



U.S. Department  
of Transportation

**Federal Transit  
Administration**

# CIRCULAR

**FTA C 4220.1F**

November 1, 2008

**Subject: THIRD PARTY CONTRACTING GUIDANCE**

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1. **PURPOSE.** This circular provides contracting guidance for recipients of Federal assistance awarded by the Federal Transit Administration (FTA) when using that Federal assistance to finance its procurements (third party contracts). This revision incorporates the new procurement provisions of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), and includes the most current available guidance for the Federal public transportation program as of the date of publication.
2. **CANCELLATION.** This circular cancels FTA Circular 4220.1E, "Third Party Contracting Requirements," dated 06-19-03.
3. **AUTHORITY.** Federal Transit Laws, Title 49, United States Code, Chapter 53.
4. **WAIVER.** FTA reserves the right to waive any provision of this circular to the extent permitted by Federal law or regulation.
5. **FEDERAL REGISTER NOTICE.** In conjunction with publication of this circular, a *Federal Register* notice was published on September 30, 2008 (73 FR 56896), addressing comments received during the development of the circular.
6. **AMENDMENTS TO THE CIRCULAR.** FTA reserves the right to update this circular due to changes in other revised or new guidance and regulations that undergo notice and comment, without further notice and comment on this circular. FTA will post updates on our Web site: <http://www.fta.dot.gov/>. The Web site allows the public to register for notification when FTA issues *Federal Register* notices or new guidance; visit the Web site and click on "Sign-up for e-mail updates."
7. **ACCESSIBLE FORMATS.** This document is available in accessible formats upon request. To obtain paper copies of this circular as well as information regarding these accessible formats, telephone FTA's Administrative Services Help Desk, 202-366-4865. Individuals with hearing impairments may contact the Federal Relay Service, 1-800-877-8339 for assistance with the call.

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James S. Simpson

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**THIRD PARTY CONTRACTING GUIDANCE**

**TABLE OF CONTENTS**

<u>CHAPTER</u>		<u>PAGE</u>
I.	<u>INTRODUCTION AND ROLE OF THE FEDERAL TRANSIT ADMINISTRATION</u> .....	I-1
	1. The Federal Transit Administration (FTA) .....	I-1
	2. Authorizing Legislation .....	I-1
	3. How to Contact FTA .....	I-1
	4. Background .....	I-2
	5. Definitions .....	I-2
	6. FTA's Role .....	I-7
II.	<u>APPLICABILITY</u> .....	II-1
	1. Legal Effect of the Circular .....	II-1
	2. Applicability of the Circular .....	II-1
	3. Federal Laws and Regulations .....	II-8
	4. State and Local Laws and Regulations .....	II-9
III.	<u>THE RECIPIENT'S RESPONSIBILITIES</u> .....	III-1
	1. Written Standards of Conduct .....	III-1
	2. Self-Certification .....	III-1
	3. Third Party Contracting Capacity .....	III-1
	4. Audit .....	III-6
IV.	<u>THE RECIPIENT'S PROPERTY AND SERVICES NEEDS AND FEDERAL REQUIREMENTS AFFECTING THOSE NEEDS</u> .....	IV-1
	1. Determining the Recipient's Needs .....	IV-1
	2. Federal Requirements That May Affect a Recipient's Acquisitions .....	IV-3
V.	<u>SOURCES</u> .....	V-1
	1. Force Account .....	V-1
	2. Shared Use .....	V-1
	3. Joint Procurement .....	V-1
	4. State or Local Government Purchasing Schedules or Purchasing Contracts .....	V-2
	5. Federal Excess and Surplus Property .....	V-2
	6. Federal Supply Schedules .....	V-2
	7. Existing Contracts .....	V-4
	8. The Open Market .....	V-8

<u>CHAPTER</u>	<u>PAGE</u>
VI. <u>PROCEDURAL GUIDANCE FOR OPEN MARKET</u>	
<u>PROCUREMENTS</u> .....	VI-1
1. Competition Required .....	VI-1
2. Solicitation Requirements and Restrictions .....	VI-2
3. Methods of Procurement .....	VI-7
4. Eligible Costs .....	VI-19
5. Incentive Costs and Payments .....	VI-19
6. Cost and Price Analysis .....	VI-19
7. Evaluations .....	VI-21
8. Contract Award .....	VI-22
VII. <u>PROTESTS, CHANGES AND MODIFICATIONS, DISPUTES,</u>	
<u>CLAIMS, LITIGATION, AND SETTLEMENTS</u> .....	VII-1
1. Protests .....	VII-1
2. Changes and Modifications .....	VII-4
3. Disputes .....	VII-5
4. Claims and Litigation .....	VII-6
5. FTA Participation in Settlements, Arbitration Awards, and	
Court Awards .....	VII-8
 <u>APPENDICES</u>	
APPENDIX A	<u>REFERENCES</u> ..... A-1
APPENDIX B	<u>FTA REGIONAL AND METROPOLITAN OFFICE</u> <u>CONTACT INFORMATION</u> ..... B-1
APPENDIX C	<u>THIRD PARTY CONTRACTING CHECKLISTS</u> ..... C-1
APPENDIX D	<u>FEDERALLY REQUIRED AND OTHER MODEL</u> <u>CLAUSES—MATRICES</u> ..... D-1
INDEX	<u>SUBJECT AND LOCATION IN CIRCULAR</u>

## CHAPTER I

### INTRODUCTION AND ROLE OF THE FEDERAL TRANSIT ADMINISTRATION

1. THE FEDERAL TRANSIT ADMINISTRATION (FTA). FTA is one of ten modal administrations within the U.S. Department of Transportation (DOT) and is headed by an Administrator who is appointed by the President of the United States. FTA administers its programs and carries out its other activities through its headquarters office in Washington, DC, 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, American Samoa, and in federally recognized Indian tribal areas.

Public transportation includes, but is not limited to, transportation by buses, subways, light rail, commuter rail, monorail, passenger ferry boats, trolleys, inclined railways, people movers, and vans. Public transportation may be either fixed-route or demand-response service. The Federal Government, through FTA, provides financial assistance to develop new public transportation systems and improve, maintain, and operate existing systems. FTA oversees thousands of federally assisted projects to hundreds of State and local public transportation providers, primarily through its ten regional offices. Each FTA recipient is responsible for managing its programs and projects in compliance with applicable Federal requirements, and FTA is responsible for ensuring that recipients comply with those requirements.

2. AUTHORIZING LEGISLATION. Most Federal transit laws are codified at 49 U.S.C. Chapter 53. Authorizing legislation is substantive legislation enacted by Congress that establishes or continues the legal operation of a Federal program or agency. Congress has amended FTA's authorizing legislation every four to six years. FTA's most recent authorizing legislation is the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, August 10, 2005, as amended by the SAFETEA-LU Technical Corrections Act, 2008, Public Law 110-244, June 6, 2008. SAFETEA-LU authorizes FTA programs from Federal Fiscal Year 2006 through Federal Fiscal Year 2009. Revisions to this edition of the circular encompass the SAFETEA-LU changes to Federal transit law and changes required by other laws that have become effective since FTA last issued this circular in 2003.
3. HOW TO CONTACT FTA. FTA's regional and metropolitan offices are responsible for providing financial assistance to FTA recipients and overseeing the implementation of most FTA programs. Certain programs, however, are the responsibility of FTA headquarters. You should direct inquiries to either the regional or metropolitan office responsible for the geographic area in which you are located. *See*, Appendix B for contact information.

For further information, visit the FTA Web site: <http://www.fta.dot.gov/>, or contact FTA headquarters at the following address and phone number:

Federal Transit Administration  
Office of Communication and Congressional Affairs  
1200 New Jersey Avenue, SE  
Washington, DC 20590  
Phone: 202-366-4043  
Fax: 202-366-3472

4. BACKGROUND. Because FTA awards such a substantial amount of Federal assistance to support public transportation through its grants and cooperative agreements, Federal laws and regulations require FTA to ensure that its recipients use that Federal assistance prudently and in compliance with all applicable Federal requirements. While FTA's enabling legislation includes several provisions governing recipient procurements financed with FTA assistance (third party contracts), other government-wide Federal requirements seek to ensure fair and economical procurements when Federal assistance is expended.
5. DEFINITIONS. All definitions in 49 U.S.C. Section 5302 apply to this circular. The following additional definitions are provided:
  - a. Approval, Authorization, Concurrence, Waiver means a deliberate written statement (transmitted in typewritten hard copy or in an electronic format or medium) of a Federal Government official authorized to permit the recipient to take or omit an action required by the Grant Agreement or Cooperative Agreement for the Project, Master Agreement, or this circular, which action may not be taken or omitted without such permission. Except to the extent that FTA determines otherwise in writing, such approval, authorization, concurrence, or waiver permitting the performance or omission of a specific action does not constitute permission to perform or omit other similar actions. An oral permission or interpretation has no legal force, authority, or effect.
  - b. Best Value describes a competitive, negotiated procurement process in which the recipient reserves the right to select the most advantageous offer by evaluating and comparing factors in addition to cost or price such that a recipient may acquire technical superiority even if it must pay a premium price. A "premium" is the difference between the price of the lowest priced proposal and the one that the recipient believes offers the best value. The term "best value" also means the expected outcome of an acquisition that, in the recipient's estimation, provides the greatest overall benefit in response to its material requirements. To achieve best value in the context of acquisitions for public transportation purposes, the evaluation factors for a specific procurement should reflect the subject matter and the elements that are most important to the recipient. While FTA does not mandate any specific evaluation factors, the recipient must disclose those factors in its solicitation. Evaluation factors may include, but are not limited to, technical design, technical approach, length of delivery schedules, quality of proposed personnel, past performance, and management plan. This definition is intended neither to limit nor to dictate qualitative measures a recipient may employ, except that they must support the purposes of the Federal public transportation program.

- c. Cardinal Change means a 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.
- d. Change Order means an order authorized by the recipient directing the contractor to make changes, pursuant to contract provisions for such changes, with or without the consent of the contractor.
- e. Common Grant Rules, for purposes of this circular, means:
  - (1) DOT regulations, “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,” 49 CFR Part 18, which apply to Federal grants and cooperative agreements with governmental recipients of Federal assistance including Indian tribal governments, and
  - (2) DOT regulations, “Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,” 49 CFR Part 19, which apply to Federal grants and cooperative agreements with non-governmental recipients of Federal assistance.
- f. Constructive Change means an act or omission by the recipient that, although not identified by a “change order” does in fact cause a change in the contract work.
- g. Cooperative Agreement means an instrument by which FTA awards Federal assistance to a specific recipient to support a particular project in which FTA takes an active role or retains substantial control, as described in 31 U.S.C. Section 6305.
- h. Design-Bid-Build Project means a construction project under which a recipient 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.
- i. Design-Build Project, as defined in 49 U.S.C. Section 5325(d)(1), means (1) a project under which a recipient 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 conforms to specific performance criteria; and (2) may include an option to finance, or operate for a period of time, the system or segment or any combination of designing, building, operating, or maintaining such system or segment. Apart from the definition at 49 U.S.C. Section 5325(d)(1), a “design-build project” also means a construction project under which a recipient enters into a contract with a seller, firm, or consortium of firms both to design and construct a public transportation facility that is the subject of the project.

- j. Electronic Commerce (E-Commerce) consists of electronic techniques for accomplishing business transactions including electronic mail or messaging, world wide web internet technology, electronic bulletin boards, purchase cards, electronic funds transfer, electronic signatures, and electronic data interchange.
- k. Force Account means the recipient's own labor forces and equipment, as discussed in this circular in the context of performing project work.
- l. FTA means the Federal Transit Administration.
- m. Full and Open Competition means that all responsible sources are permitted to compete.
- n. Governmental Recipient means a recipient that must comply with the Common Grant Rule at 49 CFR Part 18. This includes a State or local government or a federally recognized Indian tribal government, as defined in this section of this Chapter.
- o. 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, as described in 31 U.S.C. Section 6304.
- p. Indian Tribal Government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community, including any Native village as defined in Section 3 of the Alaska Native Claims Settlement Act, 43 U.S.C. Section 1602, certified by the Secretary of the Interior as eligible for the special programs and services provided by him or her through the Bureau of Indian Affairs.
- q. Joint Procurement (sometimes informally referred to as "cooperative procurement") means 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 a State or local government purchasing schedule or contract, a joint procurement is not drafted for the purpose of accommodating the needs of other parties that may later choose to participate in the benefits of that contract.

We recognize that some will use the term "cooperative procurement" informally to refer to arrangements we designate "joint procurement." We also recognize that this may cause confusion with the very different arrangements for the General Services Administration's (GSA) "Cooperative Purchasing Program" and with similar State or local government purchasing programs that the State or local government might refer to as "cooperative."

- r. Local Government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of



governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government. This term does not include a local public institution of higher education.

- s. Master Agreement means the FTA document incorporated by reference and made part of FTA's standard grant agreements and cooperative agreements that contains the standard terms and conditions governing the administration of a project supported with Federal assistance awarded by the FTA.
- t. Non-Governmental Recipient means a recipient that must comply with the Common Grant Rule at 49 CFR Part 19. This includes a public and private institution of higher education, a public or private hospital, and any other quasi-public and private nonprofit organization such as, but not limited to, a community action agency, research institute, educational association, and health center. FTA reserves the right to apply the requirements of 49 CFR Part 19 to a commercial organization, a for-profit organization, a foreign or international organization (such as an agency of the United Nations), and an individual. The term does not include a government-owned contractor-operated facility or research center providing continued support for mission-oriented, large-scale programs that is government-owned or controlled, or is designated as federally funded research and development center.
- u. Project Labor Agreement (PLA) means an agreement between the contractor, subcontractors, and the union(s) representing workers. Under a PLA, the contractor and subcontractors on a project and the union(s) agree on terms and conditions of employment for the project, establishing a framework for labor-management cooperation to advance the buyer's procurement interest in cost, efficiency, and quality.
- v. Property, as used in this circular, includes real property consisting of land and buildings, structures, or appurtenances on land, equipment, supplies, other expendable property, intellectual property, and intangible property.
- w. Public Transportation means transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include schoolbus, charter, sightseeing, or intercity bus transportation, or intercity passenger rail transportation provided by the entity described in 49 U.S.C. Chapter 243, AMTRAK, (or a successor to such entity).
- x. Recipient means the public or private entity to which FTA awards Federal assistance through a grant, cooperative agreement, or other agreement. The recipient is the entire legal entity even if only a particular component of the entity is designated in the document through which FTA has awarded Federal assistance. The term "recipient" includes "grantee," which is a "recipient" of Federal grant assistance. The term "recipient" also includes each member of a consortium, joint venture, team, or partnership awarded FTA assistance through a grant, cooperative agreement, or other agreement.

For the purposes of this circular, “recipient” also includes any subrecipient or subgrantee of the recipient. Furthermore, a recipient is responsible for assuring that each of its subrecipients complies with the applicable requirements and standards of this circular, and that each of its subrecipients is aware of the Federal statutory and regulatory requirements that apply to its actions as a subrecipient.

Neither a third party contractor nor a third party subcontractor is a “recipient” for purposes of this circular.

- y. Revenue Contract means a contract in which the recipient or subrecipient provides access to public transportation assets for the primary purpose of either producing revenues in connection with a public transportation related activity, or creating business opportunities involving the use of FTA assisted property.
- z. State means a State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, and the Virgin Islands or any agency or instrumentality of a State exclusive of local governments. “State” does not include any public and Indian housing agency under the United States Housing Act of 1937.
- aa. State or Local Government Purchasing Schedule or Purchasing Contract means an arrangement that a State or local government has established with multiple vendors in which those vendors agree to provide essentially an option to the State or local government, and its subordinate government entities and others it might include in its programs, to acquire specific property or services in the future at established prices. These arrangements are somewhat similar to the GSA’s Cooperative Purchasing Program available for Federal Government use. If, at a later date, the State or local government permits others to use its schedules, the State or local government might seek the agreement of the vendor to provide the listed property or services to others with access to the schedules. In the alternative the State or local government establishing the schedules might permit the vendor to determine whether or not it wishes to provide others the same contractual arrangement it affords the State or local government that has established the schedules.

We recognize that some will use the term “cooperative” in reference to these State and local programs, possibly because they are somewhat similar to GSA’s “Cooperative Purchasing Program.” These programs are distinct from “Joint Procurement” as defined this Chapter.

- bb. Third Party Contract refers to a recipient’s contract with a vendor or contractor, including procurement by purchase order or purchase by credit card, which is financed with Federal assistance awarded by FTA.
- cc. Unsolicited Proposal means a proposal that is:
  - (1) Innovative and unique,

- (2) Independently originated and developed by the offeror,
- (3) Prepared without the recipient's supervision, endorsement, direction, or direct involvement,
- (4) Sufficiently detailed that its benefits in support of the recipient's mission and responsibilities are apparent,
- (5) Not an advance proposal for property or services that a recipient could acquire through competitive methods, and
- (6) Not an offer responding to a recipient's previously published expression of need or request for proposals.

dd. Value Engineering means the systematic application of recognized techniques that identify the function of a product or service, establish a value for that function, and provide the necessary function reliably at the lowest overall cost. In all instances, the required function should be achieved at the lowest possible life-cycle cost consistent with requirements for performance, maintainability, safety, security, and aesthetics.

6. FTA'S ROLE. Consistent with the Common Grant Rules' directions to Federal agencies not to substitute their judgment for that of their recipients, FTA does not substitute its judgment for that of its recipients by making third party contract decisions for its recipients. FTA's role in third party procurements complies with the principles of Executive Order No. 13132, "Federalism," August 4, 1999, 5 U.S.C. Section 601 note. The Executive Order directs Federal agencies to refrain from substituting their judgment for that of their State recipients unless the matter is primarily a Federal concern and, to the maximum extent feasible, to permit the States to establish their own standards rather than impose national standards.

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

- a. Reliance on the Recipient's Self-Certification. FTA recognizes that most FTA recipients have experience with the third party contracting requirements of the Common Grant Rules. Therefore, FTA will rely primarily on the recipient's annual "self-certification" (usually submitted in the first quarter of each Federal fiscal year) that its procurement system complies with FTA requirements and that the recipient has the technical capacity to comply with Federal procurement requirements. FTA requests each recipient to "self-certify" its procurement system as part of its Annual Certifications and Assurances.

To preclude unnecessary delay of recipient procurements, FTA generally does not conduct preaward reviews of third party contracts or contract specifications as envisioned in the Common Grant Rules, 49 CFR Section 18.36(g)(2) and

49 CFR Section 19.44(e). Instead, FTA relies heavily on the recipient's self-certification of its procurement system.

FTA, however, will review compliance with this circular as part of its routine oversight responsibilities. If FTA becomes aware of circumstances that might invalidate a recipient's self-certification, FTA will investigate and recommend appropriate measures to correct the recipient's deficiencies.

- b. Third Party Contract Reviews. Although authorized by the Common Grant Rules to conduct preaward reviews, FTA relies on the validity of each recipient's self-certification rather than on a preaward review of third party contracts. FTA will rely on periodic, post-award reviews to ensure that the recipient complies with Federal requirements and standards. Should a recipient fail to self-certify its procurement system, however, FTA reserves the right to conduct preaward reviews as provided by the Common Grant Rules. Even if a recipient self-certifies its procurement system, the recipient still may request FTA's preaward review of specific procurements as part of FTA's technical assistance program. Conversely, if FTA seeks to review the record of a particular procurement, the recipient must make its procurement documents available for FTA's preaward or post-award review.
- c. Procurement System Reviews. Under 49 U.S.C. Section 5307(i), a recipient may request that the Secretary approve its procurement system, and FTA may approve that procurement system if it complies with Federal requirements. As required by 49 U.S.C. Section 5307(h), FTA must perform reviews and evaluations of the Urbanized Area Formula Program and perform a full review and evaluation of the performance of each recipient in carrying out Federal assistance through FTA's Urbanized Area Formula Programs with specific reference to their compliance with statutory and administrative requirements.

Accordingly, FTA will perform procurement system reviews as part of its on-going project oversight responsibilities and will perform procurement system reviews for Urbanized Area Formula Program recipients that self-certify their procurement systems. To assist the recipient in improving its procurement practices, FTA may recommend certain "best practices." In those situations, FTA will identify its recommendations as "advisory." For more information, see FTA's "Procurement Reviews," guidance at the FTA Web site:

**[http://www.fta.dot.gov/funding/oversight/grants\\_financing\\_100.html](http://www.fta.dot.gov/funding/oversight/grants_financing_100.html)**.

- d. Audits. FTA may perform, contract for, or instruct the recipient to obtain specific audits of particular third party contracts to determine whether payments were made in conformance with the terms of the contract, or for other purposes.
- e. Training and Technical Assistance. FTA provides procurement training and technical assistance at both regional and national levels by offering various instructional courses, by conducting regional technical assistance conferences, and by providing assistance by a contractor as needed.

- f. Master Agreement. From the inception of its electronic award system in Fiscal Year 1994, FTA has incorporated by reference and made part of each FTA grant and FTA cooperative agreement a Master Agreement that FTA issues annually. Along with the standard terms and conditions governing an FTA assisted project, the most recent FTA Master Agreement, typically issued at the beginning of each Federal fiscal year, contains references to substantially all FTA and other cross-cutting Federal laws and regulations that may apply to a federally assisted project. Many of these Federal requirements will need to be included in third party contracts to the lowest tier necessary, and others will have a direct or indirect effect on the recipient's third party contracts.
- g. "Best Practices Procurement Manual.(BPPM)" FTA's "Best Practices Procurement Manual" (BPPM) provides suggested procedures, methods, and examples to advise a recipient how it might conduct its third party procurements in compliance with Federal laws and regulations and FTA Circular 4220.1F guidance. These procedures, methods, and examples are based on the Federal acquisition process, Comptroller General Decisions, and "Best Practices" of recipients of FTA assistance and others in the industry, and FTA encourages recipients to adopt them as needed. Although the BPPM can be a good resource for the recipient to use in conducting FTA assisted procurements, it is not the source of any FTA or Federal requirements and, as such, is not binding on FTA recipients although the underlying Federal laws and regulations from which the BPPM's advice and recommendations are derived will apply. As such, the text of the BPPM is not and should not be treated as an official description of any FTA or Federal requirement. Moreover, while FTA does revise and update the BPPM periodically, FTA cautions each recipient that relying solely on the BPPM may not ensure compliance with all applicable FTA and Federal requirements. You can obtain access to the BPPM at the FTA Web site:  
**[http://www.fta.dot.gov/funding/thirdpartyprocurement/grants\\_financing\\_6037.html](http://www.fta.dot.gov/funding/thirdpartyprocurement/grants_financing_6037.html)**.
- h. Third Party Procurement Helpline. This Helpline at the FTA Web site provides another resource through which you may submit your third party contracting questions to FTA. To do so, access the FTA Web site:  
**[http://www.fta.dot.gov/funding/thirdpartyprocurement/grants\\_financing\\_6040.html](http://www.fta.dot.gov/funding/thirdpartyprocurement/grants_financing_6040.html)**.
- i. "Frequently Asked Questions." To review the Frequently Asked Questions pertaining to third party contracting, access the FTA Web site:  
**[http://www.fta.dot.gov/funding/thirdpartyprocurement/grants\\_financing\\_6039.html](http://www.fta.dot.gov/funding/thirdpartyprocurement/grants_financing_6039.html)**.
- j. FTA Offices. You may also contact your FTA regional or metropolitan office or FTA's Office of Administration for assistance. You can find a list of FTA's regional and metropolitan offices in Appendix B of this document.

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## CHAPTER II

### APPLICABILITY

1. LEGAL EFFECT OF THE CIRCULAR. The Federal Transit Administration (FTA) has developed this circular to assist its recipients and their subrecipients in complying with the various Federal laws and regulations that affect their FTA assisted procurements. FTA considers this circular, in its entirety, to be a guidance document. While this guidance itself does not have the force and effect of Federal law or regulation, it does contain information about Federal laws and regulations for which compliance is mandatory when applicable.

As guidance, this circular attempts to describe how a recipient or subrecipient of FTA assistance can comply with those Federal requirements. In some cases, this guidance describes the single method by which an FTA recipient or subrecipient can comply with a specific Federal legal or regulatory requirement. In other cases, Federal laws, regulations, and this guidance provide more flexibility. As guidance, this circular also expresses FTA's preferences about how the procurements it supports should be undertaken. FTA's Master Agreement reflects FTA and the recipient's agreement that FTA's third party contracting circular will apply to its third party contracts. As a guidance document, it does not waive any requirements of Federal statutes or regulations restated herein except as permitted by their terms.

Because the circular is guidance, FTA is willing to consider methods of compliance with Federal laws and regulations other than those described in this circular. If a recipient identifies an alternative method for complying with an applicable Federal statute and regulation, it may contact FTA before employing that method to ensure that FTA agrees with the alternative proposed. While FTA's prior concurrence is not required, FTA reserves the right to decline to participate in the costs of third party procurements that fail to comply with Federal laws, regulations, or the terms of the recipient's underlying grant or cooperative agreement.

2. APPLICABILITY OF THE CIRCULAR. Unless FTA determines otherwise in writing, this guidance applies when the recipient uses FTA assistance to support its procurements.
  - a. Participants in FTA Assisted Procurements. Whether and how the circular applies to a specific participant in an FTA assisted project depends on its relationship to the particular FTA assisted procurement:
    - (1) Recipients of FTA Grants or Cooperative Agreements. The circular applies to each FTA recipient of Federal assistance, including each grantee and each recipient of Federal assistance under a cooperative agreement or an "other agreement" (whether an individual entity or member of a consortium, joint venture, team, or partnership) when it uses FTA assistance for third party contracts. The extent to

which the provisions of this circular apply to a recipient depends on whether the recipient is a State or other than a State.

- (a) States. When procuring property and services under a grant or cooperative agreement, a State may use the same procurement policies and procedures that it uses for acquisitions not financed with Federal assistance. At a minimum, the State must comply with the federally mandated requirements on contract term limitations for revenue vehicle purchases, competition, prohibitions against geographic preferences, procurement of architectural engineering (A&E) services, and awards to responsible contractors. The State must ensure that each purchase order and contract financed with FTA assistance includes all provisions required by Federal statutes and their implementing regulations.
  - 1 Governmental Subrecipients of the State. Each State and its governmental subrecipients may use State procurement procedures for their third party contracts. Only those provisions of this circular and Department of Transportation (DOT) regulations, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," 49 CFR Part 18, applicable to the State will apply to procurements by the State's governmental subrecipients.
  - 2 Private Non-Profit Subrecipients of the State. In contrast, the provisions of this circular and DOT regulations, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 49 CFR Part 19, will apply to a private non-profit subrecipient of a State.
- (b) Recipients and Subrecipients that are not States. This circular applies to third party contracts and subcontracts of all other FTA recipients and their subrecipients, including regional public transportation authorities, that are not a State. Even though a recipient or subrecipient is not a State, it may use its own procurement procedures, if those procedures conform to applicable Federal law and regulations, including the applicable Common Grant Rule.
  - (2) Subrecipients of FTA Assistance. This circular also applies to each subrecipient, including each subgrantee (a type of subrecipient), under an FTA grant or cooperative agreement) that enters into contracts with other parties financed with FTA assistance.
  - (3) Recipients of Both Federal Assistance Awarded by FTA and Funds Provided by Another Federal Agency. An FTA recipient that also uses funding provided by another Federal agency or agencies for a third party procurement also supported with FTA assistance must comply with the third party contracting requirements of both FTA and each additional Federal agency providing Federal assistance. If compliance with all Federal requirements is impossible, the recipient should notify



the FTA Chief Counsel for resolution. If an FTA recipient finances an acquisition with funding provided by another Federal agency but not with FTA assistance, this circular would not apply to that procurement.

- (4) Recipients of “Other Agreement” Assistance. For “other agreements” authorized by 49 U.S.C. Section 5312(a) for research, development, demonstration, and deployment projects and 49 U.S.C. Section 5312(b) for joint partnership projects for the deployment of public transportation innovation, this circular may be used as an initial starting point from which to consider Federal requirements and other provisions that should be adopted, and other Federal requirements that should be modified or waived to achieve FTA’s and the recipient’s objectives.
- (5) Third Party Contractors and Subcontractors.
  - (a) Status. Neither third party contractors nor third party subcontractors are “recipients” or “subrecipients” for purposes of this circular. Consequently, third party contractors are not directly covered by this circular, the Common Grant Rule at 49 CFR Parts 18 and 19, or FTA’s “Best Practices Procurement Manual” (BPPM) in awarding their subcontracts.
  - (b) Effect of Federal Requirements. However, each third party contractor and subcontractor is required to comply with the terms of its third party contract or subcontract, including requirements to extend those federally required clauses and provisions to its subcontractors at the lowest tier required. For that reason, this circular, the Common Grant Rules at 49 CFR Parts 18 and 19, and the BPPM do provide useful information to a third party contractor and third party subcontractor about the constraints under which a recipient may enter into a third party contract financed with FTA assistance.
- b. Project Types and Third Party Contracts. With limited exceptions, FTA’s Master Agreement reflects FTA and the recipient’s agreement that FTA’s third party contracting circular will apply to its third party contracts. The extent to which this circular applies to a recipient’s contract depends on the character of that contract and the project which it supports.
  - (1) Capital Contracts. The provisions of this circular apply to most third party capital contracts except as listed below:
    - (a) Capital Contracts Financed Entirely Without Federal Assistance. The provisions of this circular do not apply to a recipient’s capital contracts that can be demonstrated to be entirely financed without FTA assistance or other Federal funds even if those contracts supplement an FTA assisted capital project.
    - (b) Art. Procurements of art are beyond the scope of this circular. FTA Circular 9400.1A, “Federal Transit Administration Design and Art in Transit Projects,”

dated 06-09-95, provides guidance on the acquisition of art. In addition, FTA's "Best Practices Procurement Manual" includes extensive non-binding suggestions and advice on implementing FTA Circular 9400.1A and related provisions.

- (c) Over-the-Road Bus Accessibility Program. Section 3038 of TEA-21, as amended by Section 3039 of SAFETEA-LU, 49 U.S.C. Section 5310 note, authorizes the Over-the-Road Bus Accessibility Program to provide Federal assistance to private for-profit companies for the incremental costs of wheelchair lift equipment and the necessary training to implement DOT's accessibility requirements for over-the-road buses. FTA has determined that the provisions of this circular and the Common Grant Rules do not apply to the acquisition of FTA assisted property or services under that program. As a result, FTA's annual notice of availability of funds for that program does not refer to Common Grant Rule procurement requirements or this circular. The provisions of this circular and the Common Grant Rule at 49 CFR Part 19, however, apply to any over-the-road buses and related equipment for them acquired under another FTA program.
- (d) Real Property. Procurements of real property consisting of land and any existing buildings and structures on that land are generally beyond the scope of this circular. Real property acquisition is addressed in DOT regulations, "Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs," 49 CFR Part 24, which provide protections for owners and lessees of real property to be acquired as part of an FTA assisted project. For further guidance, see the most recent edition of FTA Circular 5010.1, "Grant Management Guidelines."

The third party contracting provisions of this circular, however, do apply to FTA assisted construction of buildings, structures, or appurtenances that were not on land to be used for the project when that land was acquired. The third party contracting provisions of this circular also apply to any alterations or repairs to buildings or structures existing on that land when that land was acquired or made available for the FTA assisted project.

- (2) Operations Contracts. FTA has reviewed its policies with respect to operations procurements undertaken by FTA recipients and their subrecipients and has adopted the following policies:
- (a) Operations Contracts Financed With FTA Assistance. The provisions of this circular continue to apply to contracts in support of a recipient's or subrecipient's operations financed with FTA assistance.
- (b) Operations Contracts Financed Entirely Without FTA Assistance. FTA has determined that its third party contracting requirements will not apply to operations contracts that recipients and their subrecipients finance entirely

without FTA assistance. Notwithstanding any other provision of this circular, however, a recipient that enters into third party contracts for operations or planning must comply with the requirements of DOT regulations, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs," 49 CFR Part 26, applicable to those contracts, regardless of how or whether it intends to use its FTA assistance for contracts or other purposes. Specifically, a recipient required to have a Disadvantaged Business Enterprise (DBE) program may not structure its operations expenditures so that an unreasonable proportion of contracts that could be performed by DBEs are removed from its DBE program. Other Federal regulations issued by FTA, DOT, or other Federal agencies may also apply a third party contractor, either directly as a covered entity or when the third party contractor is expected to perform activities on behalf of another entity or the Federal Government.

- (3) Preventive Maintenance Contracts. Third party contracts for preventive maintenance are eligible for FTA capital assistance. This circular applies to a recipient's preventive maintenance contracts financed with FTA assistance. If a recipient uses its FTA assistance to support specific preventive maintenance contracts that are separate and distinct from its other maintenance or operations contracts, and if, through its accounting procedures, a recipient can allocate and trace all its Federal assistance for capital preventive maintenance to those separate and distinct preventive maintenance contracts, this circular applies only those specific FTA assisted contracts. If, however, the recipient applies its Federal capital assistance for preventive maintenance as a percentage of its total maintenance costs, and the recipient cannot allocate all of its Federal assistance for capital maintenance to specific preventive maintenance contracts that are separate and distinct from its other maintenance or operations contracts, this circular applies to all the recipient's preventive maintenance contracts, even if specific maintenance or operations contracts were financed wholly without FTA assistance.
- (4) Revenue Contracts. A revenue contract is a contract in which the recipient or subrecipient provides access to public transportation assets for the primary purpose of either producing revenues in connection with an activity related to public transportation, or creating business opportunities with the use of FTA assisted property. The recipient has broad latitude in determining the extent and type of competition appropriate for a particular revenue contract. Nevertheless, to ensure fair and equal access to FTA assisted property and to maximize revenue derived from such property, the recipient should conduct its revenue contracting as follows:
  - (a) Limited Contract Opportunities. If there are several potential competitors for a limited opportunity (such as advertising space on the side of a bus), then the recipient should use a competitive process to permit interested parties an equal chance to obtain that limited opportunity.

