DRAFT REPORT
OF THE
PROCUREMENT SYSTEM REVIEW
OF
Potomac and Rappahannock Transportation Commission (PRTC)

WOODBRIDGE, VA

SEPTEMBER 2016

Conducted by a Procurement Management Review Team from Business Management Research Associates, Inc. Fairfax, Virginia
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EXECUTIVE SUMMARY

Business Management Research Associates (BMRA), under contract with the Federal Transit Administration (FTA), performed an on-site Procurement System Review of the Potomac and Rappahannock Transportation Commission (PTC) and the Virginia Rail Express (VRE) during the period of August 22, 2016 through August 26, 2016.

The Federal Transit Administration (FTA) has a vested interest in assisting recipients to maintain efficient and effective procurement systems as well as a legal responsibility to ensure that its recipients expend their funds in accordance with FTA regulations, the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (49 CFR Part 18), and the contractual agreements between FTA and the local recipient. In order to carry out this responsibility, FTA has established an oversight framework that is composed of recipient self-certifications, annual single audits conducted in accordance with OMB Circular A-133, and FTA oversight reviews, including the Procurement System Review (PSR). The BMRA team conducted the review in accordance with the FTA Guide for Procurement System Reviews (May 2013).

This review was performed in accordance with FTA procedures and included a risk assessment phase and a contract review phase. The risk assessment phase included a review of data available at the FTA Regional Office. The contract review phase consisted of a recipient document review and a systemwide requirements review. During this phase, interviews were conducted with the PRTC Interim Chief Executive Officer, Director of Grants & Project Management (Also responsible for Procurement & DBE/EEO), Director of Financial & Administration, Procurement Staff, and County Attorney. The following interviews were conducted at the VRE: Chief Executive Officer, Chief Financial Officer, Contracts Manager, Procurement Staff, and the VRE Attorney.

The contract review phase included a review of contract files and documents collected during the risk assessment phase and the contract files at PRTC/VRE. The specific documents referenced in this report are available at FTA’s Regional Office or at the PRTC/VRE Contracts Offices.

PTC/VRE has a dedicated and competent professional staff. Of the 57 elements that were reviewed, PRTC/VRE was found not deficient in 41 elements, 6 not applicable and deficient in 10 elements.

These deficiencies, identified below, are addressed in the body of the report.

Element (7) Independent Cost Estimate
Element (18) Award to Responsible Contractors
Element (19) Sound and Complete Agreement
Element (23) Price Quotations (Small Purchase)
Element (24) Clear, Accurate, and Complete Specification
Element (41) Cost or Price Analysis
Element (42) Written Record of Procurement History
Element (45) Advance Payments
Element (49) Liquidated Damages Provisions
Element (56) Clauses
PROCUREMENT SYSTEM REVIEW BACKGROUND

DESCRIPTION

The objectives of the Procurement System Review (PSR) are to encourage and facilitate improved recipient procurement operations, promote the use of best practices, and assess the recipient’s compliance with all Federal requirements, specifically the requirements of FTA Circular 4220.1F and the Pre-Award, Post-Delivery Rule, applicable to Buy America requirements. The PSR is designed to be a customer-oriented review that encourages working relationships between FTA and the recipients.

The reviews are performed in accordance with FTA procedures. They include discussion with the FTA Regional Office, site visit, interviews with key management and staff personnel, systemwide requirements review, sample contract selection, contract file reviews, and follow-up interviews. The specific documents reviewed are referenced in this report and are available at FTA’s Regional Office or at the recipient’s office.

REQUIRED ELEMENTS

The PSR looks at both systemwide and individual procurement elements. Systemwide procurement elements are requirements that apply to the procurement system as a whole. Individual procurement elements are evaluated on an individual contract basis and summarized across all contracts reviewed.

CLASSIFICATION OF FINDINGS

The reviewer determined the status (not deficient/deficient) for each systemwide and individual procurement element. The reviewer determined the status for: (1) systemwide elements based on the results of the Systemwide Elements Review Checklist; and (2) each individual procurement element based upon all the contract files reviewed.

Two levels of findings are used:

Not Deficient: A finding of “not deficient” indicates that the recipient complied with the basic requirements of the element. This is defined as, “The review of selected procurement files found that in all instances the recipient complied with the requirement.”

Deficient: A finding of “deficient” indicates that the recipient did not always comply with the requirements of the element. This is defined as, “The review of selected procurement files found that in one or more of the applicable instances, the recipient did not comply with the requirement.”

DESCRIPTION OF THE RECIPIENT

Organization

PRTC is a regional transit district created under Virginia enabling legislation (Transportation District Act, Virginia Code Section 15.2-4500 et. seq.). The district comprises Prince William, Stafford, and Spotsylvania counties and the cities of Manassas, Manassas Park, and
Fredericksburg. The Board has 17 members, including two state delegates, one state senator, 13 representatives of the member jurisdictions, and one ex-officio representative from the Virginia Department of Rail and Public Transportation. PRTC applies for FTA funds under a supplemental agreement that is signed by the Northern Virginia Transportation Commission (NVTC), the Washington Metropolitan Area Transportation Authority, the Maryland Transit Administration, and FTA.

In 1989, PRTC and NVTC, through a joint powers agreement with founding member jurisdictions, formed Virginia Railway Express (VRE) for the purpose of providing commuter rail service in the two transit districts. Current member jurisdictions include Arlington, Fairfax, Prince William, Stafford, and Spotsylvania counties and the cities of Alexandria, Fredericksburg, Manassas, and Manassas Park. VRE is overseen by an operations board consisting of 14 members, 13 of whom are recommended for appointment by the member jurisdictions with the concurrence of the pertinent commission. The 14th member is an appointee of the Commonwealth Transportation Board.

