** FTA may review the reasonableness of a negotiated settlement for the purpose of determining the extent of FTA's participation in the settlement.
2. **Review Documents.** FTA may initiate review of Recipient and Subrecipient's claims file/history or experience under a particular grant or cooperative agreement. Recipient and Subrecipient must return to FTA any claimed amounts determined to be ineligible through subsequent audit or FTA review if Recipient and Subrecipient have disbursed those amounts. FTA reserves the right to defer participation in settlement costs until an adequate audit has

been provided.

## 5. CLAIMS.

A. **Recipient and Subrecipient's Role and Responsibilities.** It is Recipient and Subrecipient's responsibility to evaluate and resolve third-party contract claims resulting from violations, defaults, or breaches by the contractor and to resolve any claims that the contractor may present against Recipient and Subrecipient. Recipient and Subrecipient will also do the following:

1. **Legal Rights and Remedies.** Recipient and Subrecipient will pursue all legal rights and remedies available under any third-party contract.
2. **Notification to FTA.** Recipient and Subrecipient will notify Phoenix, who will then notify the FTA of any current or prospective litigation or major disputed claim in excess of \$100,000 relating to any third-party contract in which it is involved. Phoenix, in consultation with Subrecipients, must provide FTA with a brief description of the claim or litigation, the basis of the disagreement, how far the litigation has proceeded or the decision/agreement reached, and whether an appeal is likely to be taken. FTA reserves the right to review Recipient and Subrecipient's supporting documentation. This information should also be provided in the Phoenix's Milestone Progress Report, submitted to FTA, and provided at Phoenix's next "Project Management Oversight" review with FTA.

B. **FTA's Role and Responsibilities.** FTA retains a right to a share of any net proceeds recovered through a third-party contract claim, in proportion to the federal share committed to the project. If the affected third-party contract contains a liquidated damages provision, FTA expects Recipient and Subrecipient to credit any liquidated damages to the project unless FTA permits other uses of the funds involved.

## 6. SHARE OF NEGOTIATED OR IMPOSED COSTS.

A. **Recipient and Subrecipient's Responsibilities.**

1. **Maintain Sufficient Records.** Recipient and Subrecipient will retain claims records sufficient to substantiate that it took reasonable and prudent measures to prevent or offset the causes underlying the claim to justify FTA's participation in the negotiated cost or costs imposed through binding arbitration or judgments rendered by federal, state, or local courts.
2. **Obtain FTA Concurrence.** Even if Recipient and Subrecipient receives an assessment of costs through binding arbitration or court decision, it must secure FTA's review and written concurrence in a proposed claim or final claim settlement before Recipient and Subrecipient may use federal funds in the following instances:

- a. *More Than \$100,000.* When negotiated settlement exceeds \$100,000.
- b. *Insufficient Funds.* When insufficient funds remain in the approved project to cover the settlement.
- c. *Special Federal Interest.* Where a special federal interest is declared because of program management concerns or possible mismanagement, impropriety, waste, or fraud.

**B. FTA's Prerogatives.**

1. ***Review Supporting Documentation.*** FTA reserves the right to review Recipient and Subrecipient's supporting documentation.
2. ***Provide Federal Assistance.*** FTA may fund a prorated share of the properly-incurred eligible costs of contractor claims that are not caused by mismanagement on the part of Recipient and Subrecipient or attributable to the contractor.
3. ***Deny Federal Assistance.*** Claims that result from Recipient and Subrecipient's negligence or error normally are ineligible for FTA participation. FTA normally will not participate in any claim settlement for which Recipient and Subrecipient failed to:
  - a. Obtain clear access to all needed right-of-way prior to award of the construction contract;
  - b. Execute all required utility agreements in time to assure uninterrupted construction progress;
  - c. Undertake comprehensive project planning and scheduling to achieve proper coordination among contractors;
  - d. Inform potential contractors of all available geo-technical information on subsurface conditions;
  - e. Assure that all furnished materials are compatible with contractor project facilities and/or equipment and available when needed;
  - f. Complete all pre-construction survey and engineering prior to issuing the contractor a "Notice to Proceed";
  - g. Obtain the necessary approvals and agreements from all other public authorities affected by the project prior to contract award; or
  - h. Assure that all design and shop drawings are promptly approved and made available to the contractor as needed.