- (b) Open Contract Opportunities. If, however, one party seeks access to a public transportation asset (such as a utility that might seek cable access in a subway system), and the recipient is willing and able to provide contracts or licenses to other parties similarly situated (since there is room for a substantial number of such cables without interfering with transit operations), then competition would not be necessary because the opportunity to obtain contracts or licenses is open to all similar parties.

In the case of joint development, as explained below, FTA will work with the recipient to determine appropriate procedures, as necessary.

- (5) Joint Development. Many public transportation agencies form partnerships with the private sector in order to promote real estate development in and around transit facilities, which is often referred to as “joint development.” Although FTA joint development projects are primarily a means to provide private capital to transit projects, joint development projects combine aspects of federally assisted construction and revenue contracting. FTA has published joint development guidance, including third party contracting guidance in a “Notice of Final Agency Guidance on the Eligibility of Joint Development Improvements under Federal Transit Law,” 72 FR 5788, February 7, 2007. Section VI of the Joint Development guidance addresses FTA’s third party contracting requirements.
  - (a) Construction Contracts. This circular applies to FTA assisted construction aspects of a joint development project.
  - (b) Revenue Contracts. FTA will work with the recipient on a case-by-case basis to craft approaches suitable for revenue contracts as defined in this circular. FTA’s concern is that procedures used satisfy Federal statutory and regulatory requirements for competition while preserving the benefits of joint development to the maximum possible extent.
  - (c) Other Contracts. If a contract between a recipient and a third party involving a joint development project is not a construction contract or a revenue contract as defined in this circular, then that contract is not covered by FTA’s third party contracting provisions. For example, third party contracts to manage, operate, or maintain intercity bus or intercity rail terminals, or tenancy agreements with third party intercity bus or intercity rail operators are the types of operations contracts not covered by FTA’s third party contracting provisions. Nevertheless, even in situations not covered by the third party contracting provisions, FTA generally favors full and open competition.
- (6) Public-Private Partnerships. A Public-Private Partnership (PPP) is a formal contractual arrangement between a public recipient and one or more private partners establishing a mechanism for procuring property and services under which the private sector assumes some of the public sector’s customary role in the planning, financing, design, construction, operation, and maintenance of a

transportation facility compared to traditional procurement methods, many of which activities are generally controlled by the public sector partner. As part of FTA's interest in fostering PPPs, FTA is considering which procurement and other requirements may be modified to simplify project implementation, including procurement requirements that are redundant with private sector safeguards, incentives, and obligations. While a recipient that has not formed a PPP may use some of the contract delivery arrangements or project delivery systems listed below, FTA is considering the implications for PPPs that use the following types of contracting delivery arrangements or project delivery systems, including, but not limited to:

- (a) Design-Build,
- (b) Design-Build with a Warranty,
- (c) Construction Manager at Risk,
- (d) Design-Build-Operate-Maintain,
- (e) Design-Build-Finance-Operate,
- (f) Build-Operate-Transfer,
- (g) Build-Own-Operate, and
- (h) Full Delivery or Program Management.

For a description of these types of PPPs, see FTA "Notice of establishment of Public-Private Partnership Pilot Program; solicitation of applications," 72 FR 2583, esp. 2584, 2585-2591, January 19, 2007.

As a starting point, FTA expects the parties to the PPP to apply the requirements of this circular to FTA assisted projects they undertake. A PPP recipient seeking an exception from specific provisions of this circular should contact the FTA Project Manager. FTA will work with the recipient to craft processes as necessary to satisfy the statutory and regulatory requirements for competition when FTA assistance is used while preserving the benefits of the innovative contracting strategy proposed to the maximum possible extent.

- (7) Transactions Involving Complex Financial Arrangements. If a public transportation project involves the services of an "arranger" or similar facilitator, and those services will be financed with Federal assistance or the proceeds from the use of property supported with FTA assistance, FTA expects the recipient to use competitive procedures to select the "arranger." If, however, a public transportation project involves the services of an "arranger" or similar facilitator whose services will not be financed with Federal assistance or the proceeds from

the use of property acquired with FTA assistance, FTA encourages, but does not require, competition in the selection of that arranger.

FTA also encourages the recipient to impose whatever conflict of interest provisions in its contract with the arranger the recipient may believe desirable. After the arranger is selected and then develops a transaction involving FTA assisted assets, FTA requires competition to the extent permissible in view of the limitations of securities regulations.

- (8) Force Account. FTA third party contracting guidance does not apply to a recipient's use of its own forces to perform project work.

3. FEDERAL LAWS AND REGULATIONS. Each recipient and subrecipient must comply with applicable Federal laws and regulations including, but not limited to, Federal transit laws at 49 U.S.C. Chapter 53, FTA regulations, and other Federal laws and regulations that contain requirements applicable to FTA recipients and their FTA assisted procurements.
- a. Common Grant Rules. The following government-wide regulations (frequently referred to as the "Common Grant Rules") contain the most comprehensive Federal requirements applicable to FTA's assistance programs:
- (1) Governmental Recipients. DOT regulations, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," 49 CFR Part 18, apply to governmental recipients (apart from institutions of higher education) and Indian tribes, and
- (2) Non-Governmental Recipients. DOT regulations, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 49 CFR Part 19, apply to private non-profit entities, institutions of higher education and, if FTA so determines, to private for-profit organizations.
- b. Federal Acquisition Regulation. The Federal Acquisition Regulation (FAR), 48 CFR Chapter 1, does not apply to federally assisted procurements, absent Federal laws or regulations to the contrary. In the case of FTA programs, FAR cost principles Part 31 apply to grants and cooperative agreements with private for-profit entities. Audits of A&E services listed in 49 U.S.C. Section 5325 must be carried out under FAR Part 31 cost principles. Nevertheless, in the absence of other guidance, FAR standards may prove useful if the recipient's circumstances are suitable for application of the specific FAR provision under consideration.
- c. Other Federal Requirements. In addition to the Common Grant Rules, each FTA recipient must comply with applicable Federal transit laws and implementing regulations not addressed in the Common Grant Rules, and with other Federal cross cutting statutes and regulations that affect what a recipient may acquire.

- (1) Compilation in the Master Agreement. Citations to most Federal requirements are included in the latest edition of FTA's Master Agreement, typically issued at the beginning of each Federal fiscal year, which includes comprehensive information about Federal laws and regulations that may apply to an FTA assisted project. FTA strongly encourages participants in FTA assisted projects to review the Master Agreement when making its procurement decisions. *See*, Chapter I, subsection 6.f of this circular for additional information about the Master Agreement.
  - (2) Conflicting Federal Requirements. Requirements of the various Federal agencies that may be involved in the project will sometimes differ, with the result that FTA expects the recipient to comply with all those differences. If compliance with all applicable Federal requirements is impossible, the recipient should notify the FTA Chief Counsel for resolution.
- d. Waivers. Requests for waivers of Federal requirements should be addressed to the Federal Transit Administrator.
4. STATE AND LOCAL LAWS AND REGULATIONS. The Common Grant Rules provide that recipients and subrecipients will use their own procurement procedures that comply with applicable State and local laws and regulations, and also comply with applicable Federal laws and regulations.
- a. Inadequate State and Local Requirements. If State or local laws or regulations do not address a particular aspect of procurement adequately, Federal direct procurement principles may often (but not always) provide useful guidance.
  - b. Conflicts Between Federal Requirements and State or Local Requirements. If Federal requirements conflict with State or local requirements, the recipient should provide written notification promptly to either the FTA Regional Counsel for the region in which the project takes place or the FTA Assistant Chief Counsel for General Law in the case of projects administered by FTA headquarters staff. FTA will then work with the recipient to make appropriate arrangements to proceed with the project. If unsuccessful, then FTA reserves the right to amend or terminate Federal assistance for the underlying Project.

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## CHAPTER III

### **THE RECIPIENT'S RESPONSIBILITIES**

1. **WRITTEN STANDARDS OF CONDUCT.** The Common Grant Rules require each recipient to maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts.
  - a. **Personal Conflicts of Interest.** As provided in the Common Grant Rules and the Federal Transit Administration (FTA) Master Agreement, no employee, officer, agent, or board member, or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing may participate in the selection, award, or administration of a contract supported with FTA assistance if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when any of those previously listed has a financial or other interest in the firm selected for award.
  - b. **Gifts.** The recipient's 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 subagreements. The recipient may set minimum rules when the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.
  - c. **Violations.** To the extent permitted by State or local law or regulations, such standards of conduct will provide for penalties, sanctions, or other disciplinary action for violation of such standards by the recipient's officers, employees, agents, board members, or by contractors or subrecipients or their agents.
2. **SELF-CERTIFICATION.** FTA expects each recipient to self-certify that its procurement system complies with Federal requirements for any FTA assisted third party contract the recipient undertakes and administers.
3. **THIRD PARTY CONTRACTING CAPACITY.** As part of an FTA recipient's obligation to maintain adequate technical capacity to carry out its project and comply with the Common Grant Rules, the recipient's third party contracting capability must be adequate to undertake its procurements effectively and efficiently in compliance with applicable Federal, State, and local requirements. The Common Grant Rules require the recipient to maintain a contract administration system to ensure that it and its third party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders and applicable Federal, State and local requirements. Many FTA recipients assign contracting duties to technical, financial or management personnel. If the recipient lacks qualified personnel within its organization to undertake the various procurement tasks, such as drafting specifications, evaluating contracts, or performing internal audits for the recipient, FTA expects the recipient to acquire the necessary services from sources outside the recipient's organization. When using outside sources, the recipient should take appropriate steps to prevent or mitigate organizational conflicts of interest that would result

in conflicting roles that might bias a contractor's judgment or would result in unfair competitive advantage.

- a. Written Procurement Procedures. The Common Grant Rule for non-governmental recipients requires the recipient to have written procurement procedures, and by implication, the Common Grant Rule for governmental recipients requires written procurement procedures as a condition of self-certification. The recipient's procurement procedures are expected to address:
  - (1) Solicitations. The following standards apply to solicitations:
    - (a) Clear Descriptions. A clear and accurate description of the technical requirements for the material, product, or service to be procured is required (discussed further in Chapter VI of this circular).
    - (b) Nonrestrictive Specifications. In competitive procurements, the description may not contain features that unduly restrict competition. Notably, FTA may not finance procurements that use exclusionary or discriminatory specifications (discussed further in Chapter VI of this circular).
    - (c) Quality Requirements. A description may include a statement of the qualitative nature of the material, product, or service to be procured and when necessary, describe minimum essential characteristics and standards to which the property or services must conform if it is to satisfy its intended use (discussed further in Chapter VI of this circular).
    - (d) Preference for Performance Specifications. The Common Grant Rule for governmental recipients advises the recipient that "[d]etailed product specifications should be avoided if at all possible." The Common Grant Rule for non-governmental recipients advises the recipient to describe technical requirements in terms of "functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards" (discussed further in Chapter VI of this circular).
    - (e) Brand Name or Equal. When it is impractical or uneconomical to write a clear and accurate description of the technical requirements of the property or services to be acquired, a "brand name or equal" description may be used to define the performance or other salient characteristics of the property or services sought. The specific features or salient characteristics of the named brand which must be met by offerors of "an equal" proposal must be clearly stated (discussed further in Chapter VI of this circular).

The Common Grant Rule for non-governmental recipients further requires (and governmental recipients should have) written procurement procedures that address:

- (2) Necessity. The recipient's need for the property or services (discussed further in Chapter VI of this circular).
- (3) Lease Versus Purchase. The use of lease or purchase alternatives to achieve an economical and practical procurement (discussed further in Chapter VI of this circular).
- (4) Metric Usage. The acceptance, to the extent practicable and economically feasible, of products and services dimensioned in the metric system of measurement (discussed further in Chapter IV of this circular).
- (5) Environmental and Energy Efficiency Preferences. A preference, to the extent practicable and economically feasible, for products and services that conserve natural resources, protect the environment, and are energy efficient (discussed further in Chapter IV of this circular).

The recipient's procurement procedures should also address the following matters:

- (6) Procurement Methods. What procurement methods may be used (discussed further in Chapter VI of this circular).
  - (7) Legal Restrictions. Any Federal, State, or local restrictions on the recipient's acquisitions (discussed further in Chapter IV of this circular).
  - (8) Third Party Contract Provisions. The specific third party contract provisions required for each third party contract including requirements that each third party contractor extend those provisions to its subcontractors to the extent required (discussed further in Chapter IV of this circular).
  - (9) Sources. The availability and use of various sources of property and services (discussed further in Chapter V of this circular).
  - (10) Resolution of Third Party Contracting Issues. Procedures to resolve third party contracting issues (discussed further in Chapter VII of this circular).
- b. Adequate Third Party Contract Provisions. The Common Grant Rules require that all third party contracts include provisions adequate to form a sound and complete agreement. Compliance with Federal laws and regulations will necessarily result in the addition of many other provisions to ensure compliance with those laws and regulations. *See*, Chapter IV of this circular for requirements applicable to third party contractors and the property and services third party contractors agree to provide.
  - c. Industry Contracts. The recipient should take special care when using an industry developed contract or contract that may be provided by a bidder or offeror. Not only may that contract lack the required Federal provisions, but its terms may also be unfavorable to the recipient. FTA does not intend to prohibit the use of industry forms,

specifications, or contract terms when their use would benefit the recipient and would accommodate Federal requirements. Instead, FTA intends to remind the recipient to use industry developed forms, specifications, or contract terms cautiously.

- d. Record Keeping. The Common Grant Rules require the recipient to prepare and maintain adequate and readily accessible project performance and financial records, covering procurement transactions as well as other aspects of project implementation. The Common Grant Rules require the recipient to maintain these records for three years after the recipient and subrecipients, if any, have made final payment and all other pending matters are closed. The recipient must also prepare, maintain, and distribute the following documents as necessary:
- (1) Procurement History. The Common Grant Rules require the recipient to maintain and make available to FTA written records detailing the history of each procurement, as follows:
    - (a) Procurement Method. A governmental recipient must (and a non-governmental recipient should) provide its rationale for the method of procurement it used for each contract, including a sole source justification for any acquisition that does not qualify as competitive, while a non-governmental recipient need only provide a justification for lack of competition when it does not obtain competitive bids or proposals for contracts exceeding the simplified acquisition threshold;
    - (b) Contract Type. A governmental recipient must (and a non-governmental recipient should) state the reasons for selecting the contract type it used (fixed price, cost reimbursement, and so forth);
    - (c) Contractor Selection. A governmental recipient must state its reasons for contractor selection or rejection. For procurements exceeding the small purchase threshold, a non-governmental recipient must state its reasons for contractor selection, but need not state its reasons for contractor rejection. Each recipient should include a written responsibility determination for the successful contractor; and
    - (d) Cost or Price. Each recipient must evaluate and state its justification for the contract cost or price.
    - (e) Reasonable Documentation. The extent of documentation should be reasonable. Documents included in a procurement history should be commensurate with the size and complexity of the procurement itself. FTA recognizes that these written records will vary greatly for different procurements. For example, a receipt or bill accompanying a \$100 credit card purchase might contain all of the required information to support that procurement. Procurements that are more substantial may require extensive documentation.

- (2) Access to Records. Apart from the more limited record access provisions of the Common Grant Rules, 49 U.S.C. Section 5325(g) provides FTA and DOT officials, the Comptroller General, or any of their representatives, access to and the right to examine and inspect all records, documents, and papers, including contracts, related to any FTA project financed with Federal assistance authorized by 49 U.S.C. Chapter 53.
- e. Special Notification Requirements for States. For many years, various Federal appropriations laws imposed notification requirements on all recipients of Federal assistance awards exceeding \$500,000. Currently, notification requirements have been limited to States, but the \$500,000 threshold has been removed. Therefore, each State must include provisions in all its requests for proposals, solicitations, Federal assistance applications, forms, notifications, press releases, or other publications involving FTA assistance, stating that FTA is or will be providing Federal assistance for the project, the amount of Federal assistance FTA has provided or expects to provide, and the Catalog of Federal Domestic Assistance (CFDA) Number of the program that authorizes the Federal assistance. FTA interprets the statute to require that subrecipients, lessees, or third party contractors of the State at any tier also comply with those notification requirements. Because appropriations laws expire annually and these provisions have not been enacted as permanent legislation or even appear consistently in the same appropriations acts, it is necessary to review the various Federal appropriations acts for the applicable fiscal year to determine the required level of notification. FTA's Master Agreement incorporates the notification requirements in effect when that Master Agreement is issued.
  - f. Use of Technology/Electronic Commerce. Along with other technology the recipient may choose to employ, the recipient may use a well-structured Electronic Commerce system to conduct third party procurements.
    - (1) Sufficient System Capacity. The recipient's system must have sufficient system capacity necessary to accommodate all Federal requirements for full and open competition.
    - (2) Written Procedures. The recipient must establish adequate written procedures before any solicitation takes place. Those procedures must be sufficient to ensure that all information FTA requires for project administration is entered into the recipient's electronic system and can be made readily available to FTA as needed.
    - (3) Uses. The recipient may undertake third party procurements through:
      - (a) Standard Bidding and Proposal Procedures. Standard procurement procedures may be implemented through an electronic medium or resource to the extent of the system's capacity.
      - (b) Electronic Bidding and Reverse Auctions. FTA recipients may use electronic bidding and reverse auctions.



engage a qualified independent accountant or accounting firm to perform its audit responsibilities.

- b. Independent Auditors. The recipient's personnel will not be able to perform certain audits required by the Federal Government, such as audits required by the Single Audit Act of 1984, as amended, 31 U.S.C. Sections 7501 *et seq.* and OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations," as revised. If the Federal Government requires additional audits, it may also be necessary for the recipient to engage independent auditors not performing other work for the recipient. See also Chapter IV, subparagraph 2.b(19)(a) of this circular.
- c. Federal Audit Agencies. The Federal Government maintains a continuing Federal audit capability at certain contractor locations. On occasion, these auditors may be used to audit an FTA recipient's third party contracts. In other circumstances, an audit by a Federal agency may best serve the interests of the Federal Government and the recipient. This can be true of audits to determine a contractor's provisional overhead (burden) and General & Administrative (G&A) rates that need to be verified by audit for specific contract periods. Federal audit services, however, might not be available when needed; then the recipient will need to obtain the services of an independent private auditing firm that can perform the audit soon after an audit is requested.

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## CHAPTER IV

### **THE RECIPIENT'S PROPERTY AND SERVICES NEEDS AND FEDERAL REQUIREMENTS AFFECTING THOSE NEEDS**

1. **DETERMINING THE RECIPIENT'S NEEDS.** To support a third party contract with Federal assistance awarded by the Federal Transit Administration (FTA), the Common Grant Rules require the recipient to adopt adequate procedures for determining the type and amount of property and services it needs to acquire:
  - a. **Eligibility.** The property and services to be acquired must be eligible under the Federal law authorizing the FTA assistance award and any regulations thereunder. For example, FTA prohibits the use of capital assistance for the recipient's operations expenses. If FTA assistance will be used to finance the cost of property or services, the property or services must be within the scope of the specific project from which that FTA assistance will be derived.
  - b. **Necessity.** The Common Grant Rules require the recipient to establish procedures to avoid the purchase of unnecessary property and services it does not need (including duplicative items and quantities or options it does not intend to use or whose use is unlikely). In monitoring whether a recipient has complied with its procedures to determine what property or services are unnecessary, FTA bases its determinations on what would have been a recipient's reasonable expectations at the time it entered into the contract.
    - (1) **Unnecessary Reserves.** FTA expects the recipient to limit the acquisition of federally assisted property and services to the amount it needs to support its public transportation system. In particular, FTA seeks information about the recipient's fleets to ensure that the recipient does not acquire more vehicles than it needs for public transportation service in its service area. Further guidance on spare ratios is contained in the most recent versions of FTA Circulars 5010.1, 9030.1, and 9300.1.
    - (2) **Acquisition for Assignment Purposes.** The recipient may contract only for its current and reasonably expected public transportation needs and may not add quantities or options to third party contracts solely to permit assignment to another party at a later date. These limits on assignments, however, do not preclude joint procurements that are entered into simultaneously by two or more parties to obtain advantages unavailable for smaller procurements.
      - (a) **General Prohibition.** The recipient may contract only for its current and reasonably expected public transportation needs, and may not add quantities or options to third party contracts solely to permit assignment to another party at a later date.

- (b) Changes in the Recipient's Needs. FTA recognizes that the quantity of property or services a recipient reasonably believes it may need at the time of contract award may change. A recipient's later needs might decrease due to changed circumstances or honest mistakes. In those situations, the recipient may assign its unneeded contract authority to another entity that would like to acquire the property or services.
- (c) Exceptions. These limits on assignments, however, do not preclude:
  - 1 Joint Procurements. Two or more recipients may enter into a single procurement at the same time to obtain advantages unavailable for smaller procurements as discussed more fully in Chapter V, section 3 of this circular.
  - 2 State or Local Government Purchasing Schedules or Purchasing Contracts. A State or local government may enter into contracts that support its purchasing schedules or purchasing contracts established as discussed more fully in Chapter V, section 4 of this circular.
- c. Procurement Size. The recipient should consider whether to consolidate or break out the procurement to obtain a more economical purchase.
  - (1) Joint Procurements. It may be economically advantageous for a recipient to enter into a joint procurement with others that have similar needs. The recipient responsible for undertaking the joint procurement may, upon contract award, assign to the other participants responsibilities for administering those parts of the contract affecting their property or services. Participation in a joint procurement, however, does not relieve any participating recipient from the requirements and responsibilities it would have if it were procuring the property or services itself, and does not relinquish responsibility for the actions of other participants merely because the primary administrative responsibility for a particular action resides in an entity other than in itself.
  - (2) Smaller Procurements. In other circumstances, breaking out procurements may provide greater opportunities for Disadvantaged Business Enterprises (DBEs), small and minority firms, and women's business enterprises to participate. As stated in paragraph 1.b(2) of this Chapter, the FTA expects the recipient to ensure that it contracts only for its current and reasonably expected needs. Absent efforts to foster greater opportunities for DBE, small and minority firms, and women's business enterprises, the recipient should not split a larger procurement merely to gain the advantages of small purchase procedures available for federally assisted procurements of less than \$100,000 (currently, the Federal "simplified acquisition" threshold).
- d. Options. The recipient's contracts may include options to ensure the future availability of property or services, so long as the recipient is able to justify them as needed for its

public transportation or project purposes. An option is a unilateral right in a contract by which, for a specified time, a recipient may acquire additional equipment, supplies, or services than originally procured. An option may also extend the term of the contract. Chapter VI of this circular contains procedures for evaluating options.

- e. Lease Versus Purchase. To obtain the best value, the recipient should review lease versus purchase alternatives for acquiring property and, if necessary, should obtain an analysis to determine the more economical alternative. The recipient may use FTA capital assistance to finance the costs of leasing eligible property if leasing is more cost effective than full ownership. Before the recipient may lease an asset, FTA regulations, "Capital Leases," 49 CFR Part 639, Subpart C, require the recipient to make a written comparison of the cost of leasing the asset compared with the cost of purchasing or constructing the asset. Costs used in the comparison must be reasonable, based on realistic current market conditions, and based on the expected useful service life of the asset.
- f. Specifications. Typically, the recipient is responsible for preparing specifications that describe its needs while assuring that those specifications are not exclusionary, discriminatory, unreasonably restrictive, or otherwise in violation of Federal laws or regulations. In general, the specifications should clearly describe the property or services to be procured and state how the proposals will be evaluated. For additional guidance, see section 2 of this Chapter, and Chapter VI, section 3 of this circular.

2. FEDERAL REQUIREMENTS THAT MAY AFFECT A RECIPIENT'S ACQUISITIONS.

Before a recipient may use FTA assistance to support the acquisition of property or services, it must comply with all applicable Federal laws and regulations, whether or not addressed in the Common Grant Rules. Some of those laws and regulations will affect the third party contractor providing the property or services or even determine which entities may qualify as a third party contractor. Other laws and regulations will affect the nature of the property or services to be acquired or the terms under which the property or services must be acquired. A recipient may not use FTA assistance to support acquisitions that do not comply with all applicable Federal requirements.

FTA's Master Agreement contains a current, but not all-inclusive, description of statutory and regulatory requirements that may affect a recipient's procurement (such as Disadvantaged Business Enterprise (DBE) and Clean Air requirements). The Master Agreement states that applicable Federal requirements will apply to project participants to the lowest tier necessary to ensure compliance with those requirements. A recipient will also need to include applicable Federal requirements in each subagreement, lease, third party contract, or other document as necessary. For specific guidance on cross-cutting requirements administered by other Federal agencies, FTA recommends that the recipient contact those agencies.

The recipient may also use the checklists in Appendix C of this circular as a reminder of Federal requirements, and the matrices in Appendix D of this circular for a list of clauses

and provisions required by Federal laws and regulations. The recipient may also refer to the Model Clauses in FTA's "Best Practices Procurement Manual" but cautions the recipient also to check the latest edition of FTA's Master Agreement to determine which provisions have been added, changed, or rescinded.

Some of the more typical requirements and restrictions that will affect the use of FTA assistance to finance a recipient's third party contracts include:

- a. Contractor Qualifications. The following Federal laws and regulations may affect contractor selection:
  - (1) "Responsibility" Requirements. In addition to the Common Grant Rules that require contract awards be made only to responsible contractors, Federal transit law at 49 U.S.C. Section 5325(j) limits third party contractor awards to those contractors capable of successfully performing under the terms and conditions of the proposed contract. Before selecting a contractor for award, the recipient must consider such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. Moreover, SAFETEA-LU now requires a recipient entering into a fixed guideway project contract to consider the contractor's past performance, including information reported in FTA's required Contractor Performance Assessment Reports, 49 U.S.C. Section 5325(j)(2)(C).
  - (2) Debarment and Suspension. Debarment and suspension regulations and guidance include the following:
    - (a) DOT Debarment and Suspension Regulations. Department of Transportation (DOT) regulations, "Nonprocurement Suspension and Debarment," 2 CFR Part 1200 apply to each third party contract at any tier of \$25,000 or more, to each third party contract at any tier for a federally required audit (irrespective of the contract amount), and to each third party contract at any tier that must be approved by an FTA official irrespective of the contract amount. *See*, 2 CFR Part 1200. Thus, the recipient must apply DOT's debarment and suspension requirements to itself and each third party contractor at every tier to the extent required by DOT's regulations that incorporate the requirements of Office of Management and Budget (OMB), "Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)," 2 CFR Part 180.
    - (b) General Services Administration (GSA) Excluded Parties List System. Even though the recipient may collect a debarment and suspension certification from the prospective third party contractor, or include a clause in the third party contract requiring disclosure, FTA strongly recommends that the recipient check the Excluded Parties List System (EPLS) maintained by the GSA and available at the Web site it maintains: <http://www.epls.gov/> before awarding a third party contract.

- (c) State Debarment and Suspension Lists. A recipient may also treat any prospective contractor or subcontractor listed on a centralized State government debarment and suspension list as nonresponsible and ineligible for contract award.
- (3) Conflict of Interest. The Common Grant Rules require the recipient to be aware of conflict of interest issues a prospective contractor might have, including lack of impartiality, impaired objectivity, or unfair competitive advantage, as discussed more fully in Chapter VI, paragraph 2.a(4)(h).
- (4) Lobbying Certification and Disclosure. If the third party contract will exceed \$100,000, before awarding the contract, the recipient must obtain a lobbying certification, and if applicable, a lobbying disclosure from a prospective third party contractor. *See*, DOT regulations, “New Restrictions on Lobbying,” 49 CFR Part 20, modified as necessary by 31 U.S.C. Section 1352.
- (5) Federal Civil Rights Laws and Regulations. Each FTA recipient has agreed that it and its third party contractors at each tier will comply with:
  - (a) Federal Equal Employment Opportunity (EEO) Requirements. These include, but are not limited to:
    - 1 Nondiscrimination in Federal Public Transportation Programs. 49 U.S.C. Section 5332, covering projects, programs, and activities financed under 49 U.S.C. Chapter 53 prohibits discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimination in employment or business opportunity.
    - 2 Prohibition Against Employment Discrimination. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, and implementing Federal regulations that prohibit discrimination in employment on the basis of race, color, religion, sex, or national origin.
  - (b) Nondiscrimination on the Basis of Sex. Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. Sections 1681 *et seq.* and implementing Federal regulations, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” 49 CFR Part 25 prohibit discrimination on the basis of sex.
  - (c) Nondiscrimination on the Basis of Age. The Age Discrimination in Employment Act (ADEA), 29 U.S.C. Sections 621 through 634, and Equal Employment Opportunity Commission (EEOC) implementing regulations, “Age Discrimination in Employment Act,” 29 CFR Part 1625, prohibit employment discrimination against individuals on the basis of age. The “Age Discrimination Act of 1974, as amended, 42 U.S.C. Sections 6101 *et seq.*, and Department of Health and Human Services implementing regulations,

“Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance, 45 CFR Part 90, also prohibit discrimination against individuals on the basis of age.

- (d) Federal Protections for Individuals with Disabilities. The Americans with Disabilities Act of 1990, as amended (ADA), 42 U.S.C. Sections 12101 *et seq.*, prohibits discrimination against qualified individuals with disabilities in programs, activities, and services, and imposes specific requirements on public and private public and private entities. Third party contractors must comply with their responsibilities under Titles I, II, III, IV, and V of the ADA in employment, public services, public accommodations, telecommunications, and other provisions, many of which are subject to regulations issued by other Federal agencies.
- (6) Socio-Economic Development. Each FTA recipient must comply with applicable Federal laws and regulations that provide competitive opportunities for a contractor that qualifies as a disadvantaged business enterprise (DBE), minority owned firm, women’s business enterprise, or small business.
  - (a) Disadvantaged Business Enterprises (DBE). Section 1101(b) of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, as amended (SAFETEA-LU), requires FTA to make available at least 10 percent of its funding under that Act for contracts with small business concerns owned and controlled by socially and economically disadvantaged people. Each FTA recipient assists FTA in meeting this national goal. To receive FTA assistance, each FTA recipient must comply with applicable requirements of DOT regulations, “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,” 49 CFR Part 26. If the recipient is required to have a DBE program, the third party contracts that the recipient has included in its DBE program determine whether the recipient meets the DBE threshold for goal setting, and the goal if the threshold is met.
  - (b) Small and Minority Firms and Women’s Business Enterprises. The Common Grant Rules require each recipient and subrecipient to take steps to ensure that it uses small and minority firms and women’s business enterprises (irrespective of whether they qualify as DBEs) to the fullest extent practicable. Although the Common Grant Rule for governmental recipients includes labor surplus area firms in the category of firms authorized for special treatment, this circular does not include them because Section 7101(a) of the Federal Acquisition Streamlining Act of 1994, 15 U.S.C. Section 644 note, enacted after publication of the Common Grant Rule for governmental recipients removed nearly all labor surplus area preferences.

- 1 Notice. The Common Grant Rules require each recipient to make information available to potentially qualified firms about procurement opportunities. Each governmental recipient is directed to include these contractors on solicitation lists and request their participation when they are potential sources.
  - 2 Contract Size. To foster greater participation of small and minority firms and women's business enterprises, the Common Grant Rule for governmental recipients directs the governmental recipient to divide total requirements into smaller tasks or quantities, when economically feasible. The Common Grant Rule for non-governmental recipients encourages the non-governmental recipient to contract with consortia when a contract is too large for one of these firms to handle individually.
  - 3 Delivery Schedule. The Common Grant Rules require the recipient to specify delivery schedules that encourage their participation.
  - 4 Small Business Administration and the Department of Commerce Minority Business Development Agency. The Common Grant Rules instruct the recipient to use the services and assistance of the Small Business Administration and the Department of Commerce's Minority Business Development Agency.
  - 5 Subcontracting Opportunities. The Common Grant Rule for governmental recipients directs each governmental recipient to require its prime third party contractors to include the preceding provisions in FTA assisted subcontracts. The Common Grant Rule for non-governmental recipients directs each non-governmental recipient to consider whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises.
- (7) Sensitive Security Information. Each third party contractor must protect, and take measures to ensure that its subcontractors at each tier protect, "sensitive security information" made available during the administration of a third party contract or subcontract to ensure compliance with 49 U.S.C. Section 40119(b) and implementing DOT regulations, "Protection of Sensitive Security Information," 49 CFR Part 15, and with 49 U.S.C. Section 114(s) and implementing Department of Homeland Security regulations, "Protection of Sensitive Security Information," 49 CFR Part 1520.
- (8) Seat Belt Use. In compliance with Federal Executive Order No. 13043, "Increasing Seat Belt Use in the United States," April 16, 1997, 23 U.S.C. Section 402 note, FTA encourages each third party contractor to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel that operate company owned, rented, or personally operated

vehicles, and to include this provision in any third party subcontracts, involving the project.