VRE is not a legal entity under Virginia law and, therefore, is not an FTA grantee. PRTC is the permanent designee of NVTC and the VRE Operations Board for the receipt and management of Federal funds for VRE projects. PRTC and NVTC have delegated to the VRE Operations Board full discretionary spending authority provided the amount is included in the annual budget and six-year financial plan (with the exception of 1) CSX, Norfolk Southern and Amtrak or other operating agreements, 2) insurance agreements, and 3) purchase of real property or equipment in the Commissions' name), the authority for approval of fare changes (tariffs) provided they are consistent with annual budgets and six-year financial plans (provided the requirement for a public hearing is maintained), the authority to determine the spending authority of VRE's chief executive officer (CEO), and the authority to determine the level of compensation for the CEO. All other decisions must be approved by PRTC and NVTC. VRE coordinates its operations with the numerous agencies and jurisdictions by means of a planning task force, which meets monthly. The task force consists of staff members of VRE, PRTC, NVTC, and representatives of the local jurisdictions and the Commonwealth.

In 2014, the American Public Transportation Association awarded a Gold Award to VRE for emergency preparedness efforts.

**Services**

PRTC provides commuter and local route deviation bus service in Prince William County and the cities of Manassas and Manassas Park. All service is operated by a contractor, First Transit.

Commuter bus service, known as OmniRide, operates weekdays from 4:30 a.m. to 11:00 p.m. on 16 routes to Washington, DC, Northern Virginia destinations, and selected Metro stations. One route to the Franconia-Springfield Metrorail station operates Saturdays from 7:30 a.m. to 11:00 p.m.

Local bus service, called OmniLink, consists of six routes, four of which serve eastern Prince William County and two of which serve the cities of Manassas and Manassas Park. Weekdays, buses operate from 5:00 a.m. to 11:00 p.m. A commuter route called the Cross County Connector connects the service operated in the cities of Manassas and Manassas Park with the service operated in eastern Prince William County. Saturdays, OmniLink operates in eastern Prince William County from 6:30 a.m. to 11:00 p.m. OmniLink buses deviate up to three-
quarters of a mile off the route for pick-ups and drop-offs scheduled at least two hours in advance.

PRTC operates from a single management and operations headquarters in Woodbridge. Staff consists of executive, administrative, and dispatch employees. All other transportation and maintenance personnel are the employees of First Transit. An on-site First Transit General Manager directs the transportation and maintenance operations.

The cash fare for local OmniLink and the Cross County Connector is $1.50. During all hours, a reduced fare of $0.75 is offered to seniors (60+), persons with disabilities, and Medicare cardholders. For a full-fare passenger, deviations cost $1.30. For a passenger who qualifies for half fare, there is no deviation surcharge. Pre-payment options include SmartTrip, day and weekly passes, and ten-packs of tokens.

OmniRide’s fares range from $3.25 to $8.75. Half fares are available for seniors (60+), persons with disabilities, and Medicare cardholders boarding during off-peak hours (9:30 a.m. to 3:00 p.m. and after 7:00 p.m.). Pre-payment options include SmartTrip.

PRTC operates a fleet of 166 buses. The fleet consists of 30 and 40-foot transit coaches and 45-foot over-the-road coaches. Currently, the peak requirement is 138 buses, resulting in a spare ratio of 20 percent. There is a contingency fleet of 22 buses and 7 buses are being readied for auction.

VRE operates 30 trains daily on two rail lines, Fredericksburg and Manassas. Both lines terminate at Washington Union Station. The Fredericksburg Line has 13 stations and the Manassas Line has ten. Four stations are served by both lines. The first trains leave the Spotsylvania and Broad Run terminus stations at 4:57 a.m. and 5:05 a.m., respectively. The last trains arrive at the Spotsylvania Station at 8:24 p.m. and the Broad Run Station at 8:09 p.m. VRE has a variety of occupancy arrangements on the station properties, including outright ownership of some assets, joint ownership, and leases. VRE contracts a facilities management firm for daily inspection and maintenance of its stations and commuter parking lots.

VRE contracts with Keolis Rail Services Virginia for rail operations and maintenance. Maintenance is performed at VRE’s Broad Run or Crossroads yards at the end of each line. Equipment is stored overnight at the yards. VRE has a fleet of 79 coaches, 21 cab cars, and 20 locomotives. VRE’s management office is in Alexandria, Virginia.

VRE has a zone fare system. The following table presents the fares.

<table>
<thead>
<tr>
<th></th>
<th>VRE Full Fares</th>
<th>VRE Half Fares</th>
</tr>
</thead>
<tbody>
<tr>
<td>Single Ride Ticket</td>
<td>$3.30 - $11.55</td>
<td>$1.65 - $5.75</td>
</tr>
<tr>
<td>Day Pass</td>
<td>$6.60 - $23.10</td>
<td>$3.30 - $11.50</td>
</tr>
<tr>
<td>Ten-Ride Ticket</td>
<td>$29.40 - $105.60</td>
<td>$14.70 - $52.80</td>
</tr>
<tr>
<td>Five-Day Pass</td>
<td>$25.60 - $91.80</td>
<td>$12.80 - $45.90</td>
</tr>
<tr>
<td>Monthly Pass</td>
<td>$88.70 - $318.10</td>
<td>$44.35 - $159.05</td>
</tr>
</tbody>
</table>
RESULTS OF THE REVIEW

The results of the review are summarized for each systemwide and individual procurement element. For each procurement guidance element, the report describes the required element, cites a reference to FTA Circular 4220.1F and other applicable regulations, discusses the issues and identifies the finding, presents best practices/advisory comments, and recommends corrective actions and schedules. The procurement review summary table is provided in Appendix B.

SYSTEMWIDE PROCUREMENT ELEMENTS

Systemwide procurement elements provide guidance that applies to the procurement system as a whole. The systemwide procurement elements are primarily evaluated during the Assessment Phase. The findings in this section are a result of these interviews and additional insights gained during the Contract Review Phase. The results are presented below. Those elements for which the recipient is “not deficient” are shown first, and those defined as “deficient” with respect to that element are shown second. Within each category, the numbered element appears as it is listed in FTA’s PSR Guide.

Not Deficient

A full description of the elements for which the recipient is not deficient is in Appendix C.