- b. Administrative Restrictions on the Acquisition of Property and Services. The following Federal laws and regulations impose administrative requirements, many of which will affect specific third party procurements.
- (1) Legal Eligibility. The property or services acquired must be eligible for support under the restrictions accompanying the Federal statute authorizing the Federal assistance to be used.
  - (2) Scope of the Project. The property or services acquired must be eligible for support within the scope of the underlying grant or cooperative agreement from which the Federal assistance to be used is derived.
  - (3) Period of Performance. FTA expects the recipient to use sound business judgment and be judicious in establishing and extending a contract's period of performance.
    - (a) General Standards. The period of performance generally should not exceed the time necessary to accomplish the purpose of the contract. The recipient should also consider competition, pricing, fairness, and public perception. The recipient's procurement files should document its rationale for determining the performance period designated for each contract.
    - (b) Federal Restrictions. Except for procurements of rolling stock and replacement part contracts, which are limited by law to five (5) years as discussed in subsection 2.e of this Chapter, the recipient's other third party contracts (such as property, services, leases, construction, revenue, and so forth) are not encumbered by Federal requirements restricting the maximum periods of performance. Nevertheless, the duration of the recipient's other contracts must be reasonable.
    - (c) Time Extensions. Consistent with the general tone of the circular, contract time extensions will be considered in light of whether they are permissible changes or impermissible cardinal changes. Once the recipient awards the third party contract, an extension of the contract term length that amounts to a cardinal change will require a sole source justification.
  - (4) Federal Cost Principles. The Common Grant Rules require project costs to conform to applicable Federal cost principles for allowable costs. In general, costs must be necessary and reasonable, allocable to the project, authorized or not prohibited by Federal law or regulation, and must comply with Federal cost principles applicable to the recipient. Separate cost principles apply to the following four categories of recipients:



- (a) Governmental Entities. OMB Guidance for Grants and Agreements, “Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A-87),” 2 CFR Part 225, applies to project costs incurred by a recipient that is a State, local, or Indian tribal government.
  - (b) Educational Institutions. OMB Guidance for Grants and Agreements, “Cost Principles for Educational Institutions (OMB Circular A-21),” 2 CFR Part 220, applies to project costs incurred by a recipient that is a public or private institution of higher education.
  - (c) Non-Profit Entities. OMB Guidance for Grants and Agreements “Cost Principles for Non-profit Organizations (OMB Circular A-122),” 2 CFR Part 230, applies to project costs incurred by a recipient that is a private non-profit entity.
  - (d) For-Profit Entities. FAR Subpart 31.2, “Contracts with Commercial Organizations,” applies to project costs incurred by a recipient that is a for-profit entity.
- (5) Payment Provisions. The recipient may use its own funds to finance its contracts. However, if the recipient intends to use FTA assistance, expects to be reimbursed with FTA assistance, or dedicates its local share funds to support contract costs it has financed, then it must structure its payment provisions carefully.
- (a) FTA Support for the Project. FTA must indicate its general interest in the project before a recipient may use FTA assistance to finance or reimburse project costs, or use local share funds for project costs. FTA expresses its general interest in the project when it has taken one of the following actions:
    - 1 Award Made. FTA has awarded Federal assistance to the recipient through a grant or cooperative agreement for the underlying project,
    - 2 Preaward Authority. FTA has provided preaward authority for the underlying project through a *Federal Register* notice, or
    - 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 a contractor before the contractor incurs contract costs. The recipient may use its local share funds for advance payments. However, if there is no automatic preaward authority for its project, then advance payments made with local share funds before FTA assistance has been awarded, or before a letter of no prejudice has been issued or other preaward authority has been provided, or before FTA approval for the specific advance payment has been obtained, are ineligible for reimbursement. The following principles and restrictions apply:

- 1 Use of FTA Assistance Prohibited. The recipient may not use FTA assistance to make payments to a third party contractor before the contractor has incurred the costs for which the payments would be attributable.
- 2 Exceptions for Sound Business Reasons. Apart from advance payments that are customary, as discussed further, FTA does occasionally make exceptions to its advance payment prohibitions, if the recipient can provide sound business reasons for doing so and has obtained FTA's advance written concurrence. A recipient that seeks to use FTA assistance to support advance payments should contact the regional office administering its project to obtain FTA concurrence.

  - a Adequate Security for Advance Payments. FTA recognizes that advance payments may be needed for certain costs supported by sound business judgment. Adequate security for the advance payment is an essential pre-condition to FTA's concurrence in the use of FTA or local share funds.
  - b Customary Advance Payments. FTA recognizes that advance payments are typically required for, but are not limited to, public utility connections and services, rent, tuition, insurance premiums, subscriptions to publications, software licenses, construction mobilization costs, transportation, hotel reservations, and conference and convention registrations. Accordingly, the recipient may use FTA assistance to support or reimburse the costs of such acquisitions. FTA concurrence is required only when such advance payment or payments customarily required in the marketplace exceed \$100,000.

In summary, if there are sound business reasons justifying the advance payment and adequate security for the payment, FTA will generally concur in a written request for an exception.
- (c) Progress Payments. Progress payments are payments for contract work that has not been completed. The recipient may use FTA assistance to support progress payments provided the recipient obtains adequate security for those payments and has sufficient written documentation to substantiate the work for which payment is requested.

  - 1 Adequate Security for Progress Payments. Adequate security for progress payments may include taking title or obtaining a letter of credit or taking equivalent measures to protect the recipient's financial interest in the progress payment. Adequate security should reflect the practical realities of different procurement scenarios and factual circumstances. FTA acknowledges the practical reality that taking title to work in progress may not be desirable in some circumstances. The recipient should always

consider the costs associated with providing security (for example, the recipient may need to acquire bonds or letters of credit in the commercial marketplace) and the impact of those costs on the contract price, as well as the consequences of incomplete performance.

- 2 Adequate Documentation. Sufficient documentation is required to demonstrate completion of the amount of work for which progress payments are made.
  - 3 Percentage of Completion Method. The Common Grant Rules require that any progress payments for construction contracts be made on a percentage of completion method described therein. The recipient, however, may not make progress payments for other than construction contracts based on this percentage method.
- (6) Protections Against Performance Difficulties. The Common Grant Rule for governmental recipients authorizes FTA to require each governmental recipient to include contract provisions that would reduce potential problems that might occur during contract performance. In addition to other clauses that may be approved by the Office of Federal Procurement Policy, FTA expects the governmental recipient to include provisions as described below:
- (a) Changes. FTA expects a governmental recipient to include changes and changed conditions provisions or clauses in most contracts, except for routine supply contracts.
  - (b) Remedies. The Common Grant Rule for governmental recipients authorizes FTA to require remedies. Accordingly, FTA expectations are as follows:

    - 1 Liquidated Damages. FTA has determined that a recipient may use liquidated damages if the recipient reasonably expects to suffer damages through delayed contract completion, or if weight requirements are exceeded, and the extent or amount of such damages are uncertain and would be difficult or impossible to determine. The rate and measurement standards must be calculated to reasonably reflect the recipient's costs should the standards not be met, and must be specified in the solicitation and contract. The assessment for damages is often established at a specific rate per day for each day beyond the contract's delivery date or performance period. A measurement other than a day or another period of time, however, may be established if that measurement is appropriate, such as weight requirements in a rolling stock purchase. The procurement file should include a record of the calculation and rationale for the amount of damages established. Any liquidated damages recovered must be credited to the project account involved unless FTA permits otherwise. We also refer you to Chapter V, paragraph 5(a)(1) for a discussion of how liquidated damages can be used to encourage settlements.

- 2 Violation or Breach. Third party contracts exceeding \$100,000 must include administrative, contractual, or legal remedies for violations or breach 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.

Although the Common Grant Rule for non-governmental recipients does not expressly require contract remedies or termination clauses, FTA strongly encourages the inclusion of appropriate performance remedies in all third party contracts.

- c. Socio-Economic Requirements for the Acquisition of Property and Services. The following Federal laws and regulations imposing socio-economic requirements may affect a specific procurement:
  - (1) Labor. The following Federal labor protection laws and regulations may affect the types of property and services that may be acquired with FTA assistance:
    - (a) Wage and Hour Requirements. The Common Grant Rules direct the recipient to include provisions in its third party contracts requiring the contractor to compute the wages of every mechanic and laborer based on a standard workweek of 40 hours. Work in excess of the standard workweek is permitted if the worker is compensated at a rate of not less than one and one-half times the basic rate of pay for all hours worked in excess of 40 hours in the workweek. The Common Grant Rules require these provisions for compliance with Sections 102 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. Section 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. Section 4104(c) of the Federal Acquisition Streamlining Act of 1994, 40 U.S.C. Section 3701(b)(3)(A)(iii), increased the wage and hour thresholds of \$2,000 for construction work and \$2,500 for nonconstruction work set forth in the Common Grant Rules to \$100,000. A federally assisted contract must exceed \$100,000 before these wage and hour requirements apply to that contract.
    - (b) Fair Labor Standards. The Fair Labor Standards Act, 29 U.S.C. Sections 201 *et seq.*, applies to employees performing work involving commerce.
  - (2) Civil Rights. The following Federal civil rights laws and regulations may affect the types of property and services that may be acquired with FTA assistance:

- (a) Nondiscrimination in Federal Public Transportation Programs. Federal transit law at 49 U.S.C. Section 5332, covering projects, programs, and activities financed under 49 U.S.C. Chapter 53 prohibits discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimination in employment or business opportunity.
- (b) Title VI of the Civil Rights Act. In determining the types of property or services to acquire, no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving Federal financial assistance in violation of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sections 2000d *et seq.* and DOT regulations, “Nondiscrimination in Federally Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act of 1964,” 49 CFR Part 21. In addition, FTA Circular 4702.1, “Title VI and Title VI-Dependent Guidelines for FTA Recipients,” 05-13-07, provides FTA guidance and instructions for implementing DOT’s Title VI regulations.
- (c) Environmental Justice. Executive Order No. 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” February 11, 1994, 42 U.S.C. Section 4321 note, and DOT Order 5610.2, “Department of Transportation (DOT) Order To Address Environmental Justice in Minority Populations and Low-Income Populations,” 62 FR 18377, April 15, 1997, protect minority populations and low-income populations against disproportionately high and adverse effects of federally assisted programs. FTA Circular 4702.1, “Title VI and Title VI-Dependent Guidelines for FTA Recipients,” 05-13-07, also provides FTA guidance and instructions for implementing the DOT Order on Environmental Justice.
- (d) Limited English Proficiency (LEP). Executive Order No. 13166, “Improving Access to Services for Persons with Limited English Proficiency,” August 11, 2000, 42 U.S.C. Section 2000d-1 note, and DOT , “Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (LEP) Persons,” December 14, 2005. This guidance clarifies the responsibilities of recipients of Federal financial assistance from DOT and assists them in fulfilling their responsibilities to LEP persons, pursuant to Title VI of the Civil Rights Act of 1964 and implementing regulations. FTA Circular 4702.1, “Title VI and Title VI-Dependent Guidelines for FTA Recipients,” 05-13-07, also provides FTA guidance and instructions for implementing the DOT Policy Guidance.
- (e) Nondiscrimination on the Basis of Disability. The recipient agrees to comply, and assures the compliance of each third party contractor and each subrecipient at any tier of the project, with the applicable laws and regulations, discussed below, for nondiscrimination on the basis of disability.

- 1 Section 504 of the Rehabilitation Act of 1973, as amended (Section 504), 29 U.S.C. Section 794, prohibits discrimination on the basis of disability by recipients of Federal financial assistance.
- 2 The Americans with Disabilities Act of 1990, as amended (ADA), 42 U.S.C. Sections 12101 *et seq.*, prohibits discrimination against qualified individuals with disabilities in all programs, activities, and services of public entities, as well as imposes specific requirements on public and private providers of transportation.
- 3 DOT Public Transportation Regulations implementing Section 504 and the ADA. These regulations include DOT regulations, “Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance,” 49 CFR Part 27, DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 CFR Part 37, and Architectural and Transportation Barriers Compliance Board (ATBCB)/DOT regulations, “Americans With Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 CFR Part 1192 and 49 CFR Part 38. Examples of requirements include, but are not limited to, the following:
  - a Design and Construction. Accessibility requirements for the design and construction of new transportation facilities;
  - b Accessibility and Usability. Requirements that vehicles acquired (with limited exceptions) be accessible to and usable by individuals with disabilities, including individuals using wheelchairs;
  - c Complementary Paratransit Service. Requirements that public entities providing fixed-route service, (including a private non-profit entity providing public transportation service on behalf of the State or designated recipient as a subrecipient providing fixed-route service), provide complementary paratransit service to individuals with disabilities who cannot use the fixed-route service;
  - d Equal Opportunity. Requirements for compliance with service requirements intended to ensure that individuals with disabilities are afforded equal opportunity to use transportation systems and services.
- (f) Electronic Reports and Information. Reports and other information prepared in electronic format developed in connection with a third party contract that the recipient intends to provide to FTA, among others, whether as a contract end item or in compliance with contract administration provisions, must comply with the accessibility standards of Section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Section 794d, and ATBCB regulations,

“Electronic and Information Technology Accessibility Standards,”  
36 CFR Part 1194.

- (3) Environmental Protections. Federal laws and regulations require the recipient to comply with applicable environmental requirements and implement them as necessary through third party contracts.
- (a) Environmental Mitigation. FTA expects the recipient to include adequate third party contract provisions to facilitate compliance with environmental mitigation measures it has agreed to implement.
- (b) National Environmental Policy Act. Certain acquisitions and the timing of certain acquisitions can adversely affect the environmental review process required by the National Environmental Policy Act (NEPA), 42 U.S.C. Sections 4321 through 4335, for a project constituting a major Federal action.
- 1 Property. The recipient may not enter into binding arrangements for the acquisition 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. Council on Environmental Quality regulations, “Other Requirements of NEPA,” 40 CFR Part 1506, at Section 1506.5(c), require the recipient to obtain a disclosure statement from the contractor selected to prepare an environmental impact statement specifying that the contractor has no financial or other interest in the outcome of the project.
- (c) Protections for Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites. DOT’s enabling legislation has special requirements designed to protect parks, recreation areas, wildlife and waterfowl refuges, and historic sites, at 49 U.S.C. Sections 303(b) and 303(c) (often referred to as “Section 4(f)”), that may affect the types and methods of procurement that the recipient may use. 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 prohibit the use of facilities included in the Environmental Protection Agency (EPA) “List of Violating Facilities,” in the performance of any third party contract at any tier exceeding \$100,000. The contractor must also comply with all applicable standards, orders, or regulations issued under Section 306 of the Clean Air Act, as amended, 42 U.S.C. Section 7414, and other applicable provisions of the Clean Air Act, as amended, 42 U.S.C. Sections 7401 through 7671q.

- (e) Clean Water. The Common Grant Rules specifically prohibit the use of facilities included in the EPA “List of Violating Facilities,” in the performance of any third party contract at any tier exceeding \$100,000. The contractor must also comply with all applicable standards, orders, or regulations issued under Section 508 of the Clean Water Act, as amended, 33 U.S.C. Section 1368, and other applicable requirements of the Clean Water Act, as amended, 33 U.S.C. Sections 1251 through 1377.
  - (f) Recycled Products. The Resource Conservation and Recovery Act of 1976, 42 U.S.C. Section 6962, requires governmental recipients to provide a competitive preference to products and services that conserve natural resources, protect the environment, and are energy efficient. EPA guidelines, “Comprehensive Procurement Guideline for Products Containing Recovered Materials,” 40 CFR Part 247, direct that third party contracts of \$10,000 or more with governmental recipients specify a competitive preference for products containing recycled materials identified in those EPA guidelines. For information about EPA’s recovered materials advisory notices, see EPA’s Web site: <http://www.epa.gov/cpg/backgrnd.htm>.
  - (g) Other Federal Environmental Protection Requirements. Additional third party contract provisions may be needed for compliance with other Federal laws and regulations. FTA’s Master Agreement includes environmental laws and regulations that may affect the acquisition of property or services with FTA assistance. These laws and regulations include various provisions to protect wild and scenic rivers, manage coastal zones, protect wetlands, conserve endangered species, and protect fisheries, and protect historic sites, archeological sites, and Indian sacred sites.
- (4) Energy Conservation. The Common Grant Rules require third party contract provisions as necessary for compliance with applicable energy efficiency standards and policies of State energy conservation plans issued under the Energy Policy and Conservation Act, as amended, 42 U.S.C. Sections 6321 *et seq.*
  - (5) Preference for U.S. Property—Buy America. FTA’s “Buy America” regulations apply to procurements in excess of \$100,000 that involve the purchase of iron, steel, manufactured goods, or rolling stock to be delivered to the recipient under the third party contract for incorporation into the FTA project. Property that the contractor acquires to fabricate a deliverable for the recipient, such as tools, machinery, and other equipment or facilities, are not subject to FTA’s Buy America requirements unless the recipient intends to take possession of those assets upon completion of the project. Thus, if a third party contractor is acquiring property for its general inventory of equipment or facilities to conduct its overall business affairs, the recipient may enter the cost of that acquisition into its calculations of overhead amounts applicable to the FTA assisted project



irrespective of whether the property acquired would comply with FTA's Buy America regulations.

FTA cautions that its Buy America regulations that apply to FTA assisted third party procurements, published at 49 CFR Part 661, differ from Federal "Buy American Act" regulations that apply to direct Federal procurements, published in the FAR at 48 CFR Chapter 1, Subparts 25.1 and 25.2. FTA strongly recommends that the recipient review FTA's Buy America regulations before undertaking any FTA assisted procurement.

(6) Shipments of Property—U.S. Flag Requirements.

(a) Shipments by Ocean Vessel. The Common Grant Rules require third party contract provisions to ensure compliance with 46 U.S.C. Section 55303 and Maritime Administration regulations, "Cargo Preference-U.S. Flag Vessels," 46 CFR Part 381. With few exceptions, the regulations require that U.S. Flag vessels be used to transport at least 50 percent of any federally assisted property.

(b) Shipments by Air Carrier. Third party contracts involving shipments of federally assisted property by air carrier will require provisions to ensure compliance with Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, as amended, ("Fly America" Act), 49 U.S.C. Section 40118, and GSA regulations, "Use of United States Flag Air Carriers," 41 CFR Sections 301-10.131 through 301-10.143. The regulations require shipment by U.S. flag air carriers unless such carriers are not reasonably available within the standards of GSA's implementing regulations.

(7) Project Travel—Use of U.S. Flag Air Carriers. Third party contracts to acquire transportation by air carrier needed by people participating in a federally assisted project require provisions to ensure compliance with Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, as amended, ("Fly America" Act), 49 U.S.C. Section 40118, and GSA regulations, "Use of United States Flag Air Carriers," 41 CFR Sections 301-10.131 through 301-10.143. The regulations require transportation by 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. The following Federal laws and regulations imposing technical requirements may affect a specific procurement.

(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 Section 5307(c) of SAFETEA-LU, 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 FTA may issue. Consequently, third party contracts involving ITS are likely to require provisions to ensure compliance with Federal requirements.

- (2) Metric Measurements. The Common Grant Rules require the recipient to accept property and services with dimensions expressed in metric measurements, to the extent practicable and feasible, in compliance with the Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act, 15 U.S.C. Sections 205a *et seq.*; Executive Order No. 12770, “Metric Usage in Federal Government Programs,” July 25, 1991, 15 U.S.C. Section 205a note; and applicable Federal regulations.
  - (3) Use of \$1 Coins. To comply with Section 104 of the Presidential \$1 Coin Act of 2006, 31 U.S.C. Section 5312(p), 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. The following Federal laws and regulations impose requirements that may affect rolling stock procurements.
- (1) Accessibility. Rolling stock must comply with the accessibility requirements of DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 CFR Part 37, and Joint ATBCB/DOT regulations, “Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 CFR Part 1192 and 49 CFR Part 38.
  - (2) Transit Vehicle Manufacturer Compliance with DBE Requirements. Before a transit vehicle manufacturer (TVM) may submit a bid or proposal to provide vehicles to be financed with FTA assistance, 49 CFR Section 26.49 requires the TVM to submit a certification that it has complied with FTA’s DBE requirements.
  - (3) Minimum Service Life. FTA requires each recipient to maintain satisfactory continuing control of FTA assisted property. For buses and certain other vehicles, FTA has established minimum service life policies that may affect the quantity of vehicles that the recipient may acquire. *See*, the most recent versions of FTA Circular 5010.1, “Grants Management Guidelines,” FTA Circular 9030.1, “Urbanized Area Formula Program: Grant Application Instructions,” and FTA Circular 9300.1, “Capital Program: Grant Application Instructions,” that addresses minimum service life for vehicles.
  - (4) Spare Ratios. While all FTA assistance for third party procurements must be limited to property and services the recipient will use in the near future, FTA is concerned that the recipient does not acquire an excessive number of spare vehicles not regularly used in public transportation service.

- (5) Air Pollution and Fuel Economy. Each third party contract to acquire rolling stock must include provisions to ensure compliance with applicable Federal air pollution control and fuel economy regulations, such as EPA regulations, “Control of Air Pollution from Mobile Sources,” 40 CFR Part 85; EPA regulations, “Control of Air Pollution from New and In-Use Motor Vehicles and New and In-Use Motor Vehicle Engines,” 40 CFR Part 86; and EPA regulations, “Fuel Economy of Motor Vehicles,” 40 CFR Part 600.
- (6) Preaward and Post Delivery Review. Each third party contract to acquire rolling stock must include provisions to ensure compliance with applicable requirements of 49 U.S.C. Section 5323(m) and FTA regulations, “Pre-Award and Post-Delivery Audits of Rolling Stock Purchases,” 49 CFR Part 663, that do not conflict with 49 U.S.C. Section 5323(m).
- (7) Bus Testing. Each third party contract to acquire a new bus model or a bus with significant alterations to an existing model must include provisions to assure compliance with applicable requirements of FTA regulations, “Bus Testing,” 49 CFR Part 665.
- (8) In-State Dealers. The recipient may not limit third party bus procurements to in-State dealers, 49 U.S.C. Section 5325(i). Although FTA respects State licensing requirements, it is prohibited by law from providing FTA assistance to support bus procurements that have the result of limiting competition to entities that have been able to obtain a State license.
- (9) Basis for Contract Award. As permitted by 49 U.S.C. Section 5325(f), the recipient may award a third party contract for rolling stock based on initial capital costs, or based on performance, standardization, life cycle costs, and other factors, or by selection through a competitive procurement process.
- (10) Five-Year Limitation. A recipient may enter into a multi-year contract to buy rolling stock with an option not exceeding five (5) years to buy additional rolling stock or replacement parts, 49 U.S.C. Section 5325(e)(1). The recipient may not exercise that option later than five (5) years after the date of its original contract.

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

material requirements for rolling stock or replacement parts for five years based on the effective date of the contract.

- f. Public Transportation Services—Special Requirements. Although the Common Grant Rules refer to the following Federal requirements in the context of federally assisted procurements, these requirements will affect how a third party contractor implements its contract to provide public transportation services financed with Federal assistance. Consequently, the recipient must include provisions in its third party contract ensuring compliance with the following requirements, or the recipient must obtain the third party contractor's agreement in another form, as a matter of contractor responsibility, to ensure compliance with the following:

- (1) Protections for Public Transportation Employees. When the recipient acquires public transportation services from a third party contractor, the terms of the recipient's DOL certification of public transportation employee protective arrangements will apply to work under the contract provided by those employees covered by the certification. That certification is required by 49 U.S.C. Section 5333(b) (often referred to as "13(c)") and implementing DOL guidelines, "Section 5333(b), Federal Transit Law," 29 CFR Part 215. Consequently, the third party contractor must comply with the terms of that DOL certification.

The Fair Labor Standards Act, 29 U.S.C. Sections 201 *et seq.*, also applies to public transportation employees performing work involving commerce.

- (2) Drug and Alcohol Testing. A third party contractor providing services involving the performance of safety sensitive activities must comply with 49 U.S.C. Section 5331 and FTA regulations, "Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations," 49 CFR Part 655.
- (3) Accessibility. A third party contractor providing public transportation services must operate its services in compliance with 42 U.S.C. Sections 12101 *et seq.* and DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," using facilities and equipment that comply with 49 CFR Part 37; and Joint ATBCB/DOT regulations, "Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles," 36 CFR Part 1192 and 49 CFR Part 38. Private entities must comply with the requirements of 49 CFR Part 37 applicable to public entities with which they contract to provide public transportation services. The recipient should advise its third party contractors operating public transportation services to review the requirements for public entities in this context.
- (4) Protection of Animals. A third party contractor providing services involving the use of animals must comply with the Animal Welfare Act, 7 U.S.C. Sections 2131 *et seq.* and Department of Agriculture regulations, "Animal Welfare," 9 CFR Subchapter A, Parts 1, 2, 3, and 4.

- (5) Charter Service Restrictions. A third party 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. Section 5323(d) and FTA regulations, “Charter Service,” 49 CFR Part 604.
  - (6) School Bus Restrictions. A third party 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 U.S.C. Sections 5323(f) or (g) and FTA regulations, “School Bus Operations,” 49 CFR Part 605, to the extent consistent with 49 U.S.C. Sections 5323(f) or (g).
- g. Architectural Engineering (A&E) and Related Services—Special Requirements. Federal laws and regulations impose the following requirements on A&E and related procurements:
- (1) Qualifications-Based Requirements. For projects related to or leading to construction, an FTA recipient must use the qualifications-based procurement procedures of 40 U.S.C. Chapter 11 (Brooks Act procedures) when contracting for A&E services and other services described in 49 U.S.C. Section 5325(b), which include program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related services.
  - (2) Relation to Construction. The nature of the services to be performed and its relationship to construction, not the nature of the prospective contractor, determines whether qualifications-based procurement procedures may be used.
    - (a) Purpose of Services. FTA has long administered the requirement for using qualifications-based procurement procedures for selection of contractors that perform A&E services, generally associated with the construction, alteration, or repair of real property. FTA interprets 49 U.S.C. Section 5325(b) to authorize the use of qualifications-based procurement procedures only for those services that directly support or are directly connected or related to construction, alteration, or repair of real property. FTA’s interpretation of 49 U.S.C. Section 5325(b) is consistent with typical Federal policies implementing the Brooks Act, 40 U.S.C. Section 1102, which limits qualifications-based procurement procedures to research, planning, development, design, construction, alteration, or repair of real property. Thus if services, such as program management, feasibility studies, or mapping, are not directly in support of, directly connected to, or directly related to, or lead to construction, alteration, or repair of real property, then the recipient may not use qualifications-based procurement procedures to select the contractor that will perform those services.
    - (b) Requirements in the Context of a Construction Project. A project involving construction (including an ITS project) does not always require the use of

qualifications-based procurement procedures. Whether qualifications-based procurement procedures may be used depends on the actual services to be performed in connection with the construction project. For example:

- 1 End Products Used in Construction. The design or fabrication of message signs, signals, and movable barriers that will become off-the-shelf items or will be fabricated and delivered as final end products for installation in an FTA assisted construction project, including an Intelligent Transportation System (ITS) construction project, are not services for which qualifications-based procurement procedures may be used.
  - 2 Services Related to Design of Construction Projects. In contrast, program manager, project designer, construction manager, or engineering services in which the contractor would select the finished products to be acquired for an FTA assisted construction project are services for which qualifications-based procurement procedures must be used.
  - 3 Actual Construction. The actual construction or improvement to the real property to be used in an FTA assisted construction project, however, are not services for which qualifications-based procurement procedures may be used.
- (c) Type of Contractor Not Determinative. The nature of the firm performing the services does not determine whether it will be selected through the use of qualifications-based procurement procedures. For example, if a well-known A&E firm offers to provide mapping services not related to construction, alteration, or repair of real property, the recipient may not use qualifications-based procurement procedures to evaluate that contractor's offer. In contrast, if a firm that does not generally provide A&E services offers to provide mapping services that are directly in support of, directly connected to, or directly related to or lead to construction, alteration, or repair of real property, the recipient must evaluate that offer using qualifications-based procurement procedures.
- (3) Equivalent State Law. SAFETEA-LU also divided the former 49 U.S.C. Section 5325(b) by separating procurement requirements for FTA assisted A&E services from audit requirements for FTA assisted A&E services. As amended by the SAFETEA-LU Technical Corrections Act, 49 U.S.C. Section 5325(b)(1) requires A&E services to be procured using either Brooks Act procedures or an equivalent qualifications-based requirement adopted by a State before August 10, 2005.
  - (4) Special Requirements for Indirect Cost Rates. In addition, SAFETEA-LU amended 49 U.S.C. Section 5325 to require the acceptance of FAR indirect cost rates for applicable one-year accounting periods if those rates are not currently in dispute. After the indirect cost rates are accepted as required, the recipient must

use those indirect cost rates for contract estimates, negotiation, administration, reporting, and payments, with administrative or de facto ceiling limitations. *See*, 49 U.S.C. Section 5325(b)(3) and subparagraph 2.j(2)(c) of this Chapter.

- h. Construction—Special Requirements. The following Federal laws and regulations impose requirements that may affect FTA assisted construction projects:
- (1) Bonding. The Common Grant Rules require bonds for all construction contracts exceeding the simplified acquisition threshold unless FTA determines that other arrangements adequately protect the Federal interest. FTA’s bonding policies are as follows:
    - (a) Bid Guarantee. Both FTA and the Common Grant Rules generally require each bidder to provide a bid guarantee equivalent to 5 percent of its bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid to ensure that the bidder will honor its bid upon acceptance.
    - (b) Performance Bond. Both FTA and the Common Grant Rules generally require the third party contractor to obtain a performance bond for 100 percent of the contract price. A “performance bond” is obtained to ensure completion of the obligations under the third party contract.
    - (c) Payment Bond. The Common Grant Rules generally require the third party contractor to obtain a standard payment bond for 100 percent of the contract price. A “payment bond” is obtained to ensure that the contractor will pay all people supplying labor and material for the third party contract as required by law. FTA, however, has determined that payment bonds in the following amounts are adequate to protect FTA’s interest and 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,
      - 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, or
      - 3 More Than \$5 Million. Two and one half million dollars if the contract price is more than \$5 million.
    - (d) Acceptable Sureties. The Common Grant Rule for non-governmental recipients requires the non-governmental recipient to obtain construction bonds from companies holding certificates of authority as acceptable sureties under Department of the Treasury regulations, “Surety Companies Doing Business with the United States,” 31 CFR Part 223. For a current list of

approved sureties, see Department of the Treasury's Listing of Approved Sureties (Department Circular 570), <http://fms.treas.gov/c570/c570.html>. FTA encourages each governmental recipient to require similarly acceptable sureties.

- (e) Reduced Bonding. FTA recognizes that bonding costs can be expensive. FTA will accept a local bonding policy that conforms to the minimums described in this subparagraph 2.h(1) of this Chapter. FTA reserves the right to approve bonding amounts that do not conform to these minimums if the local bonding policy adequately protects the Federal interest. A recipient that wishes to adopt less stringent bonding requirements, for a specific class of projects, or for a particular project should submit its policy and rationale to the Regional Administrator for the region administering the project.
  - (f) Excessive Bonding. Compliance with State and local bonding policies that are greater than FTA's bonding requirements do not require FTA approval. FTA recognizes that in some situations bond requirements can be useful if the recipient has a material risk of loss because of a failure of the prospective contractor. This is particularly so if the risk results from the likelihood of the contractor's bankruptcy or financial failure at the time of partially completed work. Nevertheless, if the recipient's "excessive bonding" requirements would violate the Common Grant Rules as restrictive of competition, FTA will not provide Federal assistance for procurements encumbered by those requirements. Consequently, if the recipient's bonding policies far exceed those described in this subsection, FTA reminds the recipient that it may find it useful to submit its policy and rationale to the Regional Administrator for the region administering the project.
- (2) Seismic Safety. The recipient must include seismic safety provisions in its third party contracts for the construction of new buildings or additions to existing buildings as required by 42 U.S.C. Sections 7701 *et seq.*, and DOT regulations, "Seismic Safety," 49 CFR Part 41 at Sections 41.117 and 41.120.
  - (3) Value Engineering. The Common Grant Rule for governmental recipients encourages them to use value engineering provisions in contracts for construction projects, and cautions that value engineering can be a pre-requisite for some Federal assistance awards. FTA generally will not approve a New Starts grant application for final design funding or a full funding grant agreement until value engineering is complete. It is important to note that some contractual arrangements (for example, design-build contracts) may inherently include value engineering. When this is the case, FTA does not require separate value engineering proposals, contract changes, or other processes. From a procurement view, the concept of value engineering is more important than the form it takes.