The recipient is not deficient in the following systemwide procurement elements:

   Element 1 – Written Standards of Conduct
   Element 2 - Contract Administration System
   Element 3 – Written Protest Procedures
   Element 4 – Prequalification System
   Element 5 – Procedures for Ensuring Most Efficient and Economic Purchase
   Element 6 – Procurement Policies and Procedures

INDIVIDUAL PROCUREMENT ELEMENTS

The individual procurement elements are applicable to the contract files reviewed. We compiled the findings from all contracts reviewed by each individual procurement element. The results are organized by category of findings. Those elements for which the recipient is in compliance are shown first, followed by the elements that are found to be deficient.

Not Deficient

A full description of the elements for which the recipient is not deficient is in Appendix C.

   Element 8 – A&E Geographic Preference
   Element 9 – Unreasonable Qualification Requirements
   Element 10 – Unnecessary Experience and Excessive Bonding
   Element 11 – Organizational Conflict of Interest
Element 12 – Arbitrary Action  
Element 15 – Contract Term Limitation  
Element 16 – Written Procurement Selection Procedures  
Element 20 – No Splitting (Micro-purchase)  
Element 21 – Fair and Reasonable Price Determination (Micro-purchase)  
Element 22 – Micro-Purchase Davis Bacon  
Element 25 – Adequate Competition – Two or More Competitors  
Element 26 – Firm Fixed Price (Sealed Bid)  
Element 27 – Selection on Price (Sealed Bid)  
Element 28 – Discussions Unnecessary (Sealed Bid)  
Element 29 – Advertised/Publicized (Sealed Bid) (RFP)  
Element 30 – Adequate Number of Sources Solicited (Sealed Bid) (RFP)  
Element 31 – Sufficient Bid Time (Sealed Bid)  
Element 32 – Bid Opening (Sealed Bid)  
Element 33 – Responsiveness (Sealed Bid)  
Element 34 – Lowest Price (Sealed Bid)  
Element 35 – Rejecting Bids (Sealed Bid)  
Element 36 – Evaluation (RFP)  
Element 37 – Price and Other Factors (RFP)  
Element 38 – Sole Source if Other Award is Infeasible  
Element 39 – Cost Analysis Required (Sole Source)  
Element 40 – Evaluation of Options  
Element 43 – Exercise of Options  
Element 46 – Progress Payments  
Element 48 – Cost Plus Percentage of Cost  
Element 51 – Qualification Exclude Price (A&E and Other Services)  
Element 52 – Serial Price Negotiation (A&E and Other Services)  
Element 53 – Bid Security (Construction Over $100,000)  
Element 54 – Performance Security (Construction Over $100,000)  
Element 55 – Payment Security (Construction Over $100,000)  
Element 57 – Veterans Hiring Preference

**Not Applicable Elements**

The following elements were rated as “not applicable” because PRTC/VRE did not award the types of contracts/purchase orders that included these elements. A full description of these elements is contained in Appendix D.

Element 13 – Brand Name Restrictions
Element 14 – Geographical Preference
Element 17 – Solicitation Pre-qualification Criteria
Element 44 – Out of Scope Changes
Element 47 – Time and Materials Contracts
Element 50 – Piggybacking

Deficient

The recipient is deficient with respect to the following individual procurement elements:

Element (7) Independent Cost Estimate

*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

(FTA C4220.1F, VI, 6.)

Discussion

PRTC/VRE is deficient with respect to this element.

Deficiency 340: Lacking independent cost estimate

FTA C4220.1F requires the Recipient to make and document an independent cost estimate (ICE) before receipt of proposals or bids.

The ICE was missing in numerous purchases orders and in some contracts. It appeared that the ICE was the contractor’s quote for the P.O.s. Although the ICE was in one construction contract it lacked specificity and it was based on past history, however there was no documentation found on the past history. The ICE was missing from an IDIQ contract, and for the task orders issued against the contract.

Review disclosed the following files reviewed did not contain an independent cost estimate:

We did not find an ICE in multiple contract files we reviewed. Below is a sampling of P.O.s and Contracts that were deficient.

<table>
<thead>
<tr>
<th>ID Number</th>
<th>Contractor</th>
<th>Item Description</th>
<th>$ Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>VRE-013-012</td>
<td>Abernathy</td>
<td>Construction of 3rd Track Between Cross Board &amp;</td>
<td>$8,072,794</td>
</tr>
<tr>
<td></td>
<td>Construction</td>
<td>Fredericksburg</td>
<td></td>
</tr>
<tr>
<td>PRTC 13-03</td>
<td>Stantec &amp; WRA</td>
<td>General Engineering Consulting Services</td>
<td>Unknown - Task order contract with multiple awards</td>
</tr>
</tbody>
</table>
Best Practices/Advisory Comments BPPM § 2.3.2 – Independent Recipient Cost Estimate

A logical element of your annual procurement plan is a cost estimate for each major procurement. It is normally cost-effective to have an independent cost estimate that also satisfies the Federal requirement to have such an estimate at some time before receiving bids or proposals. You may obtain such estimates from published competitive prices, results of competitive procurements, or estimates by in-house or outside estimators.

Purpose

The following are purposes of establishing a cost estimate using a method independent from the prospective offerors in advance of the offer:

- It ensures a clear basis for the recipient's determination that the benefits of the procurement warrant its cost;
- It provides essential procurement and financial planning information (see “Advance Procurement Plan,” above); and
- It provides a basis for price analysis, which may assist in obviating the need for a more burdensome cost analysis.

Although it may seem self-evident that the agency has at least implicitly prepared a cost estimate in deciding to proceed with a procurement, many projects can change in scope without clear communication among the people responsible. For example, a management information system for parts inventory control may seem cost-effective, but may grow during discussions to include unanticipated electronic imaging, scanning of repair manual diagrams, unanticipated distributed processing devices, and multi-user programming. An independent cost estimate prepared when the agency first undertook the project could alert all involved that the project had grown beyond the scope originally intended. A deliberate decision to reduce the scope or revise the cost estimate can be made at each step of the project’s development.

The cost estimate is essential information for procurement planning. It gives the contracting official some indication of the complexity of the project and the degree of investment that offerors will want to make in the procurement process, thus allowing planning of procurement time and personnel. It is also the basis for determining which procurement procedures apply to
the project. If the cost estimate exceeds $100,000, for example, a competitive solicitation is normally required. (State or local requirements may be stricter.) Similarly, certification and bonding requirements imposed by Federal regulations are triggered based on the value of the contract. (See “Methods of Procurement” FTA Circular 4220.1F, § 9; “Bonding Requirements,” § 11; “Buy America” Master Agreement § 14 (a); “Debarment and Suspension” Master Agreement § 3 b.) However, the application of these and most other requirements depends not on the cost estimate, but on the contract amount.

A final purpose of the independent cost estimate is for price analysis. Either a cost or price analysis is required for every contract and every change order so that the essential objective of a reasonable price is assured. The adequacy of the price or cost analysis is a critical responsibility of the contracting official. In many contract awards the bids alone may be adequate to assure a reasonable price. However, in all negotiated procurements, most contract changes, sealed bids where price competition was not sufficient, and non-competitive awards, further analysis is required. An independent cost estimate prepared before receipt of offers is invaluable in these circumstances. The estimate alone may, if prepared with sufficient detail and reliability in the contracting official’s judgment, be sufficient to determine whether the price is reasonable. It will at least supplement other pricing data in making the determination. Because cost analysis can be time consuming, expensive, and raise disputes, the availability of an independent pre-bid estimate, which allows for price analysis and obviates cost analysis, is worth material pre-bid effort.

In these circumstances, it is essential that the recipient’s cost estimate be developed independently from the offerors’ pricing submissions. If a bus purchase is being prepared, for example, the prospective offerors should not be relied upon for the independent cost estimate, except in the form of prior bids submitted with adequate competition.

Any price analysis or data collection performed after receipt of the offers, in addition to consuming valuable time during the limited validity of the offers, will not be as probative as data collected before the receipt of the offers. An independent cost estimate prepared before the receipt of the offers does not raise the question of whether the particular data and analysis was consciously or unconsciously intended to justify the award.

Corrective Action and Schedule

The PRTC/VRE should comply with its Public Procurement Policies and Procedures Manual which requires an independent cost estimate for any project or contract modification. The checklists in Appendix B, items # 5a & 5b should be used to document the ICE. Recipient should address how they will assure that the appropriate personnel follow the policies and procedures.

The recipient should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft report.

Element (18) Award to Responsible Contractors

_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).

(FTA C4220.1F, IV, 2.a.1.)

Discussion

The recipient is deficient with respect to this element.

Deficiency 344: Responsibility

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.

The Team did not find a documented responsibility determination in the contract file for the following sample of contracts/purchase orders:

<table>
<thead>
<tr>
<th>ID Number</th>
<th>Contractor</th>
<th>Item Description</th>
<th>$ Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>VRE-015-008</td>
<td>Wabtec Railway Electronics</td>
<td>Positive Train Control</td>
<td>$7,023,969</td>
</tr>
<tr>
<td>VRE-016-023</td>
<td>Alban Tractor Company</td>
<td>Head End Power Kits</td>
<td>$671,192</td>
</tr>
</tbody>
</table>

Best Practices/Advisory Comments – BPPM § 5.1 – Responsibility of Contractor

DEFINITION

Responsible - If the lowest responsive bidder possesses, at the time of contract award, the ability to perform successfully and a willingness to comply with the terms and conditions of a proposed contract, the bidder is considered responsible.

DISCUSSION

Responsibility is a procurement issue determined after receipt of bids or proposals and prior to the time of contract award. The contractor must be considered responsible to be awarded a contract, regardless of the procurement method used to select that contractor (sealed bidding, competitive proposal, or sole source). For example, suppose your procurement procedures allow for award of a contract to a sole source, provided there is sufficient justification. As it turns out, the sole source chosen has been debarred by the Department of the Army. If Federal funds are involved, a contract cannot be awarded to the sole source because the contractor is not
considered responsible. Your analysis of the factors involved in making a determination of responsibility involves a great deal of subjectivity -- after all, you are grading a firm's "ability" to do a job.

You may have a procurement where it is necessary to determine the responsibility of a critical subcontractor in order for you to make a positive determination about the prime contractor's responsibility. If that is necessary, you may use the same standards in determining the responsibility of the subcontractor as you would in determining the responsibility of the prime contractor.

5.1.1 General Standards of Responsibility

To be determined responsible, a prospective contractor must meet all of the following requirements:

(a) Financial resources adequate to perform the contract, or the ability to obtain them.

(b) Ability to meet the required delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments.

(c) A satisfactory performance record;

(d) A satisfactory record of integrity and business ethics;

(e) The necessary organization, experience, accounting, and operational controls, and technical skills, or the ability to obtain them;

(f) Compliance with applicable licensing and tax laws and regulations;

(g) The necessary production, construction, and technical equipment and facilities, or the ability to obtain them;

(h) Compliance with Affirmative Action and Disadvantaged Business Program requirements; and

(i) Other qualifications and eligibility criteria necessary to receive an award under applicable laws and regulations.

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1 - If Federal funds are not involved check local and state laws to determine whether a contractor that has been debarred by an agency of the Federal government may be considered "responsible."

2 - Normally, the prime contractor is responsible for determining the responsibility of its subcontractors. However, as indicated in FAR 9.104-4, it may be necessary for you as the procurement official to determine a prospective subcontractor's responsibility such as when the prospective contract involves urgent requirements or substantial subcontracting.
Corrective Action and Schedule

The PRTC/VRE should comply with their Public Policies and Procedures Manual when documenting contractor responsibility. See Appendix B, item # 4 of the Policies and Procedures Manual.

A procedure and document should be developed and placed in the contract file that a determination has been made that the selected contractor has been determined to be a responsible contractor and cite the basics for that determination.

The recipient should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft report that ensures future compliance with this element.

Element (19) Sound and Complete Agreement

*Inadequate 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.*

(FTA C4220.1F, III, 3.a.(1)b.)

Discussion

PRTC/VRE is deficient with respect to this element.

Deficiency 712: Lacking sound and complete agreement

FTA C4220.1F Chapter V, paragraph 7 states IDIQ contracts are expected to contain both a minimum and maximum quantity that represents the recipient’s reasonably forecasted needs. PRTC/VRE’s IDIQ contracts contain a maximum amount but not a minimum.