- (4) Equal Employment Opportunity. The Common Grant Rules require that third party construction contracts include provisions ensuring compliance with DOL regulations, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor,” 41 CFR Parts 60 *et seq.*, which implement 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.
- (5) Prevailing Wages. Under 49 U.S.C. Section 5333(a), Davis-Bacon Act prevailing wage protections apply to laborers and mechanics employed on FTA assisted construction projects. Thus, the Common Grant Rules specify that third party contracts at any tier exceeding \$2,000 must include provisions requiring compliance with the Davis-Bacon Act, 40 U.S.C. Sections 3141 *et seq.*, and implementing DOL regulations, “Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction,” 29 CFR Part 5. 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. The Davis-Bacon Act also requires contractors to pay wages not less than once a week. The recipient must include a copy of the current prevailing wage determination issued by DOL in each contract solicitation and must condition contract award upon the acceptance of that wage determination. These requirements are in addition to the separate Wage and Hour Requirements addressed in paragraph 2.c(1) of this Chapter.
- (6) Anti-Kickback. For all third party construction and repair contracts exceeding \$100,000, the Common Grant Rules require provisions for compliance with the Copeland “Anti-Kickback” Act, as amended, 18 U.S.C. Section 874, and implementing DOL regulations, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States,” 29 CFR Part 3. The Act prohibits a contractor from inducing, by any means, any employee, to give up any part of his or her compensation to which he or she is otherwise entitled. Section 4104(c) of the Federal Acquisition Streamlining Act of 1994, 40 U.S.C. Section 3701(b)(3)(A)(iii), increased the threshold for construction and repair 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 “Anti-Kickback” prohibitions apply to that contract.
- (7) Construction Safety. The Common Grant Rules require 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 as prohibited by the safety requirements of Section 107 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. Section 3704, and its implementing DOL regulations, “Safety and Health Regulations for Construction,” 29 CFR Part 1926. Notably, Section 4104(c) of the Federal Acquisition

Streamlining Act of 1994, 40 U.S.C. Section 3701(b)(3)(A)(iii), increased the threshold for construction safety protections 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.

- (8) Labor Neutrality. A recipient's third party contract may not require or prohibit the use of a project labor agreement (PLA), except if special circumstances require a PLA to be used to avert an imminent threat to public health or safety. A third party contractor or subcontractor, however, may voluntarily enter into a PLA. These provisions are needed to ensure compliance with Executive Order No. 13202, "Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects," February 17, 2001, as amended by Executive Order No. 13208, April 6, 2001, 41 U.S.C. Section 251 note.
- (9) Preference for U.S. Property—Buy America. For any FTA assisted third party construction contract exceeding \$100,000, FTA's Buy America requirements require the third party contractor to provide property produced or manufactured in the United States for use in the construction project that the recipient acquires, unless FTA has granted a waiver authorized by those regulations. FTA cautions that its Buy America regulations are complex and different from the Federal "Buy American Act" regulations in FAR Subparts 25.1 and 25.2.

Property that the contractor acquires to perform its construction activities for the recipient, such as tools, machinery, and other equipment or facilities, is not covered by FTA's Buy America requirements unless the recipient intends to take possession of that property upon completion of the project. Thus, if a third party contractor is acquiring property for its general inventory of equipment or facilities to conduct its overall business affairs, the recipient may enter the cost of that acquisition into its calculations of overhead amounts applicable to the FTA assisted project irrespective of whether that property would comply with FTA's Buy America regulations.

- (10) Accessibility. Facilities to be used in public transportation service must comply with 42 U.S.C. Sections 12101 *et seq.* and DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)," 49 CFR Part 37; and Joint ATBCB/DOT regulations, "Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles," 36 CFR Part 1192 and 49 CFR Part 38. Notably, DOT incorporated by reference the ATBCB's "Americans with Disabilities Act Accessibility Guidelines" (ADAAG), revised July 2004, which include accessibility guidelines for buildings and facilities, and are incorporated into Appendix A to 49 CFR Part 37. DOT also added specific provisions to Appendix A modifying the ADAAG, with the result that buildings

and facilities must comply with both the ADAAG and amendments thereto in Appendix A to 49 CFR Part 37.

- i. 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 the recipient, subrecipient, or third party contractor (for example, a large business, small business, State government, State instrumentality, local government, Indian tribe, non-profit organization, institution of higher education, individual, and so forth) the Common Grant Rules require provisions consistent with Department of Commerce regulations, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms,” 37 CFR Part 401 (implementing 35 U.S.C. Sections 200 *et seq.*), unless 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 resulting invention or patent to the invention for Federal Government purposes.
  - (2) Rights in Data. In general, FTA does not seek greater rights in data or copyright than described in the Common Grant Rules when it provides FTA capital assistance to support acquisitions. But when FTA provides Federal assistance to support the costs of a research, development, demonstration, or a special studies project, FTA generally seeks sufficient rights in the data developed so that the resulting data can be made available to any FTA recipient, subrecipient, third party contractor, or third party subcontractor. 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, unless FTA determines otherwise in writing, FTA expects the following conditions to apply to rights in data requirements for FTA assisted research, development, demonstration, or special studies projects.
    - (a) Publication Restrictions. Except for its own internal use, neither the recipient nor the third party contractor may publish or reproduce subject data in whole or in part, or in any manner or form, without the advance written consent of the Federal Government, unless the Federal Government has released or approved the release of that data to the public. These restrictions do not apply to an institution of higher education.
    - (b) Distribution of Data. Except for contracts for adaptation of automatic data processing equipment or data provided in support of an FTA capital project, each recipient and third party contractor must agree that, in addition to the rights in data and copyrights that it must provide to FTA under 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, for any reason, the project is not completed, all data developed under the project is expected to be delivered as FTA may direct.

In certain circumstances, however, FTA may determine that it is in the public interest to take only those rights in data identified in 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 Department of Commerce, Export Administration Regulations, 15 CFR Part 730.
  - (4) Protection of Human Subjects. A third party contractor providing services involving the use of human subjects must comply with 42 U.S.C. Sections 289 *et seq.*, and DOT regulations, "Protection of Human Subjects," 49 CFR Part 11.
  - (5) Protection of Animals. A third party contractor providing services involving the use of animals must comply with the Animal Welfare Act, 7 U.S.C. Sections 2131 *et seq.*, and Department of Agriculture regulations, "Animal Welfare," 9 CFR Subchapter A, Parts 1, 2, 3, and 4.
- j. Audit Services. In general, the procedures of this circular apply to the acquisition of audit services financed with FTA assistance. The following considerations, however, are especially important in procurements of audit services:
- (1) Single Audit Act. Each recipient that spends \$500,000 or more in Federal awards in a single year must obtain an audit as required by the Single Audit Act of 1984, as amended, 31 U.S.C. Sections 7501 *et seq.*, and must ensure compliance with OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations," as revised.
    - (a) Organizational Conflicts of Interest. The auditor selected must be independent of the recipient.
    - (b) Eligibility of Costs. The recipient may charge the costs for audits required by the Single Audit Act to its project as direct or indirect costs as permitted by applicable Federal Cost Principles. A recipient that spends less than \$500,000 in Federal awards in a single year is not required to obtain this audit. Nor may a recipient spending less than \$500,000 in Federal awards in a single year finance the costs of such an audit with Federal assistance.
  - (2) Other Project Audits. Before procuring audit services for a specific contract or project, the recipient should be aware of the following:

- (a) Organizational Conflicts of Interest. In general, the recipient must select an auditor that is independent of the third party contractor to be audited.
- (b) Verification of Indirect Costs. Federal verification of a contractor's indirect cost rates, such as provisional overhead (burden) and General & Administrative (G&A) rates, may be required. To the extent possible, relevant information available through undisputed audits of the contractor by other recipients should be used.
- (c) Duplication of Services. To prevent duplication and ensure the eligibility of particular audit services for Federal participation, a recipient seeking a third party contract audit should contact FTA before undertaking the audit. This is particularly important in connection with the procurement of A&E services, because 49 U.S.C. Section 5325(b)(3) requires that FAR Part 31 cost principles be used to audit A&E contracts. In addition, 49 U.S.C. Section 5325(b)(3) requires the recipient and its A&E contractors and subcontractors to accept indirect cost rates established under FAR cost principles if those rates are not under dispute. Thus, the recipient should not obtain duplicative audits because they are likely to produce disparate indirect cost rates and may be ineligible for Federal assistance. Accordingly, FTA recommends that the recipient seek guidance from the cognizant Federal auditor or agency that approved the third party contractor's indirect cost rates before entering into audit contracts.
- (d) Obtaining Indirect Cost Rates. Recipients and third party contractors may obtain indirect cost rates based on FAR cost principles from the following sources:
  - 1 Governmental Entities. Government entities may obtain indirect cost rates through negotiations with OMB. *See*, OMB Guidance for Grants and Agreements, "Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A-87)," 2 CFR Part 225, App. E, "State and Local Indirect Cost Rate Proposals."
  - 2 Indian Tribes. Indian tribes may obtain indirect cost rates with the Department of the Interior. *See*, OMB Guidance for Grants and Agreements, "Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A-87)," 2 CFR Part 225, App. E, "State and Local Indirect Cost Rate Proposals."
  - 3 Educational Institutions. Educational institutions may obtain facilities and administrative rates (indirect cost rates) from the Department of Health and Human Services (HHS) or the Department of Defense's Office of Naval Research (DOD), usually depending on which of the two agencies (HHS or DOD) has provided more funds to the educational institution for the most recent three years. *See*, OMB Guidance for Grants and

Agreements, “Cost Principles for Educational Institutions (OMB Circular A-21),” 2 CFR Part 220, App. A, “Principles for Determining Costs Applicable to Grants, Contracts, and Other Agreements With Educational Institutions.”

- 4 Non-Profit Entities. Non-profit entities may obtain indirect cost rates from the Federal agency with the largest dollar value of awards with an organization, unless different arrangements are agreed to by the agencies concerned. *See*, OMB Guidance for Grants and Agreements, “Cost Principles for Non-Profit Organizations (OMB Circular A-122)” 2 CFR Part 230, App. A, “General Principles.”
  - 5 Private For-Profit Entities. Private for-profit entities may obtain indirect cost rates from the Defense Contract Audit Agency. *See*, the DCAA Web site: <http://www.dcaa.mil/>.
- (e) Eligibility of Costs. Costs of third party contract audits and proposal evaluations are eligible for reimbursement by FTA as a direct or indirect charge as permitted by applicable Federal cost principles. FTA reserves the right to disallow payments for duplicative audit charges.

## CHAPTER V

### SOURCES

A recipient will often have several sources from which to acquire the property and services it needs as described below:

1. FORCE ACCOUNT. As used in this circular, “force account” means the recipient’s own labor forces and equipment. The use of force account labor is a project management function, rather than a procurement and contract administration function, except in the general sense of the recipient’s ability to perform work with its own forces rather than contracting with another entity to acquire the property or services it needs, and the cost implications of the recipient’s decision. Although rarely exercised, FTA’s grant or cooperative agreement secures FTA the right to determine the extent to which Federal assistance may be used to participate in force account costs. FTA’s concern is to assure that the recipient will have adequate technical capacity to perform the work it undertakes reasonably economically and prudently. The third party contracting guidance of this circular does not apply to a recipient’s use of its own forces to perform project work.
2. SHARED USE. The Common Grant Rule for governmental recipients encourages recipients and subrecipients to enter into agreements for shared use of property and services. FTA encourages non-governmental recipients to consider shared use if economical and feasible.
3. JOINT PROCUREMENTS. 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 a State or local government purchasing schedule, 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.
  - a. Use Encouraged. The Common Grant Rules and FTA encourage recipients to procure goods and services jointly with other recipients to obtain better pricing through larger purchases. Joint procurements offer the advantage of being able to obtain goods and services that may match each participating recipient’s requirements better than those likely to be available through an assignment of another recipient’s contract rights. If economical and feasible, FTA also participates in the costs of joint procurements by non-governmental recipients.
  - b. All FTA and Federal Requirements Apply. When obtaining goods or services in this manner, recipients participating in the joint procurement must ensure compliance with all applicable FTA and Federal requirements and include all required clauses and certifications in the joint solicitation and contract documents.

4. STATE OR LOCAL GOVERNMENT PURCHASING SCHEDULES OR PURCHASING CONTRACTS. FTA uses the term “state or local government purchasing schedule” to mean an arrangement that a State or local government has established with several or many vendors in which those vendors agree to provide essentially an option to the State or local government, and its subordinate government entities, to acquire specific property or services in the future at established prices. These arrangements are somewhat similar to the General Services Administration’s (GSA) Cooperative Purchasing Program available for Federal Government use. If the State or local government wishes to permit others to use its schedules, the State or local government might seek the agreement of the vendor to provide the listed property or services to others with access to the schedules, or it may permit the vendor to determine whether or not it wishes to do so.
  - a. Use Encouraged. The Common Grant Rule for governmental recipients encourages recipients and subrecipients to enter into State and local intergovernmental agreements for procurements of property or services. If so permitted by State or local authorities, a non-governmental recipient may also use State and local sources of property and services.
  - b. All FTA and Federal Requirements Apply. When obtaining property or services in this manner, the recipient must ensure all Federal requirements, required clauses, and certifications (including Buy America) are properly followed and included, whether in the master intergovernmental contract or in the recipient's purchase document. One way of achieving compliance with FTA requirements is for all parties to agree to append the required Federal clauses in the purchase order or other document that effects the recipient’s procurement. When buying from these schedules, the recipient should obtain Buy America certification before entering into the purchase order. If the product to be purchased is Buy America compliant, there is no problem. If the product is not Buy America compliant, the recipient will need to obtain a waiver from FTA before proceeding.
5. FEDERAL EXCESS AND SURPLUS PROPERTY. The Common Grant Rule for governmental recipients encourages recipients to use Federal excess and surplus property managed by the GSA when feasible and economical rather than procuring new property. The GSA Federal Property Management Regulations, 41 CFR Parts 101-42 through 101-46, 101-48, and 101-49 govern the eligibility of recipients and subrecipients, as well as others, to acquire supplies and services through GSA’s personal property utilization and disposal programs.
6. FEDERAL SUPPLY SCHEDULES. A recipient must be specifically authorized by Federal law before it may use a GSA Federal Supply Schedule.
  - a. Full Use of Federal Supply Schedules. Appendix B of GSA Order ADM 4800.2E, “Eligibility to Use GSA Sources of Supply and Services,” FTA recipients eligible for full use of GSA Schedules are limited by 40 U.S.C. Section 502(a)(3) to the Washington Metropolitan Area Transit Authority and the District of Columbia



Department of Mass Transportation. The Government of American Samoa, the Government of Guam, Virgin Islands Department of Public Works, and the Commonwealth of the Northern Marianas are similarly authorized access to GSA schedules by 48 U.S.C. Section 1469e.

- b. Limited Use of Federal Supply Schedules. Federal laws authorize State and Local Governments (including institutions of higher education) to use Federal Supply Schedules to acquire information technology (IT) and to purchase products and services to facilitate recovery from a major disaster. In both circumstances, GSA defines the term “State and Local Government” broadly to include many FTA governmental recipients and others as follows:

The States of the United States, counties, municipalities, cities, towns, townships, tribal governments, public authorities (including public or Indian housing agencies under the United States Housing Act of 1937), school districts, colleges, and other institutions of higher education, council of governments (incorporated or not), regional or interstate government entities, or any agency or instrumentality of the preceding entities (including any local educational agency or institution of higher education), and including legislative and judicial departments.

GSA has determined that the term “State and Local Government” does not include “contractors, or grantees, of State or local governments.” Nevertheless, under the GSA Cooperative Purchasing Program, State and local governmental entities (including institutions of higher education) receiving Federal assistance, either as an FTA recipient or subrecipient, are eligible users by virtue of conforming to the definition of State or local government entities; the source of funding for these entities is irrelevant.

- (1) Information Technology. Section 211 of the E-Government Act of 2002, 40 U.S.C. Section 502(c), authorizes “State and local governments,” within limits established by law, to acquire IT of various types through GSA’s Cooperative Purchasing Program, Federal Supply Schedule 70. More information about cooperative purchasing is available at GSA’s Web site:  
**<http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelPage=%252Fep%252Fchannel%252FgsaOverview.jsp&channelId=-13528>**.
- (2) Major Disaster or Emergency Recovery. Since February 1, 2007, Section 833 of the John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364, amended 40 U.S.C. Section 502(d), to authorize State and local government entities to use any GSA Federal Supply Schedule to acquire property and services in advance of a major disaster declared by the President of the United States, as well as in the aftermath of an emergency event. The State or local government is then responsible for ensuring that the property or services acquired will be used for recovery. More information about major disaster and emergency recovery acquisition is available at GSA’s Web site:

[http://www.gsa.gov/Portal/gsa/ep/contentView.do?faq=yes&pageTypeId=8199&contentId=22410&contentType=GSA\\_OVERVIEW](http://www.gsa.gov/Portal/gsa/ep/contentView.do?faq=yes&pageTypeId=8199&contentId=22410&contentType=GSA_OVERVIEW).

- c. All FTA and Federal Requirements Apply. When using GSA schedules to acquire property or services in this manner, the recipient must ensure all Federal requirements, required clauses, and certifications (including FTA's Buy America requirements) are properly followed and included, whether in the master intergovernmental contract or in the recipient's purchase document. One way of achieving compliance with FTA requirements is for all parties to agree to append the required Federal clauses in the purchase order or other document that effects the recipient's procurement. When buying from these schedules, the recipient should obtain an FTA Buy America certification before entering into the purchase order. If the property to be purchased is Buy America compliant under FTA regulations, the recipient may proceed with its acquisition. If the property is not Buy America compliant under FTA standards, the recipient will need to obtain a waiver from FTA before proceeding.
  - d. Competition and Price Reasonableness. When using GSA schedules to acquire property or services, a recipient will have fulfilled the Common Grant Rules' competition requirements if it seeks offers from at least three sources. FTA expects a recipient using a price published on a GSA schedule to consider whether the GSA price is reasonable. The recipient may also seek a lower price than that published on the GSA schedules.
7. EXISTING CONTRACTS. Occasionally, a recipient may find it advantageous to use existing contract rights. As used in this circular, "existing contract" means a contract that, when formed, was intended to be limited to the original parties thereto, and does not include State or local government purchasing schedules or purchasing contracts as discussed in sections 4, 5, and 6 of this Chapter.
- a. Permissible Actions. Within the conditions set forth below, FTA permits a recipient to use existing contract rights held by another recipient:
    - (1) Exercise of Options. A recipient may use contract options held by another recipient with the following limitations:
      - (a) Consistency with the Underlying Contract. FTA expects the recipient to ensure that the terms and conditions of the option it seeks to exercise are substantially similar to the terms and conditions of the option as stated in the original contract at the time it was awarded.
      - (b) Price. The recipient may not exercise an option unless it has determined that the option price is better than prices available in the market, or that when it intends to exercise the option, the option is more advantageous.
      - (c) Awards Treated as Sole Source Procurements. The following actions constitute sole source awards:

- 1 Failure to Evaluate Options Before Awarding the Underlying Contract. If a contract has one or more options and those options were not evaluated as part of the original contract award, exercising those options after contract award will result in a sole source award.
- 2 Negotiating a Lower Option Price. Exercising an option after the recipient has negotiated a lower or higher price will also result in a sole source award unless that price can be reasonably determined from the terms of the original contract, or that price results from Federal actions that can be reliably measured, such as changes in Federal prevailing labor rates, for example.

In the circumstances described in this paragraph, FTA assistance may be used to support a sole source award only if that award can be justified under FTA's third party contract standards for sole source awards.

- (2) Assignment of Contract Rights. FTA expects the recipient to limit its procurements to the amount of property and services required to meet its reasonably expected needs without adding excess capacity simply for the purpose of assigning contract rights to others at a later date. FTA expects the recipient to be able to justify the quantities it procures. Having written statements of its anticipated material requirements in the recipient's contract files may prove helpful.

For example, if the supplies or services were solicited, competed, and awarded through the use of an indefinite-delivery-indefinite-quantity (IDIQ) contract, the solicitation and also the contract award are expected to contain both a minimum and maximum quantity that represent the recipient's reasonably foreseeable needs. The establishment of State or local government purchasing schedules intended to be available for future use as discussed in section 4 of this Chapter, however, are not usually financed with FTA assistance. FTA assistance would be used to acquire property or services listed on such a contract only to the extent needed for public transportation purposes.

Nevertheless, a recipient may find that it has inadvertently acquired contract rights in excess of its needs. The recipient may assign those contract rights to other recipients if the original contract contains an assignability provision that permits the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions. Some refer to this process as "piggybacking."

- (a) Acquisition Through Assigned Contract Rights. Although FTA does not encourage the practice, a recipient may find it useful to acquire contract rights through assignment by another recipient. A recipient that obtains contractual rights through assignment may use them after first determining the contract price remains fair and reasonable, and the contract provisions are adequate for

compliance with all Federal requirements. The recipient need not perform a second price analysis if a price analysis was performed for the original contract. However, FTA expects the recipient to determine whether the contract price or prices originally established are still fair and reasonable before using those rights. *See*, FTA's "Best Practices Procurement Manual" for further information about procurements through assignment of another's contract rights. The recipient using assigned contract rights is responsible for ensuring the contractor's compliance with FTA's Buy America requirements and execution of all the required preaward and post delivery Buy America review certifications. For further details, please refer to FTA's Pre-Award and Post-Delivery Handbooks for buses and rail cars, which contain copies of those certifications. The recipient seeking to use assigned contract rights will not usually be able to determine whether the assigning recipient originally procured unreasonably large quantities. Before proceeding with the assignment, however, FTA does expect the recipient seeking the assignment to review the original contract to be sure that the quantities the assigning recipient acquired, coupled with the quantities the acquiring recipient seeks, do not exceed the amounts available under the assigning recipient's contract.

(b) Alternatives to Assigned Contract Rights. Assignments limit a recipient's choices to specific property and services acquired to meet another recipient's particular needs, and may be less suited to the recipient's needs. More desirable approaches may include:

1 Joint Procurements. Recipients should consider combining or "pooling" their procurements to obtain better pricing. In general, joint procurements are often more desirable than procurements through assignment because an assignment does not represent the combined buying power of more than one purchaser at the time when prices are established. A joint procurement may also offer the advantage of permitting the parties to acquire property and services more closely responsive to each purchaser's material requirements than would be available through assignment of existing contract rights. FTA cautions, however, that if two or more parties jointly solicit and award an IDIQ contract, total minimum and maximum quantities are expected to be stated in the solicitation and contract.

2 Intergovernmental Procurements. As discussed in sections 4, 5, and 6 of this Chapter, Federal, State, and local governmental resources may provide attractive procurement opportunities.

b. Impermissible Actions. A recipient may not use Federal assistance to finance:

(1) Improper Contract Expansion. A contract has been improperly expanded when it includes a larger scope, greater quantities, or options beyond the recipient's

reasonably anticipated needs. A contract has also been improperly expanded when excess capacity has been added primarily to permit assignment of those contract rights to another entity. The Common Grant Rules require the recipient to have procurement procedures that preclude the recipient from acquiring property or services it does not need.

- (2) Cardinal Changes. A significant change in contract work (property or services) that causes a major deviation from the original purpose of the work or the intended method of achievement, or causes 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, is a cardinal change. Such practices are sometimes informally referred to as “tag-ons.” A change within the scope of the contract (sometimes referred to as an “in-scope” change) is not a “tag-on” or cardinal change.
  - (a) Identifying Cardinal Changes. Although FTA has provided additional guidance in its Best Practices Procurement Manual, FTA has not developed a finite list of acceptable contract changes. Recognizing a cardinal change to a third party contract can be difficult. A cardinal change cannot be identified easily by assigning a specific percentage, dollar value, number of changes, or other objective measure that would apply to all cases.
  - (b) Changes in Quantity. To categorize virtually any change in quantity as a prohibited cardinal change (sometimes referred to as an “out-of-scope” change) fails to account for the realities of the marketplace and unnecessarily restricts a recipient from exercising reasonable freedom to make minor adjustments contemplated fairly and reasonably by the parties when they entered into the contract. The U.S. Supreme Court decision in *Freund v. United States*, 260 U.S. 60 (1922) supports FTA’s policy.
  - (c) Tests. Among other things, customary marketing practices can influence the determination of which changes will be “cardinal.” Other tests involve the nature and extent of the work to be performed, the amount of effort involved, whether the change was originally contemplated at the time the original contract was entered into, or the cumulative impact on the contract’s quantity, quality, costs, and delivery terms.
  - (d) Rolling Stock. In the case of rolling stock, a major change in quantity or a substitution of major end items not contemplated when competition for the original award took place would generally be a cardinal change. Another cardinal change would, at this time, include a change from a high-floor to a low-floor vehicle. Changing an engine might result in a cardinal change depending on the circumstances surrounding the project and whether a compatible replacement could be obtained through competition. FTA, however, considers changes to seating, fabrics, and colors, exterior paint

schemes, signage, and floor covering, and other similar changes to be permissible changes.

- (e) Federal Procurement Standards. The broader standards applied in Federal contracting practice reflected in Federal court decisions, Federal Boards of Contract Appeals decisions, and Comptroller General decisions provide guidance in determining whether a change would be treated as a cardinal change. FTA does not imply that these Federal procurement decisions are controlling. FTA intends to consider the collective wisdom within these decisions in determining the nature of third party contract changes along the broad spectrum between permissible changes and impermissible cardinal changes. Other guidance can be found in FTA's Best Practices Procurement Manual and "Frequently Asked Questions" at the FTA Web site: [http://www.fta.dot.gov/funding/thirdpartyprocurement/grants\\_financing\\_6039.html](http://www.fta.dot.gov/funding/thirdpartyprocurement/grants_financing_6039.html).

FTA intends to monitor its recipients and oversight contractors to ensure that this concept is well understood and uniformly applied. This approach permits greater latitude but, because it requires analysis, it can sometimes require a greater knowledge of Federal contracting practices. In any event, before attempting to change the terms of its contract, the recipient should review the contract's provisions to ensure that the contract permits the change sought.

8. THE OPEN MARKET. The recipient will probably acquire most of the property and services it needs through procurements in the open market. The next two chapters of this circular will address proper procedures for conducting and administering such procurements.

## CHAPTER VI

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

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

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

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

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

2. SOLICITATION REQUIREMENTS AND RESTRICTIONS. The Common Grant Rules require that each solicitation provide the following information:
- a. Description of the Property or Services. The solicitation and the contract awarded thereunder must include a clear and accurate description of the recipient's technical requirements for the property or services to be acquired in a manner that provides for full and open competition.
    - (1) What to Include. The description may include a statement of the qualitative nature of the property or services to be acquired. When practicable, the recipient should describe its requirements in terms of functions to be performed or level of performance required, including the range of acceptable characteristics or minimum acceptable standards. The Common Grant Rules for governmental recipients states that "Detailed product specifications should be avoided if at all possible." Both Common Grant Rules express a preference for performance or functional specifications, but do not prohibit the use of detailed technical specifications when appropriate.
    - (2) Quantities Limited to the Recipient's Actual Needs. FTA limits Federal assistance to the amount necessary to support the quantity of property or extent of services the recipient actually needs at the time of acquisition. The recipient may not add quantities or options to contracts solely to allow them to assign these quantities or options at a later date. FTA will not knowingly support the additional cost of



contract rights to property or services excess to the recipient's immediate needs, even though the recipient may assign its excess contract rights to others.

- (3) Brand Name or Equal. When it is impractical or uneconomical to provide a clear and accurate description of the technical requirements of the property to be acquired, a "brand name or equal" description may be used to define the performance or other salient characteristics of a specific type of property. The recipient must identify the salient characteristics of the named brand that offerors must provide. When using a "brand name" specification, the recipient does not need to reverse-engineer a complicated part to identify precise measurements or specifications in order to describe its salient characteristics. FTA's "Best Practices Procurement Manual," (BPPM) contains additional information on preparation of specifications including examples with specific language.
- (4) Prohibitions. The Common Grant Rules prohibit solicitation requirements that contain features that unduly restrict competition. FTA recipients are also prohibited by 49 U.S.C. Section 5325(h) from using FTA assistance to support an exclusionary or discriminatory specification. Some situations considered to be restrictive of competition include, but are not limited to, the following, all of which are identified in one or both Common Grant Rules:
  - (a) Excessive Qualifications. Imposing unreasonable business requirements for bidders or offerors.
  - (b) Unnecessary Experience. Imposing unnecessary experience requirements for bidders and offerors.
  - (c) Improper Prequalification. Using prequalification procedures that conflict with the prequalification standards described in subsection 1.c of this Chapter.
  - (d) Retainer Contracts. Making a noncompetitive award to any person or firm on a retainer contract with the recipient if that award is not for the property or services specified for delivery under the retainer contract.
  - (e) Excessive Bonding. To encourage greater contractor participation in FTA assisted projects, FTA does not require the recipient to impose bonding requirements on its third party contractors other than construction bonding specified by the Common Grant Rules and this circular for construction. FTA discourages unnecessary bonding because it increases the cost of the contract and restricts competition, particularly by disadvantaged business enterprises. Bond companies exercise their discretion and assure their profits primarily by declining to undertake excessive risks. Consequently many bidders have limited "bonding capacity." Unnecessary performance bonding requirements reduce a prospective bidder's or offeror's capability to bid or offer a proposal on bonded work. Small businesses with short histories may have particular difficulty obtaining bonds as may be specified.

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

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

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

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

The following contract types are restricted or prohibited:

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

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

- d. Other Federal Requirements Affecting the Property or Services to be Acquired. The solicitation and resulting contract must identify those Federal requirements that will affect contract scope and performance. *See*, Chapter IV, subsection 2.b of this circular, and FTA's latest Master Agreement for references to Federal requirements established following publication of this circular.
- e. Other Federal Requirements Affecting the Bidder or Offeror and the Contractor. The solicitation and resulting contract must identify all Federal requirements that a bidder or offeror must fulfill before and during contract performance. *See*, Chapter IV, subsection 2.a of this circular and FTA's latest Master Agreement that may reference more Federal requirements.
- f. Award to Other Than the Low Bidder. If the recipient intends to reserve its right to award to other than the low bidder or offeror, that information should be stated in the solicitation document.

g. Rejection of All Bids or Offers. If the recipient intends to reserve its right to reject all bids or offers, that information should be stated in the solicitation document.

3. METHODS OF PROCUREMENT. The recipient should use competitive procedure(s) appropriate for the acquisition undertaken. The procedures used must comply with State and local law as well as with Federal requirements. Federal restrictions vary with the type of procurement method used. The following guidance is based on the requirements of the Common Grant Rule for governmental recipients, supplemented by FTA policies that address the needs of FTA recipients.

a. Micro-Purchases. Consistent with the Federal Acquisition Regulation (FAR), FTA considers micro-purchases to be those purchases of \$3,000 or less.

(1) When Appropriate. If permitted by State and local law, the recipient may acquire property and services valued at less than \$3,000 without obtaining competitive quotations. These purchases are exempt from FTA's Buy America requirements. Davis-Bacon prevailing wage requirements, however, will apply to construction contracts exceeding \$2,000, even though the recipient uses micro-purchase procurement procedures. FTA does not intend to imply that the recipient must treat any purchase under \$3,000 as a micro-purchase. The recipient may set lower thresholds for micro-purchases in compliance with State and local law, or otherwise as it considers appropriate.

(2) Procedures. The following procedures apply to micro-purchases:

(a) Competition. The recipient should distribute micro-purchases equitably among qualified suppliers.

(b) Prohibited Divisions. The recipient may not divide or reduce the size of its procurement merely to come within the micro-purchase limit.

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

b. Small Purchases. The Common Grant Rule for governmental recipients authorizes governmental recipients to use relatively simple and informal small purchase procedures as follows:

(1) When Appropriate. Small purchase procedures may be used to acquire services, supplies, or other property valued at more than the micro-purchase threshold but less than the Federal simplified acquisition threshold at 41 U.S.C. Section 403(11) (currently \$100,000). These purchases are also exempt from FTA's Buy America requirements. FTA does not intend to imply that any purchase of less than

\$100,000 must be treated as a small purchase. The recipient may set lower thresholds for small purchases in compliance with State and local law, or otherwise as it considers appropriate.

- (2) Procedures. When using small purchase procedures:
  - (a) Competition. The recipient must obtain price or rate quotations from an adequate number of qualified sources.
  - (b) Prohibited Divisions. The recipient may not divide or reduce the size of its procurement to avoid the additional procurement requirements applicable to larger acquisitions.
- c. Sealed Bids (Formal Advertising). The Common Grant Rule for governmental recipients acknowledges sealed bidding to be a generally accepted procurement method in which bids are publicly solicited, and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the invitation for bids, is lowest in price.
  - (1) When Appropriate. The Common Grant Rule for government recipients states a preference for the sealed bids procurement method for acquiring property, construction, and other services. Procurement using sealed bids is appropriate if:
    - (a) Precise Specifications. A complete, adequate, precise, and realistic specification or purchase description is available.
    - (b) Adequate Sources. Two or more responsible bidders are willing and able to compete effectively for the business.
    - (c) Fixed Price Contract. The procurement generally lends itself to a firm fixed price contract.
    - (d) Price Determinative. The successful bidder can be selected on the basis of price and those price-related factors listed in the solicitation including, but not limited to, transportation costs, life cycle costs, and discounts expected to be taken. Apart from responsibility determinations discussed in later sections of this Chapter, contractor selection may not be determined on the basis of other factors whose costs cannot be measured at the time of award.
    - (e) Discussions Unnecessary. Discussions with one or more bidders after bids have been submitted are expected to be unnecessary as award of the contract will be made based on price and price-related factors alone. This contrasts with Competitive Proposal procedures in which discussions with individual offerors are expected to be necessary and may take place at any time after receipt of proposals. However, a pre-bid conference with prospective bidders before bids have been received can be useful.