Review of the following sample files disclosed deficiencies with respect to this element.

<table>
<thead>
<tr>
<th>ID Number</th>
<th>Contractor</th>
<th>Item Description</th>
<th>$ Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>VRE 013-002D</td>
<td>AECOM Technical Services</td>
<td>General Engineering Consulting Services</td>
<td>NTE $5 Million</td>
</tr>
<tr>
<td>VRE 013-002C</td>
<td>Gannet Fleming, Inc.</td>
<td>General Engineering Consulting Services</td>
<td>NTE $5 Million</td>
</tr>
<tr>
<td>VRE 013-002B</td>
<td>Michael Baker International</td>
<td>General Engineering Consulting Services</td>
<td>NTE $5 Million</td>
</tr>
<tr>
<td>PRTC 13-03</td>
<td>Stantec, Inc</td>
<td>General Engineering Consulting Services</td>
<td>Multiple Task Orders Issued Totaling $59,600 in</td>
</tr>
<tr>
<td>ID Number</td>
<td>Contractor</td>
<td>Item Description</td>
<td>$ Amount</td>
</tr>
<tr>
<td>-----------</td>
<td>------------</td>
<td>------------------</td>
<td>----------</td>
</tr>
<tr>
<td>PRTC 13-03</td>
<td>WRA</td>
<td>General Engineering Consulting Services</td>
<td>Unknown - Multiple Task Orders Issued - No Federal Funds Used to date</td>
</tr>
</tbody>
</table>

Corrective Action and Schedule

The PRTC/VRE should revise its boilerplate terms and conditions to ensure that future IDIQ contracts include both a minimum and maximum amount. Additionally, they should add IDIQ minimum and maximums to Part A - Policy, paragraph 13 “Contract Provisions”, sub-paragraph 13.1, “Sound and Complete Agreement” and to Part B - Procedures, paragraph 14 “Contract Provisions”, sub-paragraph 14.1, “Sound and Complete Agreement” of their Public Policies and Procedures manual.

The recipient should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft report showing how it intends to ensure compliance with this element in the future.

Element (23) Price Quotations (Small Purchase)

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.

(FTA C4220.1F, VI, 3.b.(2))

Discussion

The recipient is deficient with respect to this element

Deficiency: 757: Lacking evidence of price quotations for small purchases

FTA C4220.1F requires that when using small purchase procedures, the Recipient must obtain price or rate quotations from an adequate number of qualified sources and may not divide or reduce the size of its procurement to avoid the additional procurement requirements applicable to larger acquisitions. The procurement files did not indicate that the adequate number of sources were solicited.
The project managers at the PRTC solicited only one quote on purchase orders. This quote served as the ICE, and the scope of services.

Review of the following sample files disclosed deficiencies with respect to this element.

<table>
<thead>
<tr>
<th>ID Number</th>
<th>Contractor</th>
<th>Item Description</th>
<th>$ Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>20160598</td>
<td>EAI Security Systems, Inc</td>
<td>Replace Bus Circle Cameras</td>
<td>$5,643.33</td>
</tr>
<tr>
<td>20160307</td>
<td>Baker Electrical Services</td>
<td>Electrical Services for CAD/AVL Wifi Gravel Lot</td>
<td>$3,950.00</td>
</tr>
<tr>
<td>20160089</td>
<td>SNI Companies</td>
<td>Temporary Software Technician</td>
<td>$80,510.82</td>
</tr>
<tr>
<td>20160417</td>
<td>Dataprise, Inc</td>
<td>Hardware &amp; Installation for CAD/AVL WiFi</td>
<td>$10,922.09</td>
</tr>
</tbody>
</table>

**Best Practices/Advisory Comments – BPPM § 4.2 – Small Purchases**

**Documentation** – How much documentation of the procurement process do I need to keep?

One standard that you may find useful is to what extent would a third party (an auditor) be satisfied that you have complied with your agency’s policies and procedures and that the price you are paying is “reasonable”. This will typically include the requisition (or purchase request), what specification was used (if any), who were quotations requested from, when and what quotations were received, and from whom (a simple abstract of quotes received), and a copy of the purchase order. Much of the documentation for small purchases can be accomplished on pre-printed forms or completed online, if your computer systems will allow for that type of input. Remember, it is supposed to be simple, but never forget that we must make an audit trail that can be followed. The clearer and more complete the trail is, the better.

**Corrective Action and Schedule**

The recipient should comply with the table in Part A - Policy in paragraph 6, “Methods of Procurement”, sub-paragraph 6.1.b, “Small Purchases” of their Public Policy and Procedures Manual to ensure that when purchases are made under small purchases procedures, price quotations are obtained from an adequate number of sources and files are documented to reflect actions taken. i.e. the table in paragraph 6.1.b requires at least two quotes for purchases of $3,001 - $15,000 if using federal funds.

The recipient should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft report detailing how it will ensure compliance with the policy in the future.
Element (24) Clear, Accurate, and Complete Specification

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.

(FTA 4220.1F, VI, 2.a.)

Discussion

The recipient is deficient with respect to this element.

Deficiency: 751: Lacking clear, accurate, and complete specifications in solicitations

FTA C4220.1F states that the solicitation and 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.

The project managers at the PRTC solicited only one quote on purchase orders. The contractor’s quote served as the ICE, and the scope of services.

Review of the following sample files disclosed deficiencies with respect to this element.

<table>
<thead>
<tr>
<th>ID Number</th>
<th>Contractor</th>
<th>Item Description</th>
<th>$ Amount</th>
</tr>
</thead>
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<td>Contractor</td>
<td>Item Description</td>
<td>$ Amount</td>
</tr>
<tr>
<td>-----------</td>
<td>--------------------------------</td>
<td>---------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>20160598</td>
<td>EAI Security Systems, Inc</td>
<td>Replace Bus Circle Cameras</td>
<td>$5,461.05</td>
</tr>
<tr>
<td>20160307</td>
<td>Baker Electrical Services</td>
<td>Electrical Services for CAD/AVL Wifi</td>
<td>$3,950.00</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Gravel Lot</td>
<td></td>
</tr>
<tr>
<td>20151072</td>
<td>EAI Security Systems, Inc</td>
<td>Replace 2 poles, Mount PTZ Cameras</td>
<td>$7,193.00</td>
</tr>
</tbody>
</table>

**Best Practices/Advisory Comments – BPPM § 3.0 - Specifications**

§ 8.c (1) of FTA Circular 4220.1E requires that all solicitations shall:

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

§ 15 of the Master Agreement states that:

d. **Exclusionary or Discriminatory Specifications.** Apart from inconsistent requirements imposed by Federal statute or regulations, the Recipient agrees to comply with the requirements of 49 U.S.C. § 5323(h)(2) by refrain from using any Federal assistance awarded by FTA to support procurements using exclusionary or discriminatory specifications.

e. **Bus Seat Specifications.** A State or local government recipient may use specifications conforming with the requirements of 49 U.S.C. § 5323(e) to acquire bus seats.

**Corrective Action and Schedule**

PRTC/VRE should follow the guidance provided in Part B - Procedures, paragraph 3 “General Procurement Standards”, sub-paragraph 3.4, “Specifications” of their Public Policies and Procedures Manual.

The recipient should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft report outlining how it will ensure future compliance with this element.
Element (41) Cost or Price Analysis

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...

(FTA C4220. 1F, VI, 6.)

Discussion

The recipient is deficient with respect to this element.

Deficiency 271: Lacking required cost/price analysis

FTA C4220.1F requires the Recipient to perform either a cost analysis, with associated profit negotiations, or a price analysis, and document same in the procurement file.

The price analysis for the Abernathy Construction Corporation was based on the ICE. The ICE was based on past history. The price analysis should have been based on the competitive bids received. There was not cost or price analysis in the purchase order files or in the task order files we looked at.

Review of the following sample files disclosed deficiencies with respect to this element.

<table>
<thead>
<tr>
<th>ID Number</th>
<th>Contractor</th>
<th>Item Description</th>
<th>$ Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>VRE-013-012</td>
<td>Abernathy Construction Corporation</td>
<td>Construction of a 3rd Track Between Crossroads and Fredericksburg</td>
<td>$8,072,794</td>
</tr>
<tr>
<td>20160598</td>
<td>EAI Security Systems</td>
<td>Replace Bus Circle Cameras</td>
<td>$5,643.33</td>
</tr>
<tr>
<td>20160089</td>
<td>SNI Companies</td>
<td>Temporary Software Technician</td>
<td>$7,193.00</td>
</tr>
<tr>
<td>20160417</td>
<td>Dataprise, Inc</td>
<td>Hardware &amp; Installations for CAD/AVL WiFi</td>
<td>$10,922.09</td>
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<tr>
<td>20160307</td>
<td>Baker Electrical Services</td>
<td>Electrical Services for CAD/AVL WiFi Gravel Lot</td>
<td>$3,950.00</td>
</tr>
</tbody>
</table>

Best Practices/Advisory Comments BPPM 5.2 – Cost and Price Analysis

In general, the purpose of cost or price analysis is to ensure that you do not pay unreasonably high prices. However, prices that are unreasonably low can also be detrimental to your agency's program if they prove to be an indication that the offeror has made a mistake or doesn't understand the work to be performed.

Before issuing a solicitation, develop an independent estimate of the proper price level for the supplies or services to be purchased. The estimate can range from a simple budgetary estimate to a complex estimate based on inspection of the product itself and review of such items as
drawings, specifications, and prior data (such as cost data from prior procurements). The estimate can then assist in a determination of reasonableness or unreasonableness of price.

Some common price analysis techniques consist of the following:

- Comparison of proposed prices received in response to the solicitation;
- Comparison with competitive, published price lists, published market price of commodities, similar indexes, and discount or rebate arrangements;
- Comparison of proposed prices with the cost estimate performed prior to the solicitation, although this alone is seldom adequate to warrant a determination that the price is reasonable; and
- Comparison of prices received with prior procurement actions for the same or similar end items. Prior price comparisons may be affected by:
  - Changes in economic conditions between the times of the two procurements;
  - Differences in quantities;
  - Inclusion of non-recurring cost in the prices, such as design, capital equipment, production facilities, etc. To make a fair comparison, nonrecurring costs can be removed from both prices.

Cost analysis entails reviewing each element of cost to determine whether the offeror's estimate contains an accurate and reasonable prediction of the cost incurred during performance. The contract price is figured by adding a rate of profit that is determined to be fair. All reasonable costs of performance can be considered but the costs must be consistent with Federal cost principles found in FAR Part 31. Some common cost analysis techniques consist of the following:

- Verification of cost or pricing data and evaluation of cost elements, examining the following:
  - Necessity for and reasonableness of proposed costs, including allowances for contingencies;
  - Projection of offeror's cost trends on the basis of current and historical cost or pricing data;
  - Technical appraisal of estimated labor, material, tooling, facilities requirements and reasonableness of scrap and spoilage factors; and
  - Application of audited or negotiated indirect cost rates, labor rates, etc.

- Evaluation of the effect of the offeror's current practices on future costs. This ensures that the effects of inefficient or uneconomical past practices are not projected into the future.

- Comparison of the individual cost elements proposed with the following:
  - Actual costs previously incurred by the same offeror;
  - Previous cost estimates from the offeror or other offerors for the same or similar items;
  - Other cost estimates received in response to the recipient's request;
  - Elements of the independent cost estimates by recipients' technical personnel;
- Verification that the offeror's cost elements are in accordance with Federal cost principles and procedures as found in FAR 31.

- Analysis of the results of any make-or-buy program reviews, so as to establish the most economical approach to the acquisition of components needed by the contractor.

- To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

Corrective Action and Schedule

PRTC/VRE should follow the guidance provided in their Public Policies and Procedures Manual, Appendix B, items # 6 and 7 for documenting cost/price analysis for purchase orders and contracts. The PRTC/VRE should provide training for personnel involved in the procurement process in the proper use of developing a cost and price analysis.

The recipient should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft report that outlines how it will ensure that the appropriate personnel comply with this element in the future.

Element (42) Written Record of Procurement History

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.

(FTA C 4220.1F, III, 3.d.)