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

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

- d. Competitive Proposals (Request for Proposals). The Common Grant Rule for governmental recipients acknowledges the use of competitive proposals to be a generally accepted procurement method when the nature of the procurement does not lend itself to sealed bidding and the recipient expects that more than one source will be willing and able to submit an offer or proposal.
  - (1) When Appropriate. Competitive proposals should be used when any of the following circumstances are present:
    - (a) Type of Specifications. The property or services to be acquired are described in a performance or functional specification; or if described in detailed technical specifications, other circumstances such as the need for discussions or the importance of basing contract award on factors other than price alone are present.

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



procurement should reflect the subject matter and the elements that are most important to the recipient. Those evaluation factors may include, but need not be limited to, technical design, technical approach, length of delivery schedules, quality of proposed personnel, past performance, and management plan. The recipient should base its determination of which proposal represents the “best value” on an analysis of the tradeoff of qualitative technical factors and price or cost factors. Apart from the statutory requirement that the contract must support the recipient’s public transportation project consistent with applicable Federal laws and regulations, FTA does not require any specific factors or analytic process.

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

- e. Two-Step Procurement Procedures. If permitted by State and local law, the recipient may use two-step procurement procedures in both sealed bid and competitively negotiated procurements, provided the opportunity for full and open competition is retained.
  - (1) Review of Technical Qualifications and Approach. The first step is a review of the prospective contractors’ technical approach to the recipient’s request and technical qualifications to carry out that approach. The recipient then may narrow the competitive range to prospective contractors that demonstrate a technically satisfactory approach and have satisfactory qualifications.
  - (2) Review of Bids and Proposals Submitted by Qualified Prospective Contractors. The second step consists of soliciting and reviewing complete bids (sometimes referred to as “two-step sealed bidding”) or proposals (as in “competitive negotiations”), including price, submitted by each prospective contractor determined to be qualified. Absent exceptional circumstances, the recipient should attempt to solicit bids or proposals from at least three qualified prospective contractors. Unlike qualifications-based procurement procedures required for A&E services, and other contracts covered by 49 U.S.C. Section 5325(b) discussed in subsection 3.f of this Chapter, FTA expects the recipient to consider all bid or proposal prices submitted as well as other technical factors, rather than limiting reviews to the most qualified bidder or offeror.
- f. Architectural Engineering (A&E) Services and Other Services. FTA’s enabling legislation at 49 U.S.C. Section 5325(b)(1) requires the use of the qualifications-based procurement procedures contained in the “Brooks Act,” 40 U.S.C. Sections 1101 through 1104, to acquire A&E services, but also for program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping and related services. The nature of the work to be performed and its relationship to construction, not the nature of the prospective contractor, determine whether qualifications-based procurement procedures may be used as described below.

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

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

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

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

- (4) Effect of State Laws. To the extent that a State has, before August 10, 2005, adopted by law, an equivalent State qualifications-based procurement requirement for acquiring architectural, engineering, and design services, Federal “Brooks Act” procedures, 40 U.S.C. Sections 1101 through 1104, will not apply.
  - (5) Audits and Indirect Costs. As required by 49 U.S.C. Section 5325(b)(3), the following requirements apply to a third party contract for program management, architectural engineering, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related services:
    - (a) Performance of Audits. The third party contract or subcontract must be performed and audited in compliance with FAR Part 31 cost principles.
    - (b) Indirect Cost Rates. The recipient and the third party contractor, its subcontractors and subrecipients, if any, must accept FAR indirect cost rates for one-year applicable accounting periods established by a cognizant Federal or State government agency, if those rates are not currently under dispute.
    - (c) Application of Rates. After a firm’s indirect cost rates established as described in subparagraph 3.f(5)(b) of this Chapter are accepted, those rates will apply for purposes of contract estimation, negotiation, administration, reporting, and payments, not limited by administrative or de facto ceilings.
    - (d) Prenotification; Confidentiality of Data. Before requesting or using cost or rate data described in subparagraph 3.f(5)(c), a recipient must notify the affected firm(s). That data must be kept confidential and may not be accessible by or provided by the group of agencies that share cost data under this subparagraph, except by written permission of the audited firm. If prohibited by law, that cost and rate data may not be disclosed under any circumstances. FTA recognizes that many States have “Open Records” laws that may make it difficult to maintain confidential cost or rate data. As a result, before requesting or using cost or rate data, not only should a recipient notify the affected firm, but it must also obtain permission to provide that data in response to a valid request under applicable State law. The confidentiality requirements of 49 U.S.C. 5325(b)(3)(D) cannot be waived, even if they conflict with State law or regulations.
- g. Design-Bid-Build. The design-bid-build procurement method requires separate contracts for design services and for construction.

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

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

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

- i. Other Than Full and Open Competition. Normally, the recipient must provide for full and open competition when soliciting bids or proposals. The Common Grant Rule for governmental recipients, however, acknowledges that under certain circumstances, a recipient may conduct procurements without providing for full and open competition.
  - (1) When Appropriate. A recipient may use noncompetitive proposals only when the procurement is inappropriate for small purchase procedures, sealed bids, or competitive proposals, and at least one of the following circumstances are present:
    - (a) Competition Adequacy. After soliciting several sources, FTA expects the recipient to review its specifications to determine if they are unduly restrictive or if changes can be made to encourage submission of more bids or proposals. After the recipient determines that the specifications are not unduly restrictive and changes cannot be made to encourage greater competition, the recipient may determine the competition adequate. A cost analysis must be performed in lieu of a price analysis when this situation occurs.
    - (b) Sole Source. When the recipient requires supplies or services available from only one responsible source, and no other supplies or services will satisfy its

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

- 1 Unique Capability or Availability. The property or services are available from one source if one of the conditions described below is present:
  - a Unique or Innovative Concept. The offeror demonstrates a unique or innovative concept or capability not available from another source. Unique or innovative concept means a new, novel, or changed concept, approach, or method that is the product of original thinking, the details of which are kept confidential or are patented or copyrighted, and is available to the recipient only from one source and has not in the past been available to the recipient from another source.
  - b Patents or Restricted Data Rights. Patent or data rights restrictions preclude competition.
  - c Substantial Duplication Costs. In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in substantial duplication of costs that are not expected to be recovered through competition.
  - d Unacceptable Delay. In the case of a follow-on contract for the continued development or production of a highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in unacceptable delays in fulfilling the recipient's needs.
- 2 Single Bid or Proposal. Upon receiving a single bid or proposal in response to a solicitation, the recipient should determine if competition was adequate. This should include a review of the specifications for undue restrictiveness and might include a survey of potential sources that chose not to submit a bid or proposal.
  - a Adequate Competition. FTA acknowledges competition to be adequate when the reasons for few responses were caused by conditions beyond the recipient's control. Many unrelated factors beyond the recipient's control might cause potential sources not to submit a bid or proposal. If the competition can be determined adequate, FTA's competition requirements will be fulfilled, and the procurement will qualify as a valid sole source.







- (c) Cost Analysis. Prepare or obtain a cost analysis verifying the proposed cost data, the projections of the data, and the evaluation of the costs and profits.
    - (d) Preaward Review. Submit the proposed procurement to FTA for preaward review if FTA so requests.
- 4. ELIGIBLE COSTS. Property and services must be eligible for Federal participation under the standards of the Federal cost principles (OMB Circular A-87, OMB Circular A-21, OMB Circular A-122, or FAR Part 31) applicable to the recipient before the recipient may use FTA assistance to support its costs. A recipient may use its own cost principles that comply with applicable Federal cost principles. FTA assistance may support contract costs or prices based on estimated costs only if the costs incurred or cost estimates included in negotiated prices comply with applicable Federal cost principles, and the property or services are eligible for Federal assistance under the terms of the underlying grant or cooperative agreement.
- 5. INCENTIVE COSTS AND PAYMENTS. SAFETEA-LU added a new amendment, 49 U.S.C. Section 5309(l), authorizing incentive payments to contractors that provide accurate cost and ridership estimates in connection with a new fixed guideway capital project, and to contractors that enable a new fixed guideway capital project to be completed for less than its original estimated cost. These incentive payments will be allowable costs in addition to other eligible project costs and must be “necessary and reasonable.” See, the Questions and Answers pertaining to incentive contracts at FTA’s Web site: [http://www.fta.dot.gov/funding/thirdpartyprocurement/faq/grants\\_financing\\_6148.html](http://www.fta.dot.gov/funding/thirdpartyprocurement/faq/grants_financing_6148.html).
- 6. COST AND PRICE ANALYSIS. The Common Grant Rules require the recipient to perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis depends on the facts and circumstances surrounding each procurement, but as a starting point, the recipient must make independent estimates before receiving bids or proposals.
  - a. Cost Analysis. The recipient must obtain a cost analysis when a price analysis will not provide sufficient information to determine the reasonableness of the contract cost. The recipient must obtain a cost analysis when the offeror submits elements (that is, labor hours, overhead, materials, and so forth) of the estimated cost, (such as professional consulting and A&E contracts, and so forth). The recipient is also expected to obtain a cost analysis when price competition is inadequate, when only a sole source is available, even if the procurement is a contract modification, or in the event of a change order. The recipient, however, need not obtain a cost analysis if it can justify price reasonableness of the proposed contract based on a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation.
    - (1) Federal Cost Principles. Federal cost principles contain many requirements about the allowability and allocability of costs.

- (2) Establishing Indirect Cost Rates. For contracts other than A&E contracts discussed in subsection 3.e of this Chapter, if the third party contractor or subcontractor does not have an approved Government indirect cost rate agreement, the contract's dollar value should determine how that rate is verified.
    - (a) Contracts of \$5 Million or Less. FTA will accept the 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 governmental agencies within the last six months.
    - (b) Contracts Exceeding \$5 Million. If the contract exceeds \$5 million, then the Defense Contract Audit Agency, another Federal cognizant audit agency, or an accounting firm approved by the Federal Government to perform audits for the Federal Government, must verify the contractor's rates.
  - (3) Profit. FTA expects the recipient to negotiate profit as a separate element of the cost for each contract in which there has been no price competition, and in all acquisitions in which the recipient performs or acquires a cost analysis. To establish a fair and reasonable profit, the recipient needs to consider the complexity of the work to be performed, the risk undertaken by the contractor, the contractor's investment, the amount of subcontracting, the quality of the contractor's record of past performance, and industry profit rates in the surrounding geographical area for similar work.
- b. Price Analysis. If the recipient determines that competition was adequate, a price analysis, rather than a cost analysis, is required to determine the reasonableness of the proposed contract price. As discussed previously in subsection 3.a of this Chapter, the price analysis for micro-purchases may be limited. Similarly, the recipient may use an abbreviated price analysis for small purchases in most cases. One method to record this price analysis is through the use of a preprinted form on which a contracting officer (or other responsible person) can annotate a finding of fair and reasonable pricing and check off the most common reasons why this would be so, such as catalog or market prices offered in substantial quantities to the general public, regulated prices (for example, for many utilities purchases), or a comparison with recent prices for similar goods and services.
  - c. Guidance on Cost and Price Analysis. FTA recognizes that some recipients may have difficulty obtaining the information necessary to conduct a proper cost or price analysis. Although neither FTA nor DOT may change the Common Grant Rules' requirements for cost or price analysis, FTA continues to seek a fair, practical solution to this problem consistent with the flexibility provided to Federal contracting officers under the FAR. The recipient may use the following resources as guidance in preparing cost or price analyses:
    - (1) FTA's "Best Practices Procurement Manual," Chapter 5,

- (2) The National Transit Institute Course, "Cost or Price Analysis and Risk Assessment,"
- (3) Pricing Guide for FTA Grantees, FTA Web Site:  
[http://www.fta.dot.gov/documents/Helpline\\_Price\\_Guide.doc.](http://www.fta.dot.gov/documents/Helpline_Price_Guide.doc.),
- (4) FAR Part 31, Contract Cost Principles and Procedures, and
- (5) Defense Contract Audit Agency Audit Manual. *See*, the DCAA Web site:  
<http://www.dcaa.mil/>.

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

7. EVALUATIONS. The following standards apply:

- a. General. When evaluating bids or proposals submitted, FTA expects the recipient to consider all evaluation factors specified in its solicitation documents, and evaluate the bids or offers only on the evaluation factors included in those solicitation documents. The recipient may not modify its evaluation factors after bids or proposals have been submitted without re-opening the solicitation.
- b. Options. In awarding the contract that will include options, the following standards apply:
  - (1) Evaluation Required. In general, FTA expects the recipient to evaluate bids or offers for any option quantities or periods contained in a solicitation if it intends to exercise those options after the contract is awarded.
  - (2) Evaluation Not Required. The recipient need not evaluate bids or offers for any option quantities when the recipient determines that evaluation would not be in its best interests. An example of a circumstance that may support a determination not to evaluate bids or offers for option quantities is when the recipient is reasonably certain that funds will not be available to permit it to exercise the option.
- c. Evaluators. In addition to evaluators with experience in technical or public policy matters related to the procurement, other evaluators may also include auditors and financial experts to the extent that the recipient determines would be necessary or helpful. Although many FTA recipients assign evaluation duties to their own personnel, a recipient lacking qualified personnel within its organization may contract for evaluation services. If it does so, the procurement standards of this circular will apply to those contracts and to those contractors selected to perform evaluation functions on behalf of the recipient.

8. CONTRACT AWARD. The following provisions apply to third party contract awards:

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

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

- (1) Integrity and Ethics. Has a satisfactory record of integrity and business ethics, in compliance with 49 U.S.C. Section 5325(j)(2)(A),
- (2) Debarment and Suspension. Is neither debarred nor suspended from Federal programs under DOT regulations, “Nonprocurement Suspension and Debarment,” 2 CFR Parts 180 and 1200, or under the FAR at 48 CFR Chapter 1, Part 9.4,
- (3) Affirmative Action and DBE. Is in compliance with the Common Grant Rules’ affirmative action and FTA’s Disadvantaged Business Enterprise requirements,
- (4) Public Policy. Is in compliance with the public policies of the Federal Government, as required by 49 U.S.C. Section 5325(j)(2)(B),
- (5) Administrative and Technical Capacity. Has the necessary organization, experience, accounting, and operational controls, and technical skills, or the ability to obtain them, in compliance with 49 U.S.C. Section 5325(j)(2)(D),
- (6) Licensing and Taxes. Is in compliance with applicable licensing and tax laws and regulations,

- (7) Financial Resources. Has, or can obtain, sufficient financial resources to perform the contract, as required by 49 U.S.C. Section 5325(j)(2)(D),
- (8) Production Capability. Has, or can obtain, the necessary production, construction, and technical equipment and facilities,
- (9) Timeliness. Is able to comply with the required delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments, and
- (10) Performance Record. Is able to provide a:
  - (a) Current Performance. Satisfactory current performance record, and
  - (b) Past Performance. Satisfactory past performance record in view of its records of long-time performance or performance with a predecessor entity, including:
    - 1 Sufficient Resources. Key personnel with adequate experience, a parent firm with adequate resources and experience, and key subcontractors with adequate experience and past performance,
    - 2 Adequate Past Experience. Past experience in carrying out similar work with particular attention to management approach, staffing, timeliness, technical success, budgetary controls, and other specialized considerations as described in the recipient's solicitation, and
    - 3 Any Past Deficiencies Not the Fault of the Bidder or Offeror. A prospective bidder or offeror that is or recently has been seriously deficient in contract performance is presumed to be nonresponsible, unless the recipient determines that the circumstances were properly beyond the bidder or offeror's control, or unless the bidder or offeror has taken appropriate corrective action. Past failure to apply sufficient tenacity, perseverance, and effort to perform acceptably is strong evidence of nonresponsibility. Failure to meet the quality requirements of a contract is a significant factor to consider in determining satisfactory performance. FTA expects the recipient to consider the number of the bidder or offeror's contracts involved and the extent of deficient performance in each contract when making this determination.

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

- c. Rejection of Bids and Proposals. Depending on the type of recipient, the following applies:

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

## CHAPTER VII

### **PROTESTS, CHANGES AND MODIFICATIONS, DISPUTES, CLAIMS, LITIGATION, AND SETTLEMENTS**

The Common Grant Rules assign responsibility to the recipient for resolving all contractual and administrative issues arising out of their third party procurements, including source evaluation and selection, including protests of awards, disputes, and claims using good administrative practices and sound business judgment. The Federal Transit Administration (FTA) also encourages the recipient to use appropriate alternative dispute resolution procedures. Neither FTA nor the Common Grant Rules relieve the recipient of any responsibility under its contracts to resolve disagreements that may arise in the course of contract formation or contract administration.

In general, FTA will not substitute its judgment for that of the recipient or subrecipient unless the matter is primarily a Federal concern. Examples of “Federal concerns” include, but are not limited to, situations “where a special Federal interest is declared because of program management concerns, possible mismanagement, impropriety, waste, or fraud.” Nevertheless, FTA can become involved in the recipient’s administrative decisions when a recipient’s protest decision is appealed to FTA, or when the recipient seeks to use FTA assistance to support the costs of settlements or other resolutions of protests, disputes, claims, or litigation.

#### 1. PROTESTS.

- a. The Recipient’s Role and Responsibilities. The Common Grant Rules charge the recipient with the initial responsibility to resolve protests of third party contract awards.
  - (1) Protest Procedures. Apart from other methods the recipient may have to resolve third party contract issues, such as mediation or arbitration, the Common Grant Rule for governmental recipients requires the recipient to have protest procedures. While the Common Grant Rule for non-governmental recipients does not impose a similar requirement on a non-governmental recipient, FTA expects each recipient to have appropriate written protest procedures, as part of its requirement to maintain or acquire adequate technical capacity to implement the project.
  - (2) Responsibilities to FTA. The recipient’s minimum responsibilities to FTA consist of the following:
    - (a) Timely Notification. The Common Grant Rule for governmental recipients requires a governmental recipient to notify FTA when it receives a third party contract protest to which this circular applies, and to keep FTA informed about the status of the protest. A non-governmental recipient involved in a protest is similarly expected to notify FTA when it receives a third party contract protest to which the circular applies, and to similarly keep FTA

informed about the status of the protest. The recipient is expected to provide the following information:

1 Subjects. A list of protests involving third party contracts and potential third party contracts that:

- a Have a value exceeding \$100,000, or
- b Involve a controversial matter, irrespective of amount, or
- c Involve a highly publicized matter, irrespective of amount.

2 Details. The following information about each protest:

- a A brief description of the protest,
- b The basis of disagreement, and
- c If open, how far the protest has proceeded, or
- d If resolved, the agreement or decision reached, and
- e Whether an appeal has been taken or is likely to be taken.

3 When and Where. The recipient should provide this information:

- a In its next quarterly Milestone Progress Report, and
- b At its next Project Management Oversight review, if any.

Small recipients may report less frequently if no protests are outstanding.

4 FTA Officials to Notify. When a recipient denies a bid protest, and especially if an appeal to FTA is likely to occur, FTA expects the recipient to inform the FTA Regional Administrator for the region administering a regional project, or the FTA Associate Administrator for the program office administering a headquarters project directly. FTA also encourages the recipient to keep its FTA project manager informed about protests with which it is involved. In particular, the recipient should contact its project manager about any unusual activity.

- (b) Access to Information. FTA expects the recipient to disclose information about any third party procurement protest to FTA upon request. FTA reserves the right to require the recipient to provide copies of a particular protest or all protests, and any or all related supporting documents as FTA may determine necessary.



- b. FTA's Role and Responsibilities. FTA has developed an appeals process for reviewing protests of a recipient's procurement decisions.
- (1) Requirements for the Protester. The protester must:
- (a) Qualify as an "Interested Party." Only an "interested party" qualifies for FTA review of its appeal. An "interested party" 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.
    - 1 Subcontractors. A subcontractor does not qualify as an "interested party" because it does not have a direct economic interest in the results of the procurement.
    - 2 Consortia/Joint Ventures/Partnerships/Teams. An established consortium, joint venture, partnership, or team that is an actual bidder or offeror and is acting in its entirety, would qualify as an "interested party" because it has a direct economic interest in the results of the procurement. An individual member of a consortium, joint venture, partnership, or team, acting solely in its individual capacity, does not qualify as an "interested party" because it does not have a direct economic interest in the results of the procurement.
    - 3 Associations or Organizations. An association or organization that does not perform contracts does not qualify as an "interested party," because it does not have a direct economic interest in the results of the procurement.
  - (b) Exhaust Administrative Remedies. The protester must exhaust its administrative remedies by pursuing the recipient's protest procedures to completion before appealing the recipient's decision to FTA.
  - (c) Appeal Within Five Days. The protester must deliver its appeal to the FTA Regional Administrator for the region administering its project or the FTA Associate Administrator for the program office administering its project within five (5) working days of the date when the protester has received actual or constructive notice of the recipient's final decision. Likewise, the protester must provide its appeal to the FTA Regional Administrator for the region administering its project or the FTA Associate Administrator for the program office administering its project within five (5) working days of the date when the protester has identified other grounds for appeal to FTA. For example, other grounds for appeal include the recipient's failure to have or failure to comply with its protest procedures or failure to review the protest.
- (2) Extent of FTA Review. As provided in the Common Grant Rule for governmental recipients, FTA will limit its review of third party contract protests as follows:

- (a) The Recipient's Procedural Failures. FTA will consider a protest if the recipient:
    - 1 Does not have protest procedures, or
    - 2 Has not complied with its protest procedures, or
    - 3 Has not reviewed the protest when presented an opportunity to do so.
  - (b) Violations of Federal Law or Regulations. FTA will not consider every appeal filed by a protestor of an FTA recipient's protest decision merely because a Federal law or regulation may be involved. Instead, FTA will exercise discretionary jurisdiction over those appeals involving issues important to FTA's overall public transportation program. FTA will refer violations of Federal law for which it does not have primary jurisdiction to the Federal authority having proper jurisdiction.
  - (c) Violations of State or Local Law or Regulations. FTA will refer violations of State or local law to the State or local authority having proper jurisdiction.
- (3) FTA Determinations to Decline Protest Reviews. FTA's determination to decline jurisdiction over a protest does not mean that FTA approves of or agrees with the recipient's decision or that FTA has determined the contract is eligible for Federal participation. FTA's determination means only that FTA does not consider the issues presented to be sufficiently important to FTA's overall program that FTA considers a review to be required.

## 2. CHANGES AND MODIFICATIONS.

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

A more extensive discussion on Changes and Modifications can be found in FTA's Best Practices Procurement Manual (BPPM).

- b. FTA's Role and Responsibilities. FTA does not participate in the recipient's decisions involving change orders, constructive changes, or modifications, but reserves the right to review the recipient's supporting documentation as necessary to determine the extent of FTA assistance that may be used to support those costs.

### 3. DISPUTES.

- a. The Recipient's Role and Responsibilities. The Common Grant Rules charge the recipient with responsibility for evaluating and resolving third party contract disputes. If the recipient intends to request FTA's permission to use Federal assistance to support payments to a third party contractor to settle a dispute, or even intends to request increased Federal assistance for that purpose, the recipient's responsibilities are as follows:

- (1) Notify FTA about Disputes. FTA expects the recipient to provide the following information in connection with third party contract disputes in which it is involved:

- (a) Subjects. A list of disputes involving third party contracts and potential third party contracts that:

- 1 Have a value exceeding \$100,000,
- 2 Involve a controversial matter, irrespective of amount, or
- 3 Involve a highly publicized matter, irrespective of amount.

- (b) Details. The following information about each dispute:

- 1 A brief description of the dispute,
- 2 The basis of disagreement, and
- 3 If open, how far the dispute has proceeded, or
- 4 If resolved, the agreement or decision reached, and
- 5 Whether an appeal has been taken or is likely to be taken.

- (c) When and Where. The recipient should provide this information:

- 1 In its next quarterly Milestone Progress Report, and
- 2 At its next Project Management Oversight review, if any.

Small recipients may report less frequently if no disputes are outstanding.

- (d) FTA Officials to Notify. FTA also encourages the recipient to keep its FTA project manager informed about disputes with which it is involved. In particular, the recipient should contact its project manager about any unusual activity.
- (2) Adequate Documentation. FTA expects the recipient to include adequate documentation in its project files of the facts, events, negotiations, applicable laws, and a legal evaluation of the likelihood of success in any potential litigation involving the dispute as may be needed to justify FTA's concurrence in any compromise or settlement of the dispute, should FTA concurrence become necessary.
- (3) Audit. An audit can help the recipient demonstrate that any settlement costs, if incurred, are necessary, reasonable, adequately documented, and appropriate for FTA support. The recipient should consider conducting or obtaining a formal audit to substantiate each part of a large contract dispute before entering into a settlement. The audit should be conducted in accordance with "Generally Accepted Auditing Standards" as defined by the American Institute of Certified Public Accountants. FTA also encourages the recipient to undertake an audit or similar analysis before settlement of a smaller dispute.
- b. FTA's Role and Responsibilities. FTA generally does not become involved in negotiating the resolution of a recipient's disputes. However, FTA does reserve the right to become involved as follows:
  - (1) Determine Reasonableness. FTA may review the reasonableness of a negotiated settlement to determine the extent of its participation in the costs of the settlement.
  - (2) Review Documents. When FTA considers necessary, FTA may review the recipient's files and history pertaining to the dispute or experience under a particular grant or cooperative agreement. If the recipient has already disbursed amounts determined to be ineligible through subsequent audit or FTA review, the recipient must return those amounts to FTA, unless FTA determines otherwise. FTA reserves the right to defer participation in settlement costs until it receives an adequate audit.

#### 4. CLAIMS AND LITIGATION.

- a. The Recipient's Role and Responsibilities. The Common Grant Rules charge the recipient with responsibility for evaluating and resolving third party contract claims and litigation resulting from a contractor's violation, default, or breach of its third party contracts with recipients of Federal assistance. The recipient is also responsible for resolving any claims and litigation the contractor may present against it. Due to FTA's financial interest in the settlement of third party contract claims and litigation, and

concerns about matters with significant policy consequences to the Federal Government, FTA expects the recipient to:

(1) Notify FTA about Claims and Litigation. FTA expects the recipient to provide the following information in connection with third party contract claims and litigation with which it is involved.

(a) Subjects. A list of claims and litigation involving third party contracts and potential third party contracts that:

- 1 Have a value exceeding \$100,000,
- 2 Involve a controversial matter, irrespective of amount, or
- 3 Involve a highly publicized matter, irrespective of amount.

(b) Details. The following information about each claim or lawsuit:

- 1 A brief description of the claim or litigation,
- 2 The basis of disagreement, and
- 3 If open, how far the claim or litigation has proceeded, or
- 4 If resolved, the decision or agreement reached, and
- 5 Whether an appeal has been or is likely to be taken.

(c) When and Where. The recipient should provide this information:

- 1 In its next quarterly Milestone Progress Report, and
- 2 At its next Project Management Oversight review, if any.

Small recipients may report less frequently if no claims or litigation are outstanding.

(d) FTA Officials to Notify. FTA also encourages the recipient to keep its FTA project manager informed about claims and litigation with which it is involved. In particular, the recipient should contact its project manager about any unusual activity.

(2) Legal Rights and Remedies. In resolving third party contract claims, FTA expects the recipient to take reasonable measures to pursue its rights and remedies available under law, including settlement, particularly if failure to do so would jeopardize the Federal interest in the project or cause the recipient to seek additional Federal assistance.

- b. FTA's Role and Responsibilities. In support of its financial interest in the settlement of claims and litigation involving any federally assisted third party contracts, FTA has retained its discretion to assert the following rights:
    - (1) Proceeds Recovered. FTA retains a right to a share of any net proceeds recovered through a third party contract claim or litigation, in proportion to the amount FTA has committed to the project, unless FTA permits other uses of the proceeds recovered.
    - (2) Liquidated Damages. If the third party contract includes a liquidated damages provision, FTA expects the recipient to credit any liquidated damages recovered to the project, unless FTA permits other uses of the liquidated damages. For example, in negotiating the terms of a claim or litigation settlement, it may be reasonable for the recipient to exchange some or all liquidated damages that may be due the recipient for additional property or services.
5. FTA PARTICIPATION IN SETTLEMENTS, ARBITRATION AWARDS, AND COURT AWARDS.
- a. The Recipient's Responsibilities.
    - (1) Settlement Arrangements Must Be Reasonable. FTA recognizes that a settlement may require the recipient to relinquish its rights to amounts it would otherwise be due, including amounts for liquidated damages and other matters, were it to prevail on all matters at issue. Still, FTA expects the recipient to enter into a settlement only if the recipient can justify its terms as reasonable. Reasonable settlement arrangements can take many forms. In certain situations, an agreement by the contractor to provide extra property or services in lieu of payments or reduced payments for damages, including liquidated damages, may be reasonable.
    - (2) Maintain Sufficient Records. To justify FTA's participation in settlements, arbitration awards, or court awards, the recipient's records must be sufficient to demonstrate that the recipient has taken reasonable and prudent measures to prevent or offset the actions or circumstances resulting in the underlying protest, dispute, claim, or litigation.
    - (3) Obtain FTA Concurrence. When the recipient incurs costs due to binding arbitration or court decision, FTA expects the recipient to secure FTA review and its written concurrence in a proposed or final settlement involving a dispute, claim, or litigation before using Federal assistance to support its costs if one of the following circumstances is present:
      - (a) More Than \$100,000. When the settlement exceeds \$100,000.
      - (b) Insufficient Funds. When the approved project lacks sufficient funds to cover the settlement costs.

- (c) Special Federal Interest or Federal Concern. When a special Federal interest or Federal concern is declared due to program management concerns, possible mismanagement, impropriety, waste, or fraud.

b. FTA's Prerogatives.

- (1) Review Supporting Documentation. FTA reserves the right to review the recipient's supporting documentation.
- (2) Provide Federal Assistance. If FTA assistance is available, FTA may provide a prorated share of any eligible costs resulting from protests, disputes, claims, litigation, or settlements that were not caused by the recipient's mismanagement or are attributable to the contractor, and were otherwise properly incurred.
- (3) Deny Federal Assistance. Protests, disputes, claims, litigation, or settlements that result from the recipient's negligence or error are usually ineligible for FTA participation. FTA reserves the right to determine the extent to which FTA assistance may be used for any dispute, claim, litigation, or settlement caused in whole or part by the recipient's negligence or error. Examples of situations that might be caused by a recipient's negligence or error include, but are not limited to, the following:
  - (a) Right-of-Way. Failure to ensure clear access to all needed right-of-way prior to award of the construction contract.
  - (b) Utility Agreements. Failure to execute all required utility agreements in time to assure uninterrupted construction progress.
  - (c) Planning and Scheduling. Failure to undertake comprehensive project planning and scheduling to achieve proper coordination among contractors.
  - (d) Subsurface Conditions. Failure to inform potential contractors of all available geo-technical information on subsurface conditions.
  - (e) Materials Compatibility. Failure to ensure that all materials provided by the recipient are compatible with contractor project facilities or equipment or both and available when needed.
  - (f) Pre-Construction Surveys and Engineering. Failure to complete all pre-construction surveys and engineering prior to issuing the contractor a Notice to Proceed.
  - (g) Public Authority Approvals. Failure to complete the necessary approvals and agreements from all other public authorities affected by the project before contract award.

- (h) Drawing Approvals. Failure by the recipient to approve and provide all design and shop drawings to the contractor promptly as needed.



## **APPENDIX A**

### **REFERENCES**

1. Federal Transit Laws, Title 49, United States Code, Chapter 53; also public transportation provisions of Title 23, United States Code.
2. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, (SAFETEA-LU), Public Law 109-59, August 10, 2005, as amended by the SAFETEA-LU Technical Corrections Act, 2008, Public Law 110-244, June 6, 2008.
3. Transportation Equity Act for the 21st Century 1998 (TEA-21), Public Law 105-178 as amended by TEA-21 Restoration Act 1998, Public Law 105-206.
4. 7 U.S.C. Sections 2131 *et seq.*—Animal Welfare Act.
5. 15 U.S.C. Sections 205a *et seq.*—Metric Conversion.
6. 15 U.S.C. Section 644 note—Repeal of Labor Surplus Area Programs.
7. 18 U.S.C. Section 874—Copeland Anti Kickback Act.
8. 20 U.S.C. Sections 1681 *et seq.*—Nondiscrimination on the Basis of Sex.
9. 23 U.S.C. Section 512 note—Intelligent Transportation Systems.
10. 29 U.S.C. Sections 201 *et seq.*—Fair Labor Standards.
11. 29 U.S.C. Sections 621 through 634—Age Discrimination in Employment.
12. 29 U.S.C. Section 794—Nondiscrimination under Federal Grants (on the Basis of Disability).
13. 29 U.S.C. Section 794d—Electronic and Information Technology (Accessibility).
14. 31 U.S.C. Section 1352—Limitation on Use of Appropriated Funds to Influence Certain Federal Contracting and Financial Transactions (Lobbying).
15. 31 U.S.C. Section 5112(p)—Section 104 of the Presidential \$1 Coin Act of 2005.
16. 31 U.S.C. Sections 7501 *et seq.*—Single Audit Act Amendments of 1996.
17. 33 U.S.C. Sections 1251 through 1377—Clean Water.
18. 35 U.S.C. Sections 200 *et seq.*—Patent Rights.