**Discussion**

The recipient is deficient with respect to this element.

**Deficiency 130: No written record of procurement history**

As a minimum the files should address type contract, contractor selection or rejection and a responsibility determination. There was no procurement history in the purchase orders reviewed.

Review of the following files disclosed deficiencies with respect to this element.

<table>
<thead>
<tr>
<th>ID Number</th>
<th>Contractor</th>
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<th>$ Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>20151072</td>
<td>EAI Security</td>
<td>Replace 2 Poles, Mount PTZ Cameras</td>
<td>$7,193.00</td>
</tr>
<tr>
<td>20160417</td>
<td>Dataprise, Inc</td>
<td>Hardware &amp; Installation for CAD/AVL WiFi</td>
<td>$10,922.09</td>
</tr>
</tbody>
</table>

**Best Practices/Advisory Comments BPPM § 2.4.1 and Appendix B.12**

Where appropriate, the procurement documentation file should contain:

- Purchase request, acquisition planning information, other presolicitation documents,
- Evidence of availability of funds,
- Rationale for the method of procurement (negotiations, formal advertising),
- List of sources solicited,
- Independent Cost Estimate,
- Statement of Work/ Scope of services,
- Copies of published notices of proposed contract action,
- Copy of the solicitation, all addenda, and all amendments,
- Liquidated damages determination,
- An abstract of each offer or quote,
- Contractor's contingent fee representations and other certifications and representations,
- Source selection documentation, if applicable,
- Contracting Officer's determination of contractor responsiveness and responsibility,
- Cost or pricing data,
- Determination that price is fair and reasonable, including an analysis of the cost and pricing data,
- Required internal approvals for award,
- Notice of award,
- Notice to unsuccessful quoters or offerors and record of any debriefing,
- Record of any protest,
- Bid, Performance, Payment, or other bond documents, and notices to sureties,
- Required insurance documents, if any,
- Notice to proceed, and
- Negotiation Memorandum.

Purchase order forms (electronic or manual) and standard files for small purchases can be designed to automate the recording of most of the relevant data for small purchases. Bid and proposal files, particularly for sealed bids under $100,000, also can be standardized to facilitate recording appropriate data. For larger procurements, there are often memoranda or correspondence that, if assembled into the file, address many of the key issues.

The procurement and the contract administration files can be coordinated by standard practice so that nothing is omitted between bid opening (or proposal receipt) and notice of award.

Where the price was established based on an evaluation of cost elements and fee in the offeror's proposal, the negotiation memorandum should clearly set forth the various amounts, as they were proposed, evaluated and negotiated.

Corrective Action and Schedule

PRTC/VRE should follow the guidance provided in their Public Policies and Procedures Manual, Appendix B, item # 10, Record of Procurement History.

Provide training to personnel involved in the procurement process on the contents of an adequate procurement history.
The recipient should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft report to show how it intends to ensure compliance with this element.

**Element (45) Advance Payments**

*Advance payments are payments made to a contractor before the contractor incurs costs in the performance of the contract. The following principles and restrictions apply:*

**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... A recipient that seeks to use FTA assistance to support advance payments should contact the regional office administering its project to obtain FTA concurrence.

(FTA C4220.1F, IV, 2.b.(5)(b).1.2.)

**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);

**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

**Cost or Price.** Each recipient must evaluate and state its justification for the contract cost or price.

(FTA C4220.1F, III, 3.d.(1)(c)(d))

**Discussion**

PRTC/VRE is deficient with respect to this element

Deficiency 309: Improper advance/progress payments

FTA C4220.1F says advance payments are payments made to a contractor before the contractor incurs contracting costs. The Recipient may use its local share funds before FTA assistance has been awarded; however, advance approval from FTA is required before those funds are eligible for reimbursement.

The files did not indicate that the FTA Region granted authority to make advanced payment. The PRTC paid a contractor 25% of the purchase order amount upon award of the purchase order. There is no evidence that the payment was tied to any type performance.
Review of the following files disclosed deficiencies with respect to this element.

<table>
<thead>
<tr>
<th>ID Number</th>
<th>Contractor</th>
<th>Item Description</th>
<th>$ Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>20160307</td>
<td>Baker Electrical Services</td>
<td>Electrical Services for CAD/AVL WiFi Gravel Lot</td>
<td>$3,950.0</td>
</tr>
</tbody>
</table>

Corrective Action and Schedule

PRTC/VRE should follow the guidance provided in their Public Policies and Procedures Manual at paragraphs 8.1 and 9.1 respectively which reads:

"The use of FTA funds for payments in advance of the incurrence of costs by the contractor is generally prohibited, without prior written approval from FTA. FTA does permit advance payments from FTA funds for those purchases where advance payment is customary in the commercial marketplace such as utility services and subscriptions. FTA approval of such advance payments is required when the amount exceeds $100,000. PRTC should not make advance payments using other funds (including local match funds) except where (a) it is customary in the industry, or (b) there are sound business reasons (e.g. to enable a more cost-effective pricing structure) for doing so; in the latter case, the file shall be documented to fully justify the advance payment."

The PRTC/VRE should develop a procedure that ensures that written approval is received from the FTA prior to paying advance payments.

The recipient should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft report that outlines how they intend to ensure that the appropriate personnel comply with the policy.

Element (49) Liquidated Damages Provisions

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.
Discussion

PRTC/VRE is deficient with respect to this element.

Deficiency 315: Improper use of liquidated damages clause

The Common Grant Rule for governmental Recipients authorizes FTA to require remedies. One of these remedies is liquidated damages (LD). In order to properly assess LDs, the Recipient must reasonably expect to suffer damages through delayed contract completion. The LD assessment must be addressed in the solicitation and resulting contract.

VRE’s method for determining liquidated damages is not in compliance with FTA C4220.1F. FTA says the procurement file should include a record of the LDs calculation that reasonably reflects the recipient’s cost if the contractor fails to complete the required work on time. VRE uses a “Schedule of Liquidated Damages” based on the amount of the contract, not the estimated cost for VRE for late completion. VRE construction contracts that include LDs are deficient with respect to this element.