19. 40 U.S.C. Section 502(a)(3)—General Services Administration (GSA) Schedule Use by the District of Columbia.
20. 40 U.S.C. Section 502(c) (Section 211 of the E-Government Act of 2002)—GSA Schedule Use for Information Technology.
21. 40 U.S.C. Section 502(d), (Section 833 of the John Warner National Defense Authorization Act for Fiscal Year 2007)—GSA Schedule Use for Major Disaster or Emergency Relief.
22. 40 U.S.C. Chapter 11—Architectural Engineering Procurement Requirements (Brooks Act).
23. 40 U.S.C. Sections 3141 *et seq.*—Prevailing Wages.
24. 40 U.S.C. Section 3702—Wage and Hour Restrictions.
25. 40 U.S.C. Section 3701(b)(3)(A)(iii) (Section 4104(c) of the Federal Acquisition Streamlining Act of 1994)—Increased Thresholds for Contract Work Hours and Safety Standards Act.
26. 40 U.S.C. Section 3704—Construction Safety.
27. 41 U.S.C. Section 253m—Design-Build Selection Procedures Process.
28. 41 U.S.C. Section 403(11)—Federal Simplified Acquisition Threshold.
29. 42 U.S.C. Sections 289 *et seq.*—Protection of Humans.
30. 42 U.S.C. Sections 2000d *et seq.*—Title VI of the Civil Rights Act of 1964, as amended.
31. 42 U.S.C. Section 2000e *et seq.*—Equal Employment Opportunity.
32. 42 U.S.C. Section 5150—Major Disaster or Emergency Relief.
33. 42 U.S.C. Sections 6101 *et seq.*—Nondiscrimination on the Basis of Age.
34. 42 U.S.C. Sections 6321 *et seq.*—Energy Conservation.
35. 42 U.S.C. Section 6962—Resource Conservation and Recovery.
36. 42 U.S.C. Sections 7401 through 7671q—Clean Air.
37. 42 U.S.C. Sections 7701 *et seq.*—Seismic Safety.
38. 42 U.S.C. Sections 12101 *et seq.*—Accessibility for Persons with Disabilities.
39. 46 U.S.C. Section 55305—Cargo Preference.

40. 48 U.S.C. Section 1469e—Use of GSA Supply Schedules by Insular Areas.
41. 49 U.S.C. Section 114(s)—Sensitive Security Information.
42. 49 U.S.C. Sections 303(b) and 303(c)—Department of Transportation (DOT) statutory protections for Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites.
43. 49 U.S.C. Section 40118—Fly America.
44. 49 U.S.C. Section 40119(b)—Sensitive Security Information.
45. DOT regulations, “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,” 49 CFR Part 18.
46. DOT regulations, “Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,” 49 CFR Part 19.
47. DOT regulations, “Protection of Human Subjects,” 49 CFR Part 11.
48. DOT regulations, “Protection of Sensitive Security Information,” 49 CFR Part 15.
49. DOT regulations, “New Restrictions on Lobbying,” 49 CFR Part 20.
50. DOT regulations, “Nondiscrimination in Federally Assisted Programs of the Department of Transportation – Effectuation of Title VI of the Civil Rights Act,” 49 CFR Part 21.
51. DOT regulations, “Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs,” 49 CFR Part 24.
52. DOT regulations, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” 49 CFR Part 25.
53. DOT regulations, “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,” 49 CFR Part 26.
54. DOT regulations, “Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance,” 49 CFR Part 27.
55. DOT regulations, “Nonprocurement Suspension and Debarment,” 2 CFR Part 1200.
56. DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 CFR Part 37.
57. Joint ATBCB/DOT regulations, “Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 CFR Part 1192 and 49 CFR Part 38.

58. DOT regulations, "Seismic Safety," 49 CFR Part 41 at Sections 41.117 and 41.120.
59. Federal Transit Administration (FTA) regulations, "Charter Service," 49 CFR Part 604.
60. FTA regulations, "School Bus Operations," 49 CFR Part 605.
61. FTA regulations, "Capital Leases," 49 CFR Part 639.
62. FTA regulations, "Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations," 49 CFR Part 655.
63. FTA regulations, "Buy America," 49 CFR Part 661.
64. FTA regulations, "Pre-Award and Post-Delivery Audits of Rolling Stock Purchases," 49 CFR Part 663.
65. FTA regulations, "Bus Testing," 49 CFR Part 665.
66. Joint Federal Highway Administration(FHWA)/FTA regulations, "Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites," 23 CFR Parts 771 and 774, and 49 CFR Part 622.
67. Federal Acquisition Regulation (FAR), 48 CFR Chapter 1.
68. FAR Subpart 6.3, 48 CFR Chapter 1, Subpart 6.3 (Federal Procurement by Noncompetitive Proposals).
69. FAR Subparts 25.1 and 25.2, 48 CFR Chapter 1, Subparts 25.1 and 25.2 (Federal Buy American Regulations).
70. FAR Part 31, 48 CFR Chapter 1, Part 31 (Federal Cost Principles).
71. FAR Subpart 31.2, 48 CFR Chapter 1, Subpart 31.2 (Contracts with Commercial Organizations).
72. Department of Homeland Security regulations, "Protection of Sensitive Security Information," 49 CFR Part 1520.
73. Department of Labor (DOL) regulations, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States," 29 CFR Part 3.
74. 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.

75. DOL guidelines, "Section 5333(b), Federal Transit Law," 29 CFR Part 215.
76. DOL regulations, "Age Discrimination in Employment Act," 29 CFR Part 1625.
77. DOL regulations, "Safety and Health Regulations for Construction," 29 CFR Part 1926.
78. Department of Agriculture regulations, "Animal Welfare," 9 CFR Subchapter A, Parts 1, 2, 3, and 4.
79. Department of the Treasury regulations, "Surety Companies Doing Business with the United States," 31 CFR Part 223.
80. Architectural and Transportation Barriers Compliance Board (ATBCB) regulations, "Electronic and Information Technology Accessibility Standards," 36 CFR Part 1194.
81. Department of Commerce regulations, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms," 37 CFR Part 401.
82. Department of Commerce, Export Administration Regulations, 15 CFR Parts 730 *et seq.*
83. Environmental Protection Agency regulations, "Comprehensive Procurement Guideline for Products Containing Recovered Materials," 40 CFR Part 247.
84. EPA regulations, "Control of Air Pollution from Mobile Sources," 40 CFR Part 85.
85. EPA regulations, "Control of Air Pollution from New and In-Use Motor Vehicles and New and In-Use Motor Vehicle Engines," 40 CFR Part 86.
86. EPA regulations, "Fuel Economy of Motor Vehicles," 40 CFR Part 600.
87. Council on Environmental Quality regulations, "Other Requirements of NEPA," 40 CFR Part 1506.
88. Department of Health and Human Services regulations, "Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance," 45 CFR Part 90.
89. GSA, "Federal Property Management Regulations," 41 CFR Parts 101-42 through 101-46, and 101-48, 101-49.
90. GSA regulations, "Use of United States Flag Air Carriers," 41 CFR Sections 301-10.131 through 301-10.143.
91. Maritime Administration regulations, "Cargo Preference U.S. Flag Vessels," 46 CFR Part 381.

92. 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.
93. Executive Order No. 12770, "Metric Usage in Federal Government Programs," 15 U.S.C. Section 205a note.
94. Executive Order No. 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," February 11, 1994, 42 U.S.C. Section 4321 note.
95. Executive Order No. 13043, "Increasing Seat Belt Use in the United States," August 16, 1997, 23 U.S.C. Section 402 note.
96. Executive Order No. 13132, "Federalism," August 4, 1999, 5 U.S.C. Section 601 note.
97. Executive Order No. 13166, "Improving Access to Services for Persons with Limited English Proficiency," August 11, 2000, 42 U.S.C. Section 2000d-1 note.
98. Executive Order No. 13202, "Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects," February 17, 2001, as amended by Executive Order No. 13208, April 6, 2001, 41 U.S.C. Section 251 note.
99. Office of Management and Budget (OMB) "Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)," 2 CFR Part 180.
100. OMB Guidance for Grants and Agreements, "Cost Principles for Educational Institutions (OMB Circular A-21)," 2 CFR Part 220.
101. OMB Guidance for Grants and Agreements, "Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A-87)," 2 CFR Part 225.
102. OMB Guidance for Grants and Agreements "Cost Principles for Non-profit Organizations (OMB Circular A-122)," 2 CFR Part 230.
103. OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations," as revised.
104. GSA Order ADM 4800.2E, "Eligibility to Use GSA Sources of Supply and Services."
105. DOT Order 5610.2, "Department of Transportation (DOT) Order To Address Environmental Justice in Minority Populations and Low-Income Populations," 62 FR 18377, April 15, 1997.
106. DOT, "Policy Guidance Concerning Recipients' Responsibilities to Limited English Proficient (LEP) Persons," December 14, 2005.

107. FTA Circular 4702.1, "Title VI and Title VI-Dependent Guidelines for FTA Recipients," 05-13-07.
108. FTA Circular 5010.1C, "Grant Management Guidelines," 10-01-98.
109. FTA Circular 9030.1C, "Urbanized Area Formula Program Grant Application Instructions Grant Application Instructions," 10-01-98.
110. FTA Circular 9300.1A, "Capital Program Grant Application Instructions," 10-01-98.
111. FTA Circular 9400.1A, "Federal Transit Administration Design and Art in Transit Projects," 06-09-95.
112. FTA, "Notice of Final Agency Guidance on the Eligibility of Joint Development Improvements under Federal Transit Law," 72 FR 5788, February 7, 2007.
113. FTA Notice, "FTA National ITS Architecture Policy on Transit Projects" 66 FR 1455 *et seq.*, January 8, 2001.
114. FTA, Master Agreement (PDF).
115. FTA, "Best Practices Procurement Manual."
116. FTA, "Pricing Guide for FTA Grantees."
117. Defense Contract Audit Agency Audit Manual.

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**APPENDIX B**

**FTA REGIONAL AND METROPOLITAN OFFICE CONTACT INFORMATION**

<b>Office</b>	<b>Area Served</b>	<b>Contact Information</b>
Region I	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont	Transportation Systems Center Kendall Square 55 Broadway, Suite 920 Cambridge, MA 02142-1093 Phone: 617-494-2055 Fax: 617-494-2865
Region II	New York and New Jersey	One Bowling Green, Room 429 New York, NY 10004-1415 Phone: 212-668-2170 Fax: 212-668-2136
Region III	Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia	1760 Market Street, Suite 500 Philadelphia, PA 19103-4124 Phone: 215-656-7100 Fax: 215-656-7260
Region IV	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and U.S. Virgin Islands	230 Peachtree St., N.W., Suite 800 Atlanta, GA 30303 Phone: 404-865-5600 Fax: 404-865-5605
Region V	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin	200 West Adams Street, Suite 320 Chicago, IL 60606 Phone: 312-353-2789 Fax: 312-886-0351
Region VI	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas	819 Taylor Street, Room 8A36 Forth Worth, TX 76102 Phone: 817-978-0550 Fax: 817-978-0575
Region VII	Iowa, Kansas, Missouri, and Nebraska	901 Locust, Suite 404 Kansas City, MO 64106 Phone: 816-329-3920 Fax: 816-329-3921
Region VIII	Colorado, Montana,	12300 W Dakota Avenue, Suite 310

Office	Area Served	Contact Information
	North Dakota, South Dakota, Utah, and Wyoming	Lakewood, CO 80228-2583 Phone: 720-963-3300 Fax: 720-963-3333
Region IX	Arizona, California, Hawaii, Nevada, Guam, American Samoa, and the Northern Mariana Islands	201 Mission Street, Room 1650 San Francisco, CA 94105-1839 Phone: 415-744-3133 Fax: 415-744-2726
Region X	Alaska, Idaho, Oregon, and Washington	915 Second Avenue, Suite 3142 Seattle, WA 98174-1002 Phone: 206-220-7954 Fax: 206-220-7959
Lower Manhattan Recovery Office	Lower Manhattan	1 Bowling Green, Room 436 New York, NY 10004 Phone: 212-668-1770 Fax: 212-668-2505
New York Metropolitan Office	New York Metropolitan Area	One Bowling Green, Room 428 New York, NY 10004-1415 Phone: 212-668-2201 Fax: 212-668-2136
Philadelphia Metropolitan Office	Philadelphia Metropolitan Area	1760 Market Street, Suite 510 Philadelphia PA 19103-4124 Telephone: 215-656-7070 Fax: 215-656-7269
Washington, DC Metropolitan Office	Washington, DC Metropolitan Area	1990 K Street NW, Suite 510 Washington, DC 20006-1178 Telephone: 202-219-3562/219-3565 Fax: 202-219-3545
Chicago Metropolitan Office	Chicago Metropolitan Area	200 West Adams Street, Suite 2410 Chicago, IL 60606 Telephone: 312-886-1616 Fax: 312-886-0351
Los Angeles Metropolitan Office	Los Angeles Metropolitan Area	888 S. Figueroa, Suite 1850 Los Angeles, CA 90012 Telephone: 213-202-3950 Fax: 213-202-3961

**APPENDIX C**  
**THIRD PARTY CONTRACTING CHECKLISTS**

CHAPTER II, Sec. 2	APPLICABILITY OF THE CIRCULAR	CHECK
Sec. 2.a	Participants in FTA Assisted Procurements	
Sec. 2.a(1)	Recipients of FTA Grants or Cooperative Agreement s	
Sec. 2.a(1)(a)	States	
Sec. 2.a(1)(a) <u>1</u>	Governmental Subrecipients of the State	
Sec. 2.a(1)(a) <u>2</u>	Private Non-Profit Subrecipients of the State	
Sec. 2.a(1)(b)	Recipients and Subrecipients that are not States	
Sec. 2.a(2)	Subrecipients of FTA Assistance	
Sec. 2.a(3)	Recipients of Both FTA Assistance and Funds Provided by Another Federal Agency	
Sec. 2.a(4)	Recipients of "Other Agreement" Assistance	
Sec. 2.a(5)	Third Party Contractors and Subcontractors	
Sec. 2.a(5)(a)	Status	
Sec. 2.a(5)(b)	Effect of Federal Requirements	
Sec. 2.b	Project Types and Third Party Contracts	
Sec. 2.b(1)	Capital Contracts	
Sec. 2.b(1)(a)	Capital Contracts Financed Without Federal Funds	
Sec. 2.b(1)(b)	Art	
Sec. 2.b(1)(c)	Over-the-Road Bus Accessibility Program	
Sec. 2.b(1)(d)	Real Property	
Sec. 2.b(2)	Operations Contracts	
Sec. 2.b(2)(a)	Operations Contracts Financed with FTA Assistance	
Sec. 2.b(2)(b)	Operations Contracts Financed Entirely Without FTA Assistance	
Sec. 2.b(3)	Preventive Maintenance Contracts	
Sec. 2.b(4)	Revenue Contracts	
Sec. 2.b(4)(a)	Limited Contract Opportunities	
Sec. 2.b(4)(b)	Open Contract Opportunities	
Sec. 2.b(5)	Joint Development	
Sec. 2.b(5)(a)	Construction Contracts	
Sec. 2.b(5)(b)	Revenue Contracts	
Sec. 2.b(5)(c)	Other Contracts	
Sec. 2.b(6)	Public-Private Partnerships	
Sec. 2.b(7)	Transactions Involving Complex Financial Arrangements	
Sec. 2.b(7)	Force Account	
Sec. 3	Federal Laws and Regulations	
Sec. 3.a	Common Grant Rules	
Sec. 3.a(1)	Governmental Recipients	
Sec. 3.a(2)	Non-Governmental Recipients	
Sec. 3.b	Federal Acquisition Regulation	
Sec. 3.c	Other Federal Requirements	
Sec. 3.c(1)	Compilation in the Master Agreement	
Sec. 3.c(2)	Conflicting Federal Requirements	
Sec. 3.d	Waivers	
Sec. 4	State and Local Laws and Regulations	
Sec. 4.a	Inadequate State and Local Requirements	
Sec. 4.b	Conflicts Between Federal Requirements and State or Local Requirements	

### THIRD PARTY CONTRACTING CHECKLISTS

CHAPTER III	THE RECIPIENT'S RESPONSIBILITIES	CHECK
Sec. 1.	Written Standards of Conduct	
Sec. 1.a	Personal Conflicts of Interest	
Sec. 1.b	Gifts	
Sec. 1.c	Violations	
Sec. 2	Self-Certification	
Sec. 3	Third Party Contracting Capacity	
Sec. 3.a	Written Procurement Procedures	
Sec. 3.a(1)	Solicitations	
Sec. 3.a(1)(a)	Clear Descriptions	
Sec. 3.a(1)(b)	Nonrestrictive Specifications	
Sec. 3.a(1)(c)	Quality Requirements	
Sec. 3.a(1)(d)	Preference for Performance Specifications	
Sec. 3.a(1)(e)	Brand Name or Equal	
Sec. 3.a(2)	Necessity	
Sec. 3.a(3)	Lease Versus Purchase	
Sec. 3.a(4)	Metric Usage	
Sec. 3.a(5)	Environmental and Energy Efficiency Preferences	
Sec. 3.a(6)	Procurement Methods	
Sec. 3.a(7)	Legal Restrictions	
Sec. 3.a(8)	Third Party Contract Provisions	
Sec. 3.a(9)	Sources	
Sec. 3.a(10)	Resolution of Third Party Contracting Issues	
Sec. 3.b	Adequate Third Party Contract Provisions	
Sec. 3.c	Industry Contracts	
Sec. 3.d	Record Keeping	
Sec. 3.d(1)	Procurement History	
Sec. 3.d(1)(a)	Procurement Method	
Sec. 3.d(1)(b)	Contract Type	
Sec. 3.d(1)(c)	Contractor Selection	
Sec. 3.d(1)(d)	Cost or Price	
Sec. 3.d(1)(e)	Reasonable Documentation	
Sec. 3.d(2)	Access to Records	
Sec. 3.e	Special Notification Requirements for States	
Sec. 3.f	Use of Technology/Electronic Commerce	
Sec. 3.f(1)	Sufficient System Capacity	
Sec. 3.f(2)	Written Procedures	
Sec. 3.f(3)	Uses	
Sec. 3.f(3)(a)	Standard Bidding and Proposal Procedures	
Sec. 3.f(3)(b)	Electronic Bidding and Reverse Auctions	
Sec. 3.f(3)(b) <u>1</u>	Value	
Sec. 3.f(3)(b) <u>2</u>	Procedures	
Sec. 3.f(3)(b) <u>2.a</u>	Notification)	
Sec. 3.f(3)(b) <u>2.b</u>	Bid or Quote Submission	
Sec. 3.f(3)(b) <u>2.c</u>	Information Displayed During the Auction	
Sec. 3.f(3)(b) <u>2.d</u>	Information Not Displayed During the Auction	
Sec. 3.f(3)(b) <u>2.e</u>	Information Displayed at the End of the Auction	
Sec. 3.f(3)(b) <u>2.f</u>	Information Provided at the End of the Auction	
Sec. 4	Audit	
Sec. 4.a	The Recipient's Auditors	
Sec. 4.b	Independent Auditors	
Sec. 4.c	Federal Audit Agencies	

**THIRD PARTY CONTRACTING CHECKLISTS**

CHAPTER IV, Sec. 1	DETERMINING THE RECIPIENT'S NEEDS	CHECK
Sec. 1.a	Eligibility	
Sec. 1.b	Necessity	
Sec. 1.b(1)	Unnecessary Reserves	
Sec. 1.b(2)	Acquisition for Assignment Prohibitions	
Sec. 1.b(1)(a)	General Prohibition	
Sec. 1.b(1)(b)	Changes in the Recipient's Needs	
Sec. 1.b(1)(c)	Exceptions	
Sec. 1.b(1)(c) <u>1</u>	Joint Procurements	
Sec. 1.b(1)(c) <u>1</u>	State or Local Government Purchasing Schedules or Purchasing Contracts	
Sec. 1.c	Procurement Size	
Sec. 1.c(1)	Joint Procurements	
Sec. 1.c(2)	Smaller Procurements	
Sec. 1.d	Options	
Sec. 1.e	Lease Versus Purchase	
Sec. 1.f	Specifications	

CHAPTER IV, Sec. 2.a.	CONTRACTOR QUALIFICATIONS	CHECK
Sec. 2.a(1)	"Responsibility" Requirements	
Sec. 2.a(2)	Debarment and Suspension	
Sec. 2.a(2)(a)	DOT Debarment and Suspension Regulations	
Sec. 2.a(2)(b)	GSA Excluded Parties List System	
Sec. 2.a(2)(c)	State Debarment and Suspension Lists	
Sec. 2.a(3)	Conflict of Interest	
Sec. 2.a(4)	Lobbying Certification and Disclosure	
Sec. 2.a(5)	Federal Civil Rights Laws and Regulations	
Sec. 2.a(5)(a)	Federal Equal Employment Opportunity (EEO) Requirements	
Sec. 2.a(5)(a) <u>1</u>	Nondiscrimination in Federal Public Transportation Programs	
Sec. 2.a(5)(a) <u>2</u>	Prohibition Against Employment Discrimination	
Sec. 2.a(5)(b)	Nondiscrimination on the Basis of Sex	
Sec. 2.a(5)(c)	Nondiscrimination on the Basis of Age	
Sec. 2.a(5)(d)	Federal Protections for Individuals with Disabilities	
Sec. 2.a(6)	Socio-Economic Development	
Sec. 2.a(6)(a)	Disadvantaged Business Enterprises (DBE)	
Sec. 2.a(6)(b)	Small and Minority Firms and Women's Business Enterprises	
Sec. 2.a(6)(b) <u>1</u>	Notice	
Sec. 2.a(6)(b) <u>2</u>	Contract Size	
Sec. 2.a(6)(b) <u>3</u>	Delivery Schedule	
Sec. 2.a(6)(b) <u>4</u>	Small Business Administration and the Department of Commerce Minority Business Development Agency	
Sec. 2.a(6)(b) <u>5</u>	Subcontracting Opportunities	
Sec. 2.a(7)	Sensitive Security Information	
Sec. 2.a(8)	Seat Belt Use	

**THIRD PARTY CONTRACTING CHECKLISTS**

CHAPTER IV, Sec.2.b	ADMINISTRATIVE RESTRICTIONS ACQUISITION OF PROPERTY AND SERVICES	CHECK
Sec. 2.b(1)	Legal Eligibility	
Sec. 2.b(2)	Scope of the Project	
Sec. 2.b(3)	Period of Performance–Limits	
Sec. 2.b(3)(a)	General Standards	
Sec. 2.b(3)(b)	Federal Restrictions	
Sec. 2.b(3)(c)	Time Extensions	
Sec. 2.b(4)	Federal Cost Principles	
Sec. 2.b(4)(a)	Governmental Entities	
Sec. 2.b(4)(b)	Educational Institutions	
Sec. 2.b(4)(c)	Non-Profit Entities	
Sec. 2.b(4)(d)	For-Profit Entities	
Sec. 2.b(5)	Payment Provisions	
Sec. 2.b(5)(a)	FTA Support for the Project	
Sec. 2.b(5)(a) <u>1</u>	Award Made	
Sec. 2.b(5)(a) <u>2</u>	Preaward Authority	
Sec. 2.b(5)(a) <u>3</u>	Letter of No Prejudice	
Sec. 2.b(5)(b)	Advance Payments	
Sec. 2.b(5)(b) <u>1</u>	Use of FTA Assistance Prohibited	
Sec. 2.b(5)(b) <u>2</u>	Exceptions for Sound Business Reasons	
Sec. 2.b(5)(b) <u>2.a</u>	Adequate Security for Advance Payments (FTA Concurrence)	
Sec. 2.b(5)(b) <u>2.b</u>	Customary Advance Payments (FTA Concurrence – \$100,000+)	
Sec. 2.b(5)(b) <u>2.b</u>	Public Utility Connections and Services	
Sec. 2.b(5)(b) <u>2.b</u>	Rent	
Sec. 2.b(5)(b) <u>2.b</u>	Tuition	
Sec. 2.b(5)(b) <u>2.b</u>	Insurance Premiums	
Sec. 2.b(5)(b) <u>2.b</u>	Subscriptions to Publications	
Sec. 2.b(5)(b) <u>2.b</u>	Software Licenses	
Sec. 2.b(5)(b) <u>2.b</u>	Construction Mobilization Services	
Sec. 2.b(5)(b) <u>2.b</u>	Transportation	
Sec. 2.b(5)(b) <u>2.b</u>	Hotel Reservations	
Sec. 2.b(5)(b) <u>2.b</u>	Conference and Convention Registration	
Sec. 2.b(5)(b) <u>2.b</u>	Other	
Sec. 2.b(5)(c)	Progress Payments	
Sec. 2.b(5)(c) <u>1</u>	Adequate Security for Progress Payments	
Sec. 2.b(5)(c) <u>2</u>	Adequate Documentation	
Sec. 2.b(5)(c) <u>3</u>	Percentage of Completion	
Sec. 2.b(6)	Protections Against Performance Difficulties	
Sec.2.b(6)(a)	Changes	
Sec. 2.b(6)(b)	Remedies	
Sec. 2.b(6)(b) <u>1</u>	Liquidated Damages	
Sec. 2.b(6)(b) <u>2</u>	Violation or Breach	
Sec. 2.b(6)(b) <u>3</u>	Suspension of Work	
Sec. 2.b(6)(b) <u>4</u>	Termination	

### THIRD PARTY CONTRACTING CHECKLISTS

CHAPTER IV, Sec. 2.c	SOCIO-ECONOMIC REQUIREMENTS ACQUISITION OF PROPERTY AND SERVICES	CHECK
Sec. 2.c(1)	Labor	
Sec. 2.c(1)(a)	Wage and Hour	
Sec. 2.c(1)(b)	Fair Labor Standards	
Sec. 2.c(2)	Civil Rights	
Sec. 2.c(2)(a)	Nondiscrimination in Federal Public Transportation Programs	
Sec. 2.c(2)(b)	Title VI of the Civil Rights Act	
Sec. 2.c(2)(c)	Environmental Justice	
Sec. 2.c(2)(d)	Limited English Proficiency (LEP)	
Sec. 2.c(2)(e)	Nondiscrimination on the Basis of Disability	
Sec. 2.c(2)(e) <u>1</u>	Section 504 of the Rehabilitation Act of 1973, as amended (Section 504)	
Sec. 2.c(3)(e) <u>2</u>	The Americans with Disabilities Act of 1990, as amended (ADA)	
Sec. 2.c(3)(e) <u>3</u>	DOT Public Transportation Regulations-Section 504 and the ADA	
Sec. 2.c(3)(e) <u>3.a</u>	Design and Construction	
Sec. 2.c(3)(e) <u>3.b</u>	Accessibility and Usability	
Sec. 2.c(3)(e) <u>3.c</u>	Complementary Paratransit Service	
Sec. 2.c(3)(e) <u>3.d</u>	Equal Opportunity	
Sec. 2.c(2)(f)	Electronic Reports and Information	
Sec. 2.c(3)	Environmental Protections	
Sec. 2.c(3)(a)	Environmental Mitigation	
Sec. 2.c(3)(b)	National Environmental Policy Act	
Sec. 2.c(3)(b) <u>1</u>	Property	
Sec. 2.c(3)(b) <u>2</u>	Services	
Sec. 2.c(3)(c)	Protections for Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites	
Sec. 2.c(3)(d)	Clean Air	
Sec. 2.c(3)(e)	Clean Water	
Sec. 2.c(3)(f)	Recycled Products	
Sec. 2.c(3)(g)	Other Federal Environmental Protection Requirements	
Sec. 2.c(3)(g)	Wild and Scenic Rivers	
Sec. 2.c(3)(g)	Coastal Zones	
Sec. 2.c(3)(g)	Wetlands	
Sec. 2.c(3)(g)	Endangered Species	
Sec. 2.c(3)(g)	Fisheries	
Sec. 2.c(3)(g)	Historic Sites	
Sec. 2.c(3)(g)	Archeological Sites	
Sec. 2.c(3)(g)	Indian Sacred Sites	
Sec. 2.c(4)	Energy Conservation	
Sec. 2.c(5)	Preference for U.S. Property—Buy America	
Sec. 2.c(6)	Shipments of Property—U.S. Flag Requirements	
Sec. 2.c(6)(a)	Shipments by Ocean Vessel	
Sec. 2.c(6)(b)	Shipments by Air Carrier	
Sec. 2.c(7)	Project Travel—Use of U.S. Flag Air Carriers	

### THIRD PARTY CONTRACTING CHECKLISTS

CHAPTER IV, Sec. 2.d	TECHNICAL RESTRICTIONS ACQUISITION OF PROPERTY AND SERVICESS	CHECK
Sec. 2.d(1)	Intelligent Transportation Systems	
Sec. 2.d(2)	Metric Measurements	
Sec. 2.d(3)	Use of \$1 Coins	

CHAPTER IV, Sec. 2.e	ROLLING STOCK—SPECIAL REQUIREMENTS ACQUISITION OF PROPERTY AND SERVICES	CHECK
Sec. 2.e(1)	Accessibility	
Sec. 2.e(2)	Transit Vehicle Manufacturer Compliance with DBE Requirements	
Sec. 2.e(3)	Minimum Service Life	
Sec. 2.e(4)	Spare Ratios	
Sec. 2.e(5)	Air Pollution and Fuel Economy	
Sec. 2.e(6)	Preaward and Post Delivery Review	
Sec. 2.e(7)	Bus Testing	
Sec. 2.e(8)	In-State Dealers	
Sec. 2.e(9)	Basis for Contract Award	
Sec. 2.e(10)	Five-Year Limitation	

CHAPTER IV, Sec. 2..f	PUBLIC TRANSPORTATION SERVICES – SPECIAL REQUIREMENTS ACQUISITION OF PROPERTY AND SERVICES	CHECK
Sec. 2.f(1)	Protections for Public Transportation Employees	
Sec. 2.f(2)	Drug and Alcohol Testing	
Sec. 2.f(3)	Accessibility	
Sec. 2.f(4)	Protection of Animals	
Sec. 2.f(5)	Charter Service Restrictions	
Sec. 2.f(6)	School Bus Restrictions	



**THIRD PARTY CONTRACTING CHECKLISTS**

CHAPTER IV, Sec. 2.g	ARCHITECTURAL ENGINEERING AND RELATED SERVICES—SPECIAL REQUIREMENTS ACQUISITION OF PROPERTY AND SERVICES	CHECK
Sec. 2.g(1)	Qualifications-Based Requirements	
Sec. 2.g(2)	Relation to Construction	
Sec. 2.g(2)(a)	Purpose of Services	
Sec. 2.g(2)(b)	Requirements in the Context of a Construction Project	
Sec. 2.g(2)(b) <u>1</u>	End Products Used in Construction	
Sec. 2.g(2)(b) <u>2</u>	Services Related to Design of Construction Projects	
Sec. 2.g(2)(b) <u>3</u>	Actual Construction	
Sec. 2.g(2)(c)	Type of Contractor Not Determinative	
Sec. 2.g(3)	Equivalent State Law	
Sec. 2.g(4)	Special Requirements for Indirect Cost Rates	

CHAPTER IV, Sec. 2.h	CONSTRUCTION—SPECIAL REQUIREMENTS ACQUISITION OF PROPERTY AND SERVICES	CHECK
Sec. 2.h(1)	Bonding	
Sec. 2.h(1)(a)	Bid Guarantee	
Sec. 2.h(1)(b)	Performance Bond	
Sec. 2.h(1)(c)	Payment Bond	
Sec. 2.h(1)(c) <u>1</u>	Less Than \$1 Million	
Sec. 2.h(1)(c) <u>2</u>	More Than \$1 Million but Less Than \$5 Million	
Sec. 2.h(1)(c) <u>3</u>	More Than \$5 Million	
Sec. 2.h(1)(d)	Acceptable Sureties	
Sec. 2.h(1)(e)	Reduced Bonding	
Sec. 2.h(1)(f)	Excessive Bonding	
Sec. 2.h(2)	Seismic Safety	
Sec. 2.h(3)	Value Engineering	
Sec. 2.h(4)	Equal Employment Opportunity	
Sec. 2.h(5)	Prevailing Wages	
Sec. 2.h(6)	Anti-Kickback	
Sec. 2.h(7)	Construction Safety	
Sec. 2.h(8)	Labor Neutrality	
Sec. 2.h(9)	Preference for U.S. Property—Buy America	
Sec. 2.h(10)	Accessibility	

**THIRD PARTY CONTRACTING CHECKLISTS**

CHAPTER IV, Sec. 2.i	RESEARCH, DEVELOPMENT, DEPLOYMENT, AND SPECIAL STUDIES SPECIAL REQUIREMENTS ACQUISITION OF PROPERTY AND SERVICES	CHECK
Sec. 2.i(1)	Patent Rights	
Sec. 2.i(2)	Rights in Data	
Sec. 2.i(2)(a)	Publication Restrictions	
Sec. 2.i(2)(b)	Distribution of Data	
Sec. 2.i(3)	Export Control	
Sec. 2.i(4)	Protection of Human Subjects	
Sec. 2.i(5)	Protection of Animals	

CHAPTER IV, Sec. 2.j	AUDIT SERVICES—SPECIAL REQUIREMENTS ACQUISITION OF PROPERTY AND SERVICES	CHECK
Sec. 2.j(1)	Single Audit Act	
Sec. 2.j(1)(a)	Organizational Conflicts of Interest	
Sec. 2.j(1)(b)	Eligibility of Costs	
Sec. 2.j(2)	Other Project Audits	
Sec. 2.j(2)(a)	Organizational Conflicts of Interest	
Sec. 2.j(2)(b)	Verification of Indirect Costs	
Sec. 2.j(2)(c)	Duplication of Services	
Sec. 2.j(2)(d)	Obtaining Indirect Cost Rates	
Sec. 2.j(2)(d) <u>1</u>	Governmental Entities	
Sec. 2.j(2)(d) <u>2</u>	Indian Tribes	
Sec. 2.j(2)(d) <u>3</u>	Educational Institutions	
Sec. 2.j(2)(d) <u>4</u>	Non-Profit Entities	
Sec. 2.j(2)(d) <u>5</u>	Private For-Profit Entities	
Sec. 2.j(2)(e)	Eligibility of Costs	

### THIRD PARTY CONTRACTING CHECKLISTS

CHAPTER V	SOURCES	CHECK
Sec. 1	Force Account	
Sec. 2	Shared Use	
Sec. 3	Joint Procurements	
Sec. 3.a	Use Encouraged	
Sec. 3.b	All FTA and Federal Requirements Apply	
Sec. 4	State or Local Government Purchasing Schedules or Purchasing Contracts	
Sec. 4.a	Use Encouraged	
Sec. 4.b	All FTA and Federal Requirements Apply	
Sec. 5	Federal Excess and Surplus Property	
Sec. 6	Federal Supply Schedules	
Sec. 6.a	Full Use of Federal Supply Schedules	
Sec. 6.b	Limited Use of Federal Supply Schedules	
Sec. 6.b(1)	Information Technology	
Sec. 6.b(2)	Major Disaster or Emergency Recovery	
Sec. 6.c	All FTA and Federal Requirements Apply	
Sec. 6.d	Competition and Price Reasonableness	
Sec. 7	Existing Contracts	
Sec. 7.a	Permissible Actions	
Sec. 7.a(1)	Exercise of Options	
Sec. 7.a(1)(a)	Consistency with the Underlying Contract	
Sec. 7.a(1)(b)	Price	
Sec. 7.a(1)(c)	Awards Treated as Sole Source Procurements	
Sec. 7.a(1)(c) <u>1</u>	Failure to Evaluate Options Before Awarding the Underlying Contract	
Sec. 7.a(1)(c) <u>2</u>	Negotiating a Lower Option Price	
Sec. 7.a(2)	Assignment of Contract Rights	
Sec. 7.a(2)(a)	Acquisition Through Assigned Contract Rights	
Sec. 7.a(2)(b)	Alternatives to Assigned Contract Rights	
Sec. 7.a(2)(b) <u>1</u>	Joint Procurements	
Sec. 7.a(2)(b) <u>2</u>	Intergovernmental Procurements	
Sec. 7.b	Impermissible Actions	
Sec. 7.b(1)	Improper Contract Expansion	
Sec. 7.b(2)	Cardinal Changes	
Sec. 7.b(2)(a)	Identifying Cardinal Changes	
Sec. 7.b(2)(b)	Changes in Quantity	
Sec. 7.b(2)(c)	Tests	
Sec. 7.b(2)(d)	Rolling Stock	
Sec. 7.b(2)(e)	Federal Procurement Standards	
Sec. 8	The Open Market	

### THIRD PARTY CONTRACTING CHECKLISTS

CHAPTER VI	OPEN MARKET PROCUREMENTS - COMPETITION	CHECK
Sec. 1	Competition Required	
Sec. 1.a	Solicitation by the Recipient	
Sec. 1.b	Unsolicited Proposals	
Sec. 1.b(1)	Receipt	
Sec. 1.b(2)	Adequate Description	
Sec. 1.b(3)	Interest in the Property or Services	
Sec. 1.b(3)	Adequate Opportunity to Compete	
Sec. 1.b(4)	Contract Award Based on Proposals Received	
Sec. 1.c	Prequalification	
Sec. 1.c(1)	Lists	
Sec. 1.c(2)	Sources	
Sec. 1.c(3)	Qualification Periods	
Sec. 2	Solicitation Requirements and Restrictions	
Sec. 2.a	Description of the Property or Services	
Sec. 2.a(1)	What to Include	
Sec. 2.a(2)	Quantities Limited to the Recipient's Actual Needs	
Sec. 2.a(3)	Brand Name or Equal	
Sec. 2.a(4)	Prohibitions	
Sec. 2.a(4)(a)	Excessive Qualifications	
Sec. 2.a(4)(b)	Unnecessary Experience	
Sec. 2.a(4)(c)	Improper Prequalification	
Sec. 2.a(4)(d)	Retainer Contracts	
Sec. 2.a(4)(e)	Excessive Bonding	
Sec. 2.a(4)(f)	Brand Name Only	
Sec. 2.a(4)(g)	In-State or Local Geographic Restrictions	
Sec. 2.a(4)(g) <u>1</u>	Architectural Engineering Services	
Sec. 2.a(4)(g) <u>2</u>	Licensing	
Sec. 2.a(4)(g) <u>3</u>	Major Disaster or Emergency Relief	
Sec. 2.a(4)(h)	Organizational Conflicts of Interest	
Sec. 2.a(4)(h) <u>1</u>	Occurrence	
Sec. 2.a(4)(h) <u>1.a</u>	Lack of Impartiality or Impaired Objectivity	
Sec. 2.a(4)(h) <u>1.b</u>	Unequal Access to Information	
Sec. 2.a(4)(h) <u>1.c</u>	Biased Ground Rules	
Sec. 2.a(4)(h) <u>2</u>	Remedies	
Sec. 2.a(4)(i)	Restraint of Trade	
Sec. 2.a(4)(j)	Arbitrary Action	
Sec. 2.b	Evaluation Factors	
Sec. 2.c	Contract Type Specified	
Sec. 2.c(1)	Typical Contract Types	
Sec. 2.c(1)(a)	Firm Fixed Price	
Sec. 2.c(1)(b)	Cost Reimbursement	
Sec. 2.c(2)	Prohibited or Restricted Contract Types	
Sec. 2.c(2)(a)	Cost Plus a Percentage of Cost—Prohibited	
Sec. 2.c(2)(b)	Time and Materials—Restricted	
Sec. 2.c(2)(b) <u>1</u>	When to Use	
Sec. 2.c(2)(b) <u>2</u>	Firm Ceiling Price	
Sec. 2.d	Other Federal Requirements Affecting the Property or Services to be Acquired	
Sec. 2.e	Other Federal Requirements Affecting the Bidder or Offeror and Contractor	
Sec. 2.f	Award to Other Than the Low Bidder or Offeror	
Sec. 2.g	Rejection of All Bids or Offers	

### THIRD PARTY CONTRACTING CHECKLISTS

CHAPTER VI, Sec. 3	OPEN MARKET PROCUREMENTS – METHODS OF COMPETITIVE PROCUREMENT	CHECK
Sec. 3.a	Micro-Purchases	
Sec. 3.a(1)	When Appropriate	
Sec. 3.a(2)	Procedures	
Sec. 3.a(2)(a)	Competition	
Sec. 3.a(2)(b)	Prohibited Divisions	
Sec. 3.a(2)(c)	Documentation	
Sec. 3.b	Small Purchases	
Sec. 3.b(1)	When Appropriate	
Sec. 3.b(2)	Procedures	
Sec. 3.b(2)(a)	Competition	
Sec. 3.b(2)(b)	Prohibited Divisions	
Sec. 3.c	Sealed Bids (Formal Advertising)	
Sec. 3.c(1)	When Appropriate	
Sec. 3.c(1)(a)	Precise Specifications	
Sec. 3.c(1)(b)	Adequate Sources	
Sec. 3.c(1)(c)	Fixed Price Contract	
Sec. 3.c(1)(d)	Price Determinative	
Sec. 3.c(1)(e)	Discussions Unnecessary	
Sec. 3.c(2)	Procurement Procedures	
Sec. 3.c(2)(a)	Publicity	
Sec. 3.c(2)(b)	Adequate Sources	
Sec. 3.c(2)(c)	Adequate Specifications	
Sec. 3.c(2)(d)	Sufficient Time	
Sec. 3.c(2)(e)	Public Opening	
Sec. 3.c(2)(f)	Fixed Price Contract	
Sec. 3.c(2)(g)	Rejection of Bids	
Sec. 3.d	Competitive Proposals (Request for Proposals)	
Sec. 3.d(1)	When Appropriate	
Sec. 3.d(1)(a)	Type of Specifications	
Sec. 3.d(1)(b)	Uncertain Number of Sources	
Sec. 3.d(1)(c)	Price Alone Not Determinative	
Sec. 3.d(1)(d)	Discussions Expected	
Sec. 3.d(2)	Procurement Procedures	
Sec. 3.d(2)(a)	Publicity	
Sec. 3.d(2)(b)	Evaluation Factors	
Sec. 3.d(2)(c)	Adequate Sources	
Sec. 3.d(2)(d)	Evaluation Method	
Sec. 3.d(2)(e)	Price and Other Factors	
Sec. 3.d(2)(f)	Best Value	

### THIRD PARTY CONTRACTING CHECKLISTS

CHAPTER VI	OPEN MARKET PROCUREMENTS - METHODS OF COMPETITIVE PROCUREMENT	CHECK
Sec. 3.e	Two-Step Procurement Procedures	
Sec. 3.e(1)	Review of Technical Qualifications and Approach	
Sec. 3.e(2)	Review of Bids and Proposals Submitted by Qualified Prospective Contractors	
Sec. 3.f	Architectural Engineering Services (A&E) and Other Services	
Sec. 3.f(1)	Qualification-Based Procurement Procedures Required	
Sec. 3.f(2)	Qualifications-Based Procurement Procedures Prohibited	
Sec. 3.f(3)	Qualifications-Based Procurement Procedures	
Sec. 3.f(3)(a)	Qualifications	
Sec. 3.f(3)(b)	Price	
Sec. 3.f(3)(c)	Most Qualified	
Sec. 3.f(3)(d)	Next Most Qualified	
Sec. 3.f(4)	Effect of State Laws	
Sec. 3.f(5)	Audits and Indirect Costs	
Sec. 3.f(5)(a)	Performance of Audits	
Sec. 3.f(5)(b)	Indirect Cost Rates	
Sec. 3.f(5)(c)	Application of Rates	
Sec. 3.f(5)(d)	Prenotification: Confidentiality of Data	
Sec. 3.g	Design-Bid-Build	
Sec. 3.g(1)	Design Services	
Sec. 3.g(2)	Construction	
Sec. 3.h	Design-Build	
Sec. 3.h(1)	Procurement Method	
Sec. 3.h(1)(a)	Construction Predominant	
Sec. 3.h(1)(b)	Design Services Predominant	
Sec. 3.h(2)	Selection Processes	
Sec. 3.h(2)(a)	One-Step Method	
Sec. 3.h(2)(b)	Two-Step Method	
Sec. 3.h(2)(b) <u>1</u>	Review of Technical Qualifications and Approach	
Sec. 3.h(2)(b) <u>2</u>	Review of Complete Proposals	

### THIRD PARTY CONTRACTING CHECKLISTS

CHAPTER VI, Sec. 3.h	OPEN MARKET PROCUREMENTS - METHODS OF PROCUREMENT OTHER THAN FULL AND OPEN COMPETITION	CHECK
Sec. 3.i(1)	When Appropriate	
Sec. 3.i(1)(a)	Competition Adequacy	
Sec. 3.i(1)(b)	Sole Source	
Sec. 3.i(1)(b) <u>1</u>	Unique Capability and Availability	
Sec. 3.i(1)(b) <u>1.a</u>	Unique or Innovative Concept	
Sec. 3.i(1)(b) <u>1.b</u>	Patents or Restricted Data Rights	
Sec. 3.i(1)(b) <u>1.c</u>	Substantial Duplication Costs	
Sec. 3.i(1)(b) <u>1.d</u>	Unacceptable Delay	
Sec. 3.i(1)(b) <u>2</u>	Single Bid or Proposal	
Sec. 3.i(1)(b) <u>2.a</u>	Adequate Competition	
Sec. 3.i(1)(b) <u>2.b</u>	Inadequate Competition	
Sec. 3.i(1)(c)	Unusual and Compelling Urgency	
Sec. 3.i(1)(d)	Associated Capital Maintenance Item Exception Repealed	
Sec. 3.i(1)(e)	Authorized by FTA	
Sec. 3.i(1)(e) <u>1</u>	Consortium, Joint Venture, Team, Partnership	
Sec. 3.i(1)(e) <u>2</u>	FAR Standards	
Sec. 3.i(1)(e) <u>2.a</u>	Statutory Authorization or Requirement	
Sec. 3.i(1)(e) <u>2.b</u>	National Emergency	
Sec. 3.i(1)(e) <u>2.c</u>	Research	
Sec. 3.i(1)(e) <u>2.d</u>	Protests, Disputes, Claims, Litigation	
Sec. 3.i(1)(e) <u>2.e</u>	International Agreements	
Sec. 3.i(1)(e) <u>2.f</u>	National Security	
Sec. 3.i(1)(e) <u>2.g</u>	Public Interest	
Sec. 3.i(2)	When Prohibited	
Sec. 3.i(2)(a)	Failure to Plan	
Sec. 3.i(2)(b)	Limited Availability of Federal Assistance	
Sec. 3.i(3)	Procurement Procedures	
Sec. 3.i(3)(a)	Potential Sources	
Sec. 3.i(3)(b)	Sole Source Justification	
Sec. 3.i(3)(c)	Cost Analysis	
Sec. 3.i(3)(d)	Preaward Review	

**THIRD PARTY CONTRACTING CHECKLISTS**

CHAPTER VI	OPEN MARKET PROCUREMENTS - EVALUATIONS	CHECK
Sec. 4	Eligible Costs	
Sec. 5	Incentive Costs and Payments	
Sec. 6	Cost and Price Analysis	
Sec. 6.a	Cost Analysis	
Sec. 6.a(1)	Federal Cost Principles	
Sec. 6.a(2)	Establishing Indirect Cost Rates	
Sec. 6.a(2)(a)	Contracts of \$5 Million or Less	
Sec. 6.a(2)(b)	Contracts Exceeding \$5 Million	
Sec. 6.a(3)	Profit	
Sec. 6.b	Price Analysis	
Sec. 6.c	Guidance on Cost and Price Analysis	
Sec. 7	Evaluations	
Sec. 7.a	General	
Sec. 7.b	Options	
Sec. 7.b(1)	Evaluation Required	
Sec. 7.b(2)	Evaluation Not Required	
Sec.7.c	Evaluators	

CHAPTER VI	OPEN MARKET PROCUREMENTS CONTRACT AWARDS - REJECTIONS OF BIDS AND PROPOSALS	CHECK
Sec. 8	Contract Award	
Sec. 8.a	Award to Other Than the Lowest Bidder or Offeror	
Sec. 8.b	Award to Only a Responsible Bidder or Offeror	
Sec. 8.b(1)	Integrity and Ethics	
Sec. 8.b(2)	Debarment and Suspension	
Sec. 8.b(3)	Affirmative Action and DBE	
Sec. 8.b(4)	Public Policy	
Sec. 8.b(5)	Administrative and Technical Capacity	
Sec. 8.b(6)	Licensing and Taxes	
Sec. 8.b(7)	Financial Resources	
Sec. 8.b(8)	Production Capability	
Sec. 8.b(9)	Timeliness	
Sec. 8.b(10)	Performance Record	
Sec. 8.b(10)(a)	Current Performance	
Sec. 8.b(10)(b)	Past Performance	
Sec. 8.b(10)(b) <u>1</u>	Sufficient Resources	
Sec. 8.b(10)(b) <u>2</u>	Adequate Past Experience	
Sec. 8.b(10)(b) <u>3</u>	Any Past Deficiencies Not the Fault of the Bidder or Offeror	
Sec. 8.c	Rejection of Bids and Proposals	
Sec. 8.c(1)	Governmental Recipients	
Sec. 8.c(2)	Non-Governmental Recipients	
Sec. 8.d	Extent and Limits of Contract Award	



**APPENDIX D**

**FEDERALLY REQUIRED AND OTHER MODEL CLAUSES**

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

REQUIREMENT	COMMENTS	MASTER AGREEMENT REFERENCE	1	2	3
<b>All FTA Assisted Third Party Contracts and Subcontracts</b>					
No Federal Government Obligations to Third Parties (by Use of a Disclaimer)		§ 2.f			
False or Fraudulent Statements or Claims – Civil and Criminal Fraud		§ 3.f			
Access to Third Party Contract Records		§ 15.t			
Changes to Federal Requirements		§ 2.c(1)			
Termination	Contracts exceeding \$10,000 (49 CFR Part 18)	§ 11			
Civil Rights (Title VI, EEO, ADA)		§ 12			
Disadvantaged Business Enterprises (DBEs)	Contracts awarded on the basis of a bid or proposal offering to use DBEs.	§ 12.d			
Incorporation of FTA Terms	Per FTA C 4220.1F	§ 15.a			
Suspension and Debarment	Contracts exceeding \$25,000	§ 3.b			
<b>Awards Exceeding the Simplified Acquisition Threshold (\$100,000)</b>					
Buy America	When tangible property or construction will be acquired.	§14.a			
Resolution of Disputes, Breaches, or Other Litigation		§ 52			
<b>Awards Exceeding \$100,000 by Statute</b>					
Lobbying		§ 3.d			
Clean Air		§ 25.b			
Clean Water		§ 25.c			

**FEDERALLY REQUIRED AND OTHER MODEL CLAUSES**

**A. REQUIRED THIRD PARTY CONTRACT CLAUSES (Continued)**

(excluding micro-purchases, except for construction contracts over \$2,000)

REQUIREMENT	COMMENTS	MASTER AGREEMENT REFERENCE	1	2	3
<b>Transport of Property or Persons</b>					
Cargo Preference	When acquiring property suitable for shipment by ocean vessel	§ 14.b			
Fly America	When property or persons are transported by air between U.S. and foreign destinations, or between foreign locations	§ 14.c			
<b>Construction Activities</b>					
Construction Employee Protections – Davis-Bacon Act	For contracts exceeding \$2,000	§ 24.a			
Construction Employee Protections – Contract Work Hours & Safety Standards Act	For contracts exceeding \$100,000	§ 24.b			
Construction Employee Protections – Copeland Anti-Kickback Act	All contracts	§ 24.a			
Bonding for Construction Activities Exceeding \$100,000	5% bid guarantee bond 100% performance bond Payment bond equal to: – 50% for contracts < \$1M – 40% for contracts > \$1M – < \$5M – \$2.5M for contracts > \$5M	§ 15.o(1)			
Seismic Safety	Construction contracts for new buildings or for existing buildings	§ 23.e			
<b>Nonconstruction Activities</b>					
Nonconstruction Employee Protection – Contract Work Hours & Safety Standards Act	For all turnkey, rolling stock, and operational contracts (excluding transportation services contracts) in excess of \$100,000	§ 24.b			
<b>Transit Operations</b>					
Transit Employee Protective Arrangements		§ 24.d			
Charter Bus Operations		§ 28			
School Bus Operations		§ 29			
Drug Use and Testing	Safety sensitive functions	§ 32.b			
Alcohol Misuse and Testing	Safety sensitive functions	§ 32.b			

**FEDERALLY REQUIRED AND OTHER MODEL CLAUSES**

**A. REQUIRED THIRD PARTY CONTRACT CLAUSES (Continued)**

(excluding micro-purchases, except for construction contracts over \$2,000)

REQUIREMENT	COMMENTS	MASTER AGREEMENT REFERENCE	1	2	3
<b>Planning, Research, Development, and Demonstration Projects</b>					
Patent Rights		§ 17			
Rights in Data and Copyrights		§ 18			
<b>Special Notification Requirements for States</b>					
Special Notification Requirement for States		§ 37			
<b>Miscellaneous Special Requirements</b>					
Energy Conservation		§ 26			
Recycled Products	Contracts when procuring \$10,000 or more per year of items designated by EP	§ 15.k			
Conformance with National ITS Architecture	Contracts and solicitations for ITS projects	§ 15.m			
ADA Access	Contracts for rolling stock or facilities construction/renovation	§ 12.g			
Assignability Clause	Procurements through assignments	§ 15.a			

**FEDERALLY REQUIRED AND OTHER MODEL CLAUSES**

**B. REQUIRED CERTIFICATIONS, REPORTS, AND FORMS**

<b>REQUIREMENT</b>	<b>COMMENTS</b>	<b>MASTER AGREEMENT REFERENCE</b>	<b>1</b>	<b>2</b>	<b>3</b>
Bus Testing Certification	Procurements of buses and modified mass produced vans	§ 15.n(4)			
TVM Certifications	All rolling stock procurements	§ 12.d(1)			
Buy America Certification	Procurements of steel, iron or manufactured products exceeding \$100,000	§ 14.a			
Preaward Review	Rolling stock procurements exceeding procurements exceeding \$100,000	§ 15.n(3)			
Preaward Buy America Certification	Rolling stock procurements exceeding procurements exceeding \$100,000	§ 15.n(3)			
Preaward Purchaser's Requirement	Rolling stock procurements exceeding procurements exceeding \$100,000	§ 15.n(3)			
Post Delivery Review	Rolling stock procurements exceeding procurements exceeding \$100,000	§ 15.n(3)			
Post Delivery Buy America Certification	Rolling stock procurements exceeding procurements exceeding \$100,000	§ 15.n(3)			
Post Delivery Purchaser's Requirement	Rolling stock procurements exceeding procurements exceeding \$100,000	§ 15.n(3)			
On-Site Inspector's Report	Rolling Stock procurements for more than 10 vehicles	§ 15.n(3)			
Federal Motor Vehicles Safety Standards (Preaward and Post Delivery)	Motor vehicle procurements (49 CFR 571)	§ 15n(3)			
Lobbying	Procurements exceeding \$100,000	§ 3.d(1)			
Standard Form LLL and Quarterly Updates (when required)	Procurements exceeding \$100,000 where contractor engages in lobbying activities	§ 3.d(1)			

**FEDERALLY REQUIRED AND OTHER MODEL CLAUSES**

**C. OTHER REQUIRED ITEMS**

<b>REQUIREMENT</b>	<b>COMMENTS</b>	<b>FTA C 4220.1F REFERENCES</b>	<b>1</b>	<b>2</b>	<b>3</b>
Contract Administration System		§ 7.b			
Record of Procurement History		§ 7.i			
Protest Procedures		§ 7.l			
Selection Procedures		§8.c			
Cost/Price Analysis		§ 10a-b			
Justification for Noncompetitive Awards	If Applicable	§ 9.h			
No Excessive Bonding Requirements		§ 8.a			
No Exclusionary Specifications		§ 8.a			
No Geographic Preferences	Except for A&E Services	§8.b			
Evaluation of Options	If Applicable	§ 9.I			

**FEDERALLY REQUIRED AND OTHER MODEL CLAUSES**

**APPLICABILITY OF THIRD PARTY CONTRACT CLAUSES**

(excluding micro-purchases, except for construction contracts over \$2,000)

TYPE OF PROCUREMENT					
CLAUSE	Professional Services/A&E	Operations/ Management	Rolling Stock Purchase	Construction	Materials & Supplies
No Federal Government Obligations to Third Parties (by Use of a Disclaimer)	All	All	All	All	All
False Statements or Claims Civil and Criminal Fraud	All	All	All	All	All
Access to Third Party Contract Records	All	All	All	All	All
Changes to Federal Requirements	All	All	All	All	All
Termination	All	All	All	All	All
Civil Rights (Title VI, EEO, ADA)	>\$10,000	>\$10,000	>\$10,000	>\$10,000	>\$10,000
Disadvantaged Business Enterprises (DBEs)	All	All	All	All	All
Incorporation of FTA Terms	All	All	All	All	All
Suspension and Debarment	>\$25,000	>\$25,000	>\$25,000	>\$25,000	>\$25,000
Buy America			>\$100,000	>\$100,000	>\$100,000
Resolution of Disputes, Breaches, or Other Litigation	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Lobbying	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Clean Air	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Clean Water	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Cargo Preference			Involves property transported by ocean vessel	Involves property transported by ocean vessel	Involves property transported by ocean vessel
Fly America	Involves foreign transport or travel by air	Involves foreign air transport or travel	Involves foreign transport or travel	Involves foreign transport or travel	Involves foreign air transport or travel
Davis-Bacon Act				>\$2,000 (including ferry vessels)	
Contract Work Hours and Safety Standards Act		>\$2,500 (except transportation services)	>\$2,500	>\$2,000 (including ferry vessels)	

**FEDERALLY REQUIRED AND OTHER MODEL CLAUSES**

**APPLICABILITY OF THIRD PARTY CONTRACT CLAUSES**

(excluding micro-purchases, except for construction contracts over \$2,000)

TYPE OF PROCUREMENT					
CLAUSE	Professional Services/A&E	Operations/ Management	Rolling Stock Purchase	Construction	Materials & Supplies
Copeland Anti-Kickback Act				>\$2,000 (including ferry vessels)	
Bonding				\$100,000	
Seismic Safety	A&E for New Buildings & Additions			New Buildings &	
Transit Employee Protective Arrangements		Transit Operations			
Charter Service Operations		All			
School Bus Operations		All			
Drug Use and Testing		Transit Operations			
Alcohol Misuse and Testing		Transit Operations			
Patent Rights	Research & Development				
Rights in Data and Copyright Requirements	Research & Development				
Energy Conservation	All	All	All	All	All
Recycled Products		Contracts for items designated by EPA, when procuring \$10,000 or more per year		Contracts for items designated by EPA, when procuring \$10,000 or more per year	Contracts for items designated by EPA, when procuring \$10,000 or more per year
Conformance with ITS National Architecture	ITS Projects	ITS Projects	ITS Projects	ITS Projects	ITS Projects
ADA Access	A&E	All	All	All	All
Notification of Federal Participation for States	Limited to States	Limited to States	Limited to States	Limited to States	Limited to States

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## INDEX

### SUBJECT AND LOCATION IN CIRCULAR

<u>Subject</u>	<u>Chapter/Page</u>
Accessibility.....	IV-18; IV-20; IV-26; App. A-1; A-2
Americans With Disabilities (ADA) Accessibility Specifications for Transportation Vehicles .....	IV-14; IV-15; IV-1; IV-15; IV-16; App. A-3
Electronic Reports/Information .....	IV-14; IV-15
Formats .....	IV-14
Individuals with Disabilities Rehabilitation Act.....	IV-14; IV-15
Specifications for Transportation Vehicles.....	IV-14; IV-18; IV-20; IV-27; App. A-3
Transit Vehicle Manufacturer (TVM) .....	IV-18; App. D-4
Transportation Services for Individuals with Disabilities .....	IV-14; IV-18
.....	IV-20; IV-26; App. A-3
Animal Welfare.....	IV-20; IV-21; IV-28; App. A-1; A-5
Annual Certifications and Assurances .....	I-7
Approval, Authorization, Concurrence, Waiver .....	I-2
Definition .....	I-2
Architectural and Engineering (A&E).....	IV-21
Audits.....	II-8; IV-22; VI-13; VI-29
Brooks Act .....	IV-21; IV-22; VI-11; VI-13; VI-14; App. A-2
Contractors and Subcontractors .....	VI-29
Contracts .....	VI-19; VI-20
Services .....	II-2; IV-21; IV-22; VI-4; VI-11; VI-12; VI-14
Architectural and Transportation Barriers Compliance Board (ATBCB) .....	IV-14; IV-18; IV-20
.....	IV-26; App. A-3; A-5
Art .....	II-3; App. A-7
Audits.....	III-2; IV-19
American Institute of Certified Public Accountants.....	VII-6
Architectural Engineering Services .....	II-8; IV-22; IV-29
Duplication of Services.....	IV-29
Duplicative.....	IV-29; IV-30
Eligibility of Costs .....	IV-28; IV-30
Federal Audit Agencies .....	III-7
Indirect Costs .....	IV-28; IV-29; VI-13
Other Audit Services.....	III-7
Other Projects .....	IV-28
Performance .....	VI-13
Recipient's Auditors.....	III-6
Single Audit Act .....	III-7; IV-28; App. A-1
OMB Circular A-133 .....	III-7; IV-28
Third Party .....	III-6

<u>Subject</u>	<u>Chapter/Page</u>
Best Practices Procurement Manual .....	I-9; II-3; II-4; IV-4; V-6; V-7
.....	V-8; VI-3; VI-20; VII-5; App. A-7
Overview.....	I-9
Best Value.....	I-2; IV-3; VI-10; VI-11
Definition .....	I-2
Bonding.....	VI-23; IV-24; VI-3; VI-4; App. D-2; D-5; D-7
Bid.....	VI-23; VI-3; VI-4; App. D-2
Payment .....	VI-23; VI-3; App. D-2
Excessive .....	IV-24; VI-3; App. D-5
Performance.....	VI-23; VI-3; VI-4; App. D-2
Reduced .....	IV-24
Brooks Act .....	<i>See, Architectural Engineering (A&amp;E)</i>
Bus Testing .....	IV-19; App. A-4; D-4
Buy America .....	IV-16; IV-17; IV-26; V-2; V-4; V-6; VI-7; App. A-4; D-1; D-4; D6
Buy American Act .....	IV-17; IV-26
Certification .....	V-2; V-4; V-6; App. A-4; D-4
Regulations .....	IV-16; IV-17; IV-26; V-4; App. A-4
Requirements .....	IV-16; IV-26; V-2; V-4
Buy American Act .....	<i>See, Buy America</i>
Capital Contracts.....	II-3; II-4
Art.....	II-3
General.....	II-4
Preventive Maintenance.....	II-5
Real Property .....	II-4
Without Federal Funds.....	II-3
Cardinal Change.....	<i>See, Changes and Modifications</i>
Catalog of Federal Domestic Assistance (CFDA) Number .....	III-5
Changes and Modifications.....	VII-1; VII-4; VII-5
Cardinal Change .....	I-3; IV-8; V-7; V-8
Definition .....	I-3
Change Order.....	I-3; VI-19; VII-4; VII-5
Definition .....	I-3
Constructive Change.....	VII-4; VII-5
Definition .....	I-3
FTA's Role and Responsibilities .....	VII-5
Recipient's Role and Responsibilities .....	VII-4
Administration .....	VII-4
Approval Requirements .....	VII-4
Cost Restrictions .....	VII-4
Civil Rights .....	IV-5; IV-6; IV-12; IV-13; App. A-2; A-3; D-1; D6
Age.....	IV-5; IV-6; IV-13; App. A-5
Nondiscrimination.....	IV-5
Equal Employment Opportunity.....	IV-5; IV-13

<u>Subject</u>	<u>Chapter/Page</u>
Disabilities .....	<i>See</i> , Accessibility
Creed or Religion.....	IV-5; IV-13
Nondiscrimination.....	IV-5
Equal Employment Opportunity .....	IV-5; IV-13
National Origin .....	IV-5; IV-6; IV-13
Nondiscrimination.....	IV-5
Equal Employment Opportunity .....	IV-5; IV-13
Disadvantaged Business Enterprise .....	IV-6
Small, Minority and Women's Business .....	IV-6
Race .....	IV-5; IV-13
Nondiscrimination.....	IV-5
Equal Employment Opportunity .....	IV-5; IV-13
Disadvantaged Business Enterprise .....	IV-6
Small, Minority and Women's Business .....	IV-6
Sex .....	IV-5; IV-13; App. A-1; A-3
Nondiscrimination.....	IV-5
Equal Employment Opportunity .....	IV-5; IV-13
Small, Minority and Women's Business .....	IV-6
Claims and Litigation.....	VII-6, VII-7; VII-8
FTA's Role and Responsibilities .....	VII-8
Liquidated Damages .....	VII-8
Proceeds Recovered.....	VII-8
Recipient's Role and Responsibilities .....	VII-6
Legal Rights and Remedies .....	VII-7
Notify FTA.....	VII-7
Clean Air Act .....	IV-3; IV-15; App. A-2; D-1; D-6
Clean Water Act (CWA).....	IV-16; App. A-1; D-1; D6
Common Grant Rules .....	I-3; I-4; I-5; I-7; I-8; II-2; II-3; II-4; II-8; II-9; III-1; III-2 ..... III-3; III-4; III-5; IV-1; IV-3; IV-4; IV-5; IV-6; IV-7; IV-8; IV-11 ..... IV-12; IV-15; V-16; IV-17; IV-18; IV-20; IV-23; IV-24; IV-25; IV-26 ..... IV-27; IV-28; V-1; V-2; V-4; V-7; VI-1; VI-2; VI-3; VI-4; VI-6; VI-7; VI-8 ..... VI-9; VI-15; VI-17; VI-18; VI-19; VI-20; VI-22; VI-24; VII-1; VII-3; VII-5; VII-6
Definition .....	I-3
Governmental Recipients.....	I-3; I-4; II-8; III-2; IV-6; IV-7; IV-11; IV-24; V-1; V-2; VI-2 ..... VI-6; VI-7; VI-8; VI-9; VI-15; VI-17; VI-18; VI-24; VII-1; VII-3
Definition .....	I-4
Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (Part 18) .....	I-3; II-2; II-8; App. A-3
Non-Governmental Recipients .....	I-3; I-5; II-8; III-2; III-4; IV-7; IV-12 ..... IV-23; V-1; V-2; VI-6; VI-9; VI-11; VI-24; VII-1
Definition .....	I-5
Uniform Administrative Requirements for Grants and Agreements with Institutions of	

<u>Subject</u>	<u>Chapter/Page</u>
Higher Education, Hospitals, and Other Non-Profit Organizations (Part 19) .....	I-3; II-2
.....	II-8; App. A-3
Common Rule .....	<i>See, Common Grant Rules</i>
Comprehensive Procurement Guideline for Products Containing Recovered Materials.....	IV-16
.....	App. A-5
Comptroller General .....	I-9; III-5; III-6; V-8
Construction .....	I-3; II-4; II-6; II-7; IV-10; IV-11; IV-12; IV-14; IV-21
.....	IV-22; IV-23; IV-24; IV-25; IV-26; VI-4; VI-7; VI-8; VI-12
.....	VI-13; VI-14; VII-9; App. A-2; A-4; A-5; A-6; D-1; D-2; D-3
Architectural Engineering (A&E) Services .....	IV-21; VI-12
Contracts .....	II-6; IV-23; IV-25; IV-26; VI-7; VII-9
Anti-Kickback.....	IV-25
Bonding.....	IV-23
Buy America Requirements.....	IV-26; VI-7
Davis-Bacon Requirements .....	VI-7
DOL Compliance .....	IV-25
Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction .....	IV-12; IV-25; App. A-4
Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act .....	IV-12; App. A-4
Micro-Purchases .....	VI-7; App. D-1; D-2; D-3; D-6; D-7
Percentage of Completion Method .....	IV-11
Public-Private Partnerships.....	II-6; II-7
Safety .....	IV-26
Contract Work Hours and Safety Standards Act .....	IV-25
Safety and Health Regulations for Construction .....	IV-25; App. A-5
Seismic Safety.....	App. D-2
Cost Plus a Percentage of Construction Cost.....	VI-6
Cost Plus a Percentage of Cost .....	VI-6
Design-Bid-Build Project .....	I-3; VI-13
Definition .....	I-3
Design-Build Project.....	I-3; II-7; IV-24; VI-14; VI-15; App. A-2
Definition .....	I-3
Construction Costs Predominant.....	VI-14
Design Services Predominant .....	VI-14
Intelligent Transportation System (ITS).....	IV-22
Major Disaster or Emergency Relief .....	VI-4
Stafford Act.....	VI-4
Management.....	IV-21; VI-11; VI-12; VI-13; VI-14
Mobilization Costs.....	IV-10
Progress Payments .....	IV-10; IV-11
Pre-Construction Surveys and Engineering.....	VII-9

<u>Subject</u>	<u>Chapter/Page</u>
Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects .....	IV-26; App. A-6
Qualifications-Based Procurement Procedures .....	IV-21; IV-22; VI-11; VI-12; VI-14
Sealed Bids Procurement Method.....	VI-8
Special Requirements .....	IV-23
Accessibility.....	IV-26
Anti-Kickback.....	IV-25
Bonding.....	IV-23
Bid Guarantee .....	IV-23
Payment Bond.....	IV-23
Acceptable Sureties.....	IV-23
Less More \$5 Million.....	IV-23
Less Than \$1 Million.....	IV-23
More Than \$1 Million, Less Than \$5 Million .....	IV-23
Performance Bond .....	IV-23
Buy America .....	IV-26
EEO.....	IV-25
Labor Neutral .....	IV-26
Manager At Risk.....	II-4
Prevailing Wages .....	IV-25
Safety .....	IV-25
Seismic Safety.....	IV-24
Value Engineering .....	IV-24
Pre-Construction Surveys and Engineering.....	VII-9
Value Engineering .....	IV-24
Wage Protections .....	IV-25
Constructive Change.....	<i>See, Changes and Modifications</i>
Contact Information.....	<i>See, Federal Transit Administration (FTA)</i>
Contract Work Hours and Safety Standards Act .....	IV-12; IV-25; App. A-2; A-4; D-6
Contractor Qualifications.....	IV-5
Civil Rights Laws and Regulations .....	IV-5
DBE .....	IV-6
Debarment and Suspension.....	IV-4
EEO Requirements .....	IV-5
Individuals with Disabilities .....	IV-6
Lobbying Certification and Disclosure.....	IV-5
Minority Firms and Women's Businesses .....	IV-6
Seat Belt Use.....	IV-7
Sensitive Security Information .....	IV-7
Cooperative Agreement .....	I-3; I-5; I-9; II-1; II-2; II-8; IV-9
.....	V-1; VI-17; VI-19; VII-4; VII-6; App. A-3
Definition .....	I-3

<u>Subject</u>	<u>Chapter/Page</u>
Cooperative Purchasing Program .....	I-4; I-6; V-2; V-3
General Services Administration (GSA) .....	I-4; I-6; V-2; V-3
State .....	V-3
Copeland Anti-Kickback" Act .....	IV-25; App. A-1; D-2; D-7
Davis-Bacon Act .....	IV-25; VI-7; App. D-2; D-6
Debarment and Suspension .....	IV-4; IV-5; VI-22; App. A-6
DOT Regulations .....	IV-4
Excluded Parties List System (EPLS) .....	IV-4
OMB Guidelines .....	IV-4
Defense Contract Audit Agency (DCAA) .....	IV-30; VI-20; VI-21; App. A-7
Audit Manual .....	VI-21
Auditors .....	VI-20
Department of Labor (DOL) .....	IV-12; IV-20; IV-25; App. A-4
Guidelines .....	IV-20; App. A-5
Regulations .....	IV-12; IV-25; App. A-4; A-5
Department of Transportation (DOT) Regulations .....	I-3; II-2; II-4; II-5; II-8; IV-5; IV-6; IV-7
.....	IV-13; IV-14; IV-18; IV-20; IV-24; IV-26; IV-28; VI-22; App. A-3; A-4
Debarment and Suspension (Nonprocurement) .....	IV-4; VI-22; App. A-3
Disadvantaged Business Enterprises .....	IV-6; App. A-3
Lobbying .....	IV-5; App. A-3
Nondiscrimination—Title VI of the Civil Rights Act .....	IV-13; App. A-2; A-3
Nondiscrimination on the Basis of Handicap .....	IV-14; App. A-3
Nondiscrimination on the Basis of Sex .....	IV-5; App. A-3
Protection of Human Subjects .....	IV-28; App. A-3
Protection of Sensitive Security Information .....	IV-7; App. A-3
Seismic Safety .....	IV-24; App. A-4
Transportation Services for Individuals with Disabilities (ADA) .....	IV-14; IV-18
.....	IV-20; IV-26; App. A-3
Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments .....	I-3; II-2; II-8; App. A-3
Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs .....	II-4; App. A-3
Design-Bid-Build Project .....	I-3; VI-13; VI-14
Definition .....	I-3
Construction .....	VI-14
Design Services .....	VI-14
Design-Build Project .....	I-3; VI-14
Definition .....	I-3
Construction Costs Predominant .....	VI-14
Design Services Predominant .....	VI-14
Disadvantaged Business Enterprises (DBEs) .....	II-5; IV-2; IV-3; IV-6
.....	VI-3; VI-23; App. A-3; D-1; D-6
Disaster and Emergency Recovery .....	V-3

<u>Subject</u>	<u>Chapter/Page</u>
GSA Schedules .....	V-3
GSA Web site .....	V-4
John Warner National Defense Authorization Act for Fiscal Year 2007 .....	V-3; App. A-2
Stafford Act.....	VI-4
Disputes.....	VII-5
FTA's Role and Responsibilities .....	VII-6
Determine Reasonableness .....	VII-6
Review Documents .....	VII-6
Recipient's Role and Responsibilities .....	VII-5
Adequate Documentation.....	VII-6
Audit .....	VII-6
Notify FTA.....	VII-5; VII-6
District of Columbia Department of Mass Transportation .....	V-3
E-Government Act of 2002.....	<i>See, Electronic Commerce</i>
Electronic and Information Technology Accessibility Standards .....	<i>See, Electronic Commerce</i>
Electronic Commerce.....	I-4; III-5
Definition .....	I-4
E-Government Act of 2002.....	V-3
Electronic and Information Technology Accessibility Standards .....	IV-15; App. A-5
Electronic Commerce System.....	III-5
Environmental Protection .....	IV-15; IV-16
Environmental Protection Agency (EPA).....	IV-15; IV-16; IV-19; App.A-5
Regulations .....	IV-19; App.A-5
Web Site.....	IV-16
Mitigation.....	IV-15
Other Requirements .....	IV-16
Protected Resources .....	IV-15
Clean Air.....	IV-15
Clean Water .....	IV-16
Recycled Products.....	IV-16
Equal Employment Opportunity (EEO) Requirements ....	IV-5; IV-25; App.A-2; A-6; D-1; D-6
Excluded Parties List System (EPLS).....	IV-4
Web site .....	IV-4
Existing Contracts.....	V-4
Impermissible Actions .....	V-6
Expanded Quantity.....	V-7
Expanded Scope.....	V-7
Permissible Actions .....	V-4
Assignment of Rights.....	V-5
Exercise of Options.....	V-4
Consistency with the Underlying Contract.....	V-4
Price .....	V-4
Source Procurement Awards.....	V-4

<u>Subject</u>	<u>Chapter/Page</u>
Failure to Evaluate the Options.....	V-5
Negotiating Price Options.....	V-5
Federal Acquisition Regulation (FAR).....	II-8; IV-9; IV-17; IV-22; IV-26; IV-29; VI-7
.....	VI-13; VI-17; VI-19; VI-20; VI-21; VI-22; App. A-4
Federal Relay Service.....	P-1
Federal Supply Schedule.....	<i>See, General Services Administration (GSA)</i>
Federal Transit Administration (FTA).....	P-1; I-1; II-1; III-1; IV-1; VII-1
Administrative Services Help Desk Telephone Number.....	P-1
Authorizing Legislation.....	I-1
Contact Information.....	I-1; App. B-1
Address.....	I-2
Definition.....	I-4
Federal Relay Service Toll Free Access Telephone Number.....	P-1
Offices.....	I-1
Guidance.....	I-7; I-9; II-1; II-4; II-6; II-8; IV-1; IV-3; IV-4; IV-13
.....	IV-29; V-1; V-7; V-8; VI-1; VI-6; VI-7; VI-20; App. A-7
Best Practices Procurement Manual.....	I-9; II-3; II-4; IV-4; V-6; V-7
.....	V-8; VI-3; VI-20; VII-5; App. A-7
Definition.....	I-9
Circular.....	II-3; II-4; IV-1; IV-13; IV-18; App. A-7
Capital Program—Grant Application Instructions.....	IV-18; App. A-7
Federal Transit Administration Design and Art in Transit Projects.....	II-3; App. A-7
Grant Management Guidelines.....	II-4; App. A-7
Third Party Contracting Requirements.....	P-1
Urbanized Area Formula Program—Grant Application Instructions.....	IV-18; App. A-7
Master Agreement.....	I-2; I-9; II-1; II-3; II-9; III-1; III-5; IV-3
.....	IV-4; IV-16; VI-6; App. A-7; D-1; D-2; D-3; D-4
Definition.....	I-5
Role.....	I-7
Audits.....	I-8
Procurement System Reviews.....	I-8
Reliance on the Recipient's Self-Certification.....	I-7
Settlements.....	VII-8; VII-9
Third Party Contract Reviews.....	I-8
Web site.....	P-1; I-1
Fly America Act.....	IV-17; App. A-3; D-2; D-6
General & Administrative (G&A) Rates.....	III-7; IV-29
General Services Administration (GSA).....	I-4; I-6; IV-4; IV-8; IV-9; IV-17; V-2; App. A-2
GSA Cooperative Purchasing Program.....	I-4; I-6; IV-3; V-2
Cooperative Purchasing Program, Federal Supply Schedule 70.....	V-3
Disaster Recovery Web site.....	V-4
Excluded Parties List System (EPLS).....	IV-4
Federal Excess and Surplus Property.....	V-2



<u>Subject</u>	<u>Chapter/Page</u>
Federal Supply Schedule .....	V-2; V-3
Full Use .....	V-2
Limited Use .....	V-3
Disaster or Emergency Recovery .....	V-3
Information Technology .....	V-3
Information Technology .....	App. A-1; A-2; A-5
Regulations .....	IV-17; App. A-2; A-3; A-5; A-6
Schedules .....	V-2; V-3
Web site .....	V-3
Governmental Recipient .....	I-3; I-4; II-8; III-2; IV-6; IV-7; IV-11; IV-24; V-1; V-2; VI-2
.....	VI-6; VI-7; VI-8; VI-9; VI-15; VI-17; VI-18; VI-24; VII-1; VII-3
Definition .....	I-3
Grant .....	I-3
Definition .....	I-4
Grant Agreement .....	I-2; IV-24; VI-17
Human Subjects .....	IV-28; App. A-3
Indefinite-Delivery-Indefinite-Quantity (IDIQ) Contract .....	V-5; V-6
Indian Tribal Governments .....	I-3; I-4; IV-9; IV-29; App. A-6
Definition .....	I-4
Intelligent transportation system (ITS) .....	IV-17; IV-18; IV-21; IV-22; App. A-7
International Air Transportation Fair Competitive Practices Act .....	<i>See Fly America Act</i>
Joint Procurement .....	I-4; I-6; IV-1; IV-2; V-1; V-6; App. A-3
Advantages .....	IV-1; IV-2; V-1; V-6
Definition .....	I-4
FTA and Federal Requirements .....	V-1
IDIQ Contract .....	V-6
Non-Governmental Recipients .....	V-1
Pooling .....	V-6
Smaller Procurements .....	IV-2
Labor .....	I-4; I-5; IV-6; IV-12; IV-20; IV-25; IV-26; VI-7; App. A-1; A-2; A-4; A-6
Anti-Kickback .....	IV-25
Department of Labor (DOL) .....	IV-25
Guidelines .....	IV-20; App. A-5
Laws .....	IV-12; IV-20
Nonconstruction .....	IV-12; App. A-4; D-2
Regulations .....	IV-12; IV-25; IV-26; App. A-4; A-5
Construction Safety .....	IV-25
Prevailing Wage .....	IV-25; VI-7; App. A-2
Project Labor Agreements (PLA) .....	I-5; IV-26
Definition .....	I-5
Public Transportation .....	IV-20;
Wage and Hour .....	IV-12; IV-25
Laws .....	I-1; II-8; II-9; III-1; App. A-3

<u>Subject</u>	<u>Chapter/Page</u>
Applicability .....	II-9; III-1; IV-12; IV-25
Federal .....	II-8; III-1; IV-12; IV-25
State and Local.....	II-9; III-1; IV-12; IV-25
Authorizing Legislation .....	I-1; II-8; II-9
List of Violating Facilities .....	IV-15; IV-16
Lobbying.....	IV-5; App. D-1; D-4; D-6
Certification .....	IV-5
Regulations .....	IV-5; App. A-3
Statute .....	IV-5; App. A-1
Local Government .....	I-4; I-5; I-6
Definition .....	I-4; I-5; I-6
Master Agreement.....	<i>See, Federal Transit Administration (FTA)</i>
Metric Conversion Act.....	IV-18
Metric Usage in Federal Government Programs .....	IV-18; App. A-6
National Intelligent Transportation Systems (ITS) Architecture and Standards ..	IV-17; App. A-1
New Starts.....	IV-24
Nondiscrimination.....	IV-5; IV-6; IV-13
Individuals with Disabilities .....	IV-6; IV-13
Title VI of the Civil Rights Act .....	IV-13
Title VII of the Civil Rights Act.....	IV-5
Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance.....	IV-14; App. A-3
Non-Governmental Recipient .....	I-3; I-5; II-8; III-2; III-4; IV-7; IV-12
.....	IV-23; V-1; V-2; VI-6; VI-9; VI-11; VI-24; VII-1
Definition .....	I-5
Office of Management and Budget (OMB) Circular .....	III-7; IV-4; IV-9
.....	IV-28; IV-29; IV-30; App. A-6
Audits of States, Local Governments, and Non-Profit Organizations....	III-7; IV-28; App. A-6
Cost Principles for Educational Institutions (OMB Circular A-21).....	IV-9; IV-30; App. A-6
Cost Principles for Non-profit Organizations (OMB Circular A-122) ..	IV-9; IV-30, App. A-6
Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A-87) ...	IV-9
.....	IV-29; App. A-6
Omnibus Trade and Competitiveness Act .....	IV-18
Open Market Acquisitions .....	II-5
Open Market Requirements .....	VI-1
Contract Award.....	VI-22
Award to Other Than Lowest Bidder.....	VI-22
Award to Responsible Contractor .....	VI-22
Debarment/Suspension .....	VI-22
Financial and Technical Resources.....	VI-22; VI-23
Integrity.....	VI-22
Past Performance .....	VI-23
Public Policy .....	VI-22

<u>Subject</u>	<u>Chapter/Page</u>
Rejection of Bids and Offers.....	VI-23
Governmental Recipients.....	VI-24
Non-Governmental Recipients.....	VI-24
Cost and Price Analysis .....	VI-19
Cost Analysis .....	VI-19
Price Analysis .....	VI-20
Eligible Costs.....	VI-19
Incentive Payments .....	VI-19
Indirect Cost Rates.....	VI-20
Contracts Exceeding \$5 Million .....	VI-20
Contracts of \$5 Million or Less .....	VI-20
Guidance .....	VI-20
Best Practices Procurement Manual .....	VI-20
Defense Contract Audit Agency Audit Manual.....	VI-21; App. A-7
Federal Acquisition Regulation (FAR).....	VI-21
National Transit Institute Course .....	VI-21
Pricing Guide for FTA Grantees.....	VI-21
Profit .....	VI-20
Evaluation Factors .....	VI-5
Evaluations.....	VI-21
General.....	VI-21
Evaluators .....	VI-21
Options.....	VI-21
Evaluation Not Required.....	VI-21
Evaluation Required.....	VI-21
Other Federal Requirements .....	VI-6
Other Federal Requirements Affecting Bidder/Offeror/Contractor.....	VI-6
Prequalification.....	VI-2
Lists.....	VI-2
Sources.....	VI-2
Procurement Methods .....	VI-7
Architectural Engineering Services (A&E) and Other Services.....	VI-11
Audits and Indirect Costs.....	VI-13
Application of Rates .....	VI-13
Indirect Cost Rates.....	VI-13
Performance Audits .....	VI-13
Prenotification/Confidentiality of Data.....	VI-13
Design-Bid-Build.....	VI-13
Design-Build.....	VI-14
Effect of State Laws.....	VI-13
Other Than Full and Open Competition .....	VI-15
Required Procedures .....	VI-18
Change Order .....	VI-19

<u>Subject</u>	<u>Chapter/Page</u>
Limited Resources .....	VI-18
Sole Source .....	VI-15
When Appropriate.....	VI-15
FTA Authorized.....	VI-17
FAR Standards.....	VI-17
Joint Partnership/Joint Venture/Consortia/Research .....	VI-17
Inadequate Competition.....	VI-17
Sole Source .....	VI-16
Single Bid.....	VI-16
Unique Capability and Availability .....	VI-16
Unusual and Compelling Urgency.....	VI-17
When Prohibited .....	VI-18
Failure to Plan.....	VI-18
Limited Funding Availability .....	VI-18
Qualifications-Based Procurement Procedures.....	VI-12
Most Qualified .....	VI-12
Next Most Qualified .....	VI-12
Price .....	VI-12
Qualifications.....	VI-12
When Prohibited .....	VI-12
When Required .....	VI-12
Competitive Proposal/Request for Proposals (RFP).....	VI-9
Cost Type Contract .....	VI-5
Discussions .....	VI-10
Price .....	VI-10
Procurement Requirements.....	VI-10
Adequate Sources.....	VI-10
Evaluation Factors .....	VI-10
Evaluation Method.....	VI-10
Price .....	VI-10
Publicity .....	VI-10
Value .....	VI-10
When Appropriate.....	VI-9
Adequate Sources.....	VI-10
Specifications.....	VI-9
Micro-Purchases .....	VI-7
Sealed Bids/Formal Advertising.....	VI-8
Procurement Requirements.....	VI-9
Adequate Sources.....	VI-9
Firm Fixed Price Contract.....	VI-9
Public Opening.....	VI-9
Publicity .....	VI-9
Rejection of Bids.....	VI-9

<u>Subject</u>	<u>Chapter/Page</u>
Specifications .....	VI-9
When Appropriate.....	VI-8
Adequate Sources.....	VI-8
Discussions .....	VI-8
Firm Fixed Price Contract.....	VI-8
Price .....	VI-8
Specifications .....	VI-8
Small Purchases .....	VI-7
Prohibited/Restricted Contract Types.....	VI-6
Cost Plus a Percentage of Cost Prohibited.....	VI-6
Time and Materials Restricted.....	VI-6
Firm Ceiling Price.....	VI-6
Restricted Use .....	VI-6
Qualification Periods .....	VI-2
Solicitation Prohibitions .....	VI-2
Arbitrary Action.....	VI-5
Brand Name Only .....	VI-4
Excessive Bonding.....	VI-3; VI-4
Excessive Qualifications.....	VI-3
Geographic Restrictions.....	VI-4
Architecture and Engineering Services.....	VI-4
Disaster or Emergency Recovery.....	VI-4
Licensing.....	VI-4
Improper Prequalification .....	VI-3
Organizational Conflict of Interest .....	VI-4
Occurrence .....	VI-5
Impaired Objectivity .....	VI-5
Lack of Impartiality .....	VI-5
Unfair Competitive Advantage.....	VI-5
Remedy .....	VI-5
Governmental Recipients.....	VI-6
Non-Governmental Recipients.....	VI-6
Restraint of Trade .....	VI-5
Retainers .....	VI-3
Unnecessary Experience .....	VI-3
Solicitation Requirements.....	VI-2
Property or Services Description .....	VI-2
Brand Name or Equal.....	VI-3
What to Include.....	VI-2
Unsolicited.....	VI-1
Operations Contracts.....	II-4; II-5; II-6
Financed Entirely Without FTA Assistance .....	II-4
Financed with FTA Assistance.....	II-4

<u>Subject</u>	<u>Chapter/Page</u>
Preventive Maintenance.....	II-5
Over-the-Road Bus Accessibility Program.....	II-4
Patent Rights .....	IV-27; App. A-1; D-3; D-7
Payment Bond.....	IV-23
Performance Clauses.....	IV-11
Change Condition .....	IV-11
Remedies.....	IV-11
Delay .....	IV-11
Suspension of Work.....	IV-12
Termination.....	IV-12
Violation or Breach.....	IV-12
Performance Bond .....	IV-21
Preventive Maintenance.....	II-5
Preaward and Post Delivery Review.....	IV-19
Pricing Guide for FTA Grantees.....	VI-21
Procurement Capacity.....	III-1
Adequate Contract Provisions .....	III-3
Industry Contracts.....	III-3
Record Keeping .....	III-4
State Notification Requirements.....	III-5
Technology/Electronic Commerce Use.....	III-5
Written Procurement Procedures.....	III-2
Contract Clauses .....	III-3
Contract Resolution .....	III-3
Legal Restrictions .....	III-3
Methods.....	III-3
Open Market .....	III-2
Property and Services .....	III-2
Sources.....	III-3
Procurement Restrictions.....	IV-8
Architectural Engineering/Related Service.....	IV-21
Audit Services.....	IV-28
Other Project Audits .....	IV-28
Duplication of Services.....	IV-29
Eligibility of Costs .....	IV-28
Organizational Conflict of Interest .....	IV-29
Verification of Indirect Costs.....	IV-29
Single Audit Act .....	IV-28
Cost Eligibility .....	IV-28
OMB Circular A-133 .....	IV-28
Organizational Conflict of Interest .....	IV-29
Construction Special Requirements.....	IV-23
Accessibility.....	IV-26

<u>Subject</u>	<u>Chapter/Page</u>
Anti-Kickback.....	IV-25
Bonding.....	IV-23
Bid Guarantee .....	IV-23
Payment Bond.....	IV-23
Acceptable Sureties.....	IV-23
Less More \$5 Million.....	IV-23
Less Than \$1 Million.....	IV-23
More Than \$1 Million, Less Than \$5 Million .....	IV-23
Performance Bond .....	IV-23
Construction Safety.....	IV-25
EEO.....	IV-25
Labor Neutral .....	IV-26
Prevailing Wages .....	IV-25
Seismic Safety.....	IV-24
U.S. Preference .....	IV-26
Value Engineering .....	IV-24
Electronic Reports/Information .....	IV-14
Energy Conservation.....	IV-16
Environmental Protections.....	IV-15
Clean Air.....	IV-15
Clean Water .....	IV-16
Mitigation.....	IV-15
Other Requirements .....	IV-16
Recycled Products.....	IV-16
Federal Cost Principles .....	IV-8
Education Institutions .....	IV-9
For-Profit Organizations .....	IV-9
Government Entities .....	IV-9
Non-Profit Organizations.....	IV-9
ITS .....	IV-17
Metric Measurements .....	IV-18
Payment Provisions.....	IV-9
Advance .....	IV-9
General.....	IV-9
Progress Payments .....	IV-10; IV-11
Performance Period Limits .....	IV-8
Project Scope .....	IV-8
Public Transportation.....	IV-20
Accessibility.....	IV-20
Animal Protection .....	IV-20
Charter Service Restrictions .....	IV-21
Drug/Alcohol Testing .....	IV-20
School Bus Restrictions .....	IV-21

<u>Subject</u>	<u>Chapter/Page</u>
Transit Employee Protection.....	IV-20
Research Type Services .....	IV-27
Animal Protection .....	IV-28
Export Control .....	IV-28
Human Subjects Protection.....	IV-28
Patent Rights .....	IV-27
Rights in Data .....	IV-27
Distribution of Data .....	IV-27
Publication Restrictions .....	IV-27
Rolling Stock Special Requirements .....	IV-18
Accessibility.....	IV-18
Air Pollution/Fuel Economy.....	IV-19
Basis for Award .....	IV-19
Bus Testing .....	IV-19
DBE Compliance .....	IV-18
Five-year Limitation .....	IV-19
In-State Dealers.....	IV-19
Preaward and Post Delivery Review.....	IV-19
Service Life.....	IV-18
Shipments/U.S. Flag Requirements .....	IV-17
Air Carrier.....	IV-17
Ocean Vessel.....	IV-17
U.S. Preference .....	IV-16
Use U.S. Flag Air Carriers.....	IV-17
Wage/Hour Requirements.....	IV-12
Procurement System Reviews.....	I-8
Definition .....	I-8
Project Labor Agreement (PLA).....	I-5; IV-26
Definition .....	I-5
Labor-Management Cooperation.....	I-5
Preservation of Open Competition and Government Neutrality Towards Government Contractors' Labor Relations on Federal and Federally Funded Construction Projects	IV-26
Public Health or Safety Threat.....	IV-26
Special Circumstances .....	IV-26
Definition .....	I-8
Definition .....	I-8
Property.....	I-5
Definition .....	I-5
Property and Service Needs .....	IV-1
Eligibility .....	IV-1
Lease vs Purchase .....	IV-3
Necessity.....	IV-1
Options.....	IV-2



<u>Subject</u>	<u>Chapter/Page</u>
Procurement Size .....	IV-2
Specifications.....	IV-3
Protection of Human Subjects .....	IV-28; App. A-3
Protection of Sensitive Security Information.....	IV-7; App. A-3; A-4
Protests.....	VII-1
FTA's Role and Responsibilities .....	VII-3
Extent of FTA Review .....	VII-3
Procedural Failures .....	VII-4
Violations of Federal Law or Regulation.....	VII-4
Protester Requirements .....	VII-3
Exhaust Administrative Remedies .....	VII-3
Five-Day Limit for Appeal .....	VII-3
Interested Party .....	VII-3
Recipients' Role and Responsibilities .....	VII-1
Protest Procedures.....	VII-1
Responsibilities to FTA .....	VII-1
Access to Information.....	VII-2
Timely Notification.....	VII-1
Recipient .....	I-4; I-5
Categories .....	II-1
Definition .....	I-5
Governmental Subrecipients.....	II-2
Non-profit Subrecipients.....	II-2
Other Recipients .....	II-3
Self-Certification .....	I-7; III-1; III-2
States.....	II-2
Regulations and Laws.....	II-5; II-8; IV-5; IV-18; VI-7; VI-8; VI-11; VI-14
Federal .....	II-5
Common Grant Rules .....	II-8
Governmental Recipient .....	II-8
Non-Governmental Recipient.....	II-8
Conflicting Requirements .....	II-9
Federal Acquisition Regulation (FAR).....	II-8
Master Agreement.....	II-9
Other Requirements .....	II-8
Waivers .....	II-9
State and Local.....	II-5
Conflicting Requirements .....	II-9
Inadequate Requirements.....	II-9
Rehabilitation Act .....	IV-14
Request for Proposals (RFP).....	I-7; VI-9; VI-10; VI-24
Revenue Contract.....	I-6; II-5; II-6
Definition .....	I-6

<u>Subject</u>	<u>Chapter/Page</u>
Responsibility .....	I-11; III-4; IV-2; IV-4; IV-20; VI-8; VI-22; VII-1; VII-5; VII-6; App. A-5
Nonresponsibility .....	VI-23
Reviews .....	I-7; I-8; III-1; IV-15; IV-19; V-6; VI-2; VI-11; VI-15; VII-4;
Preaward and Post Delivery .....	I-7; I-8; IV-19; V-6
Procurement System .....	I-7; I-8; III-1
Safe Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users..... (SAFETEA-LU).....	P-1; I-1; II-4; IV-4; IV-6; IV-17 IV-22; VI-14; VI-17; VI-19; VI-22; App. A-1
Secretary of Labor.....	IV-25
Seismic Safety.....	IV-24; App. A-2; A-4; D2; D7
Self-Certification.....	I-7; I-8; III-1; III-2
Sensitive Security Information .....	IV-7; App. A-2; A-3; A-4
Settlements, Arbitration Awards, and Court Awards—Cost Sharing.....	VII-8
FTA Prerogative .....	VII-9
Deny Federal Assistance.....	VII-9
Drawing Approvals.....	VII-10
Materials Compatibility .....	VII-9
Planning and Scheduling.....	VII-9
Pre-Construction Survey and Engineering.....	VII-9
Public Authority Approvals .....	VII-9
Right-of-Way .....	VII-9
Subsurface Conditions .....	VII-9
Utility Agreements.....	VII-9
Provide Federal Assistance .....	VII-9
Review Supporting Documentation.....	VII-9
Recipient’s Responsibilities.....	VII-8
Maintain Sufficient Records .....	VII-8
Obtain FTA Concurrence.....	VII-8
Special Federal Interest.....	VII-9
Single Audit Act .....	III-7; IV-28; App. A
OMB Circular (A-133).....	III-7; IV-28
Standards of Conduct.....	III-1
Conflicts of Interest .....	III-1
Gifts .....	III-1
Violations.....	III-1
State.....	I-4; I-6
Definition.....	I-6
State or Local Government Purchasing Schedules or Purchasing Contracts.....	IV-2 IV-2; V-2; V-4
Surety Companies Doing Business with the United States .....	IV-23; App. A-5
Tag-Ons.....	V-7
Third Party Contracts.....	II-3
Capital Contracts.....	II-3

<u>Subject</u>	<u>Chapter/Page</u>
Definition .....	I-6
Joint Development .....	II-6
Operations Contracts.....	II-4
Preventive Maintenance Contracts .....	II-5
Public-Private Partnerships (PPP) .....	II-6; II-7
Construction Manager At Risk .....	II-7
Build-Operate-Transfer.....	II-7
Build-Own-Operate.....	II-7
Design-Build.....	II-7
Design-Build-Finance-Operate.....	II-7
Design-Build-Operate-Maintain .....	II-7
Design-Build With Warranty .....	II-7
Full Delivery or Program Management .....	II-7
Revenue Contracts .....	II-5
Title IX of the Americans with Disabilities Act .....	IV-5
Title VII of the Civil Rights Act.....	IV-5
Transit Vehicle Manufacturer (TVM) .....	IV-16
Transportation Equity Act for the 21st Century (TEA-21) .....	II-4; App. A-1
Transportation Services for Individuals with Disabilities (ADA) .....	IV-5; IV-14; IV-18
.....	IV-20; IV-26; App. A-3
Uniform Relocation Assistance and Real Property Acquisition for Federal and .....	
Federally Assisted Programs .....	II-2; App. A-3
United States Housing Act.....	I-4; I-6; V-3
Unsolicited Proposal .....	I-6; VI-1
Definition .....	I-6
Urbanized Area Formula Program.....	I-8; IV-1; IV-18; App. A-2
U.S. Export Control Regulations .....	IV-28
Value Engineering .....	I-7; IV-24
Wage and Hour Requirements .....	I-7; IV-12; IV-25; VI-7; App. A-2
Davis-Bacon Act.....	IV-25; VI-7; App. D-2; D-6
Waiver.....	II-9; IV-26; V-2; V-4
Washington Metropolitan Area Transit Authority.....	V-2