Review of the following files disclosed deficiencies with respect to this element.

<table>
<thead>
<tr>
<th>ID Number</th>
<th>Contractor</th>
<th>Item Description</th>
<th>$ Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>VRE-013-012</td>
<td>Abernathy Construction Corporation</td>
<td>Construction of a 3rd Track Between Crossroads and Fredericksburg</td>
<td>$8,072,794</td>
</tr>
<tr>
<td>VRE 015-017</td>
<td>C3M Systems LLC</td>
<td>Construction of the VRE L’Enfant Station Wayside Power</td>
<td>$482,003</td>
</tr>
<tr>
<td>VRE 016-013</td>
<td>STV Incorporated dba STV Group Incorporated</td>
<td>Construction Engineering and Inspection Services for the Crossroads to Hamilton Third Track Project</td>
<td>$329,604</td>
</tr>
</tbody>
</table>

Best Practices/Advisory Comments BPPM § 8.2.3.

Liquidated Damages - Liquidated damages are a specific sum (or a sum readily determinable) of money stipulated by the contracting parties as the amount to be recovered for each day of delay in delivery of the product or completion of the contract. They do not represent actual damages but are established in the initial contract as a substitute for actual damages. They should represent, however, the most realistic forecast possible of what the actual damages are likely to be.

DISCUSSION

Liquidated damages are a widely used method of ensuring contractors perform timely. These provisions are regularly used in construction contracts and sometimes in supply and service contracts.
Liquidated damages clauses are most appropriately used when:

- The time of delivery or performance is of particular importance and you may reasonably expect to suffer damage if the delivery or performance is delinquent; and
- The extent or amount of such damage would be difficult to prove.

When determining whether to use a liquidated damages clause, you will wish to consider such factors as:

- The probable effect on pricing and competition; and
- The costs and difficulties of contract administration.

Liquidated damages may be used for supplies, services and construction.

Best Practices

Rate Determination - The rate of liquidated damages must be a reasonable estimate to compensate for possible damages and not be so large as to be construed as a penalty. If it is construed as a penalty it will be held unenforceable. The most prudent approach is to formulate the liquidated damages on a case-by-case basis. You will find it useful to briefly document the calculation of the rate of damages each time you use liquidated damages in a contract and keep the documentation on file. Appendix B.3 is an example of a Liquidated Damages Checklist being used by a Transit Authority. ³ Once liquidated damages are included in a contract, you will be unable to recover actual damages in many jurisdictions.

Application - When it is determined that a liquidated damages clause will be included in the contract, the applicable clause and appropriate rate(s) must be contained in the solicitation. For construction contracts, the rate to be assessed can be for each day of delay, and the rate typically, at a minimum, covers the estimated cost of inspection and superintendence for each day of delay in completion. If you will suffer other specific losses due to failure of timely completion, the rate can also include an amount for these items (for example, the cost of substitute facilities or the rental of buildings or equipment). The contract may include an overall maximum dollar amount or period of time, or both, during which liquidated damages may be assessed. This will help ensure that there is not an unreasonable assessment of damages.

It is important to note, that in your establishment of liquidated damages, you may use whatever consequential damages may result from a failure to deliver or perform, even damages for items which are not within the scope of the grant. However, it must be understood that all liquidated damages collected from the contractor must be credited to the grant and treated as a reduction to the allowable costs of the grant, in accordance with § 13 of FTA Circular 4220.1E. This will have the effect of making the funds collected (or the contract price reduction taken) available to the grantee for other activities/costs which are within the scope of the grant. In other words, while you may use the incurred cost of activities which are not within the scope of the grant to

³ - Bay Area Rapid Transit District (BART) Procurement Manual, Rev 4, July 20, 1994, Attachment Y.
estimate and establish liquidated damages amounts, you will not be able to directly apply the collected damages to those impacted activities unless they are within the scope of the grant. The funds returning to the grantee must be credited to the grant where they become available for other activities which are within the scope of the grant.

Corrective Action and Schedule

PRTC/VRE should provide training to personnel involved in the procurement process on the proper use and development of LD’s, and follow the guidance provided in their Public Policies and Procedures Manual paragraphs 10, and 9 respectively for establishing liquidated damages.

Recipient should determine how they will ensure the policy and procedures for this element is met in the future.

The recipient should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft report.

Element (56) Clauses

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 Procedures 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.

(FTA C4220.1F, VI, 2.)

Discussion

The recipient is deficient with respect to this element.

Deficiency 365: Other

The Common Grant Rule requires the Recipient to determine the applicability of the clauses addressed in FTA C4220.1F and the Master Agreement. FTA C4220.1F, Appendix D can be used to determine applicability of the specific language of a clause that a Recipient may use.

VRE’s General Terms and Conditions need to be updated. It was last revised April 1, 2009.
Three required clauses are missing “Changes to Federal Requirements”, “Recycled Products”, & “Veterans Preference” (Construction Contracts). The “Veterans Preference” clause was also missing from the PRTC applicable contracts.

Best Practices/Advisory Comments BPPM § 8.1.1.

DISCUSSION

FTA grantees recognize that the most significant of the strings attached to the receipt of federal funds is the requirement to comply with federal statutes and regulations applicable to their project or particular contract.

You will want to be able to determine exactly which clauses are required for a specific procurement because the incorporation of unnecessary or loosely drafted clauses can:

- discourage competitors,
- cause confusion for anyone involved with the contract, and
- ultimately result in additional costs for your agency.

Appendix A.1 of this manual discusses each of the most generally applicable clauses. Knowing that a particular law must be complied with and that appropriate language must be included in a third party contract, still leaves the Grantee trying to draft or incorporate a clause that meets those requirements. The clause-by-clause discussions in Appendix A.1 have been developed by FTA to assist you.

Best Practices

Appendix A.1 of this Manual contains thirty model contract clauses that are either federally required or are suggested model clauses that you may include in contracts. The clauses contained in this Appendix include the following common elements which will be helpful to grantees in deciding if a specific clause is required in a particular procurement:
Applicability to Contracts - discusses the types of contracts for which the clause is applicable.

Flow Down - discusses to which prime contractors and which level of subcontractors the clauses apply.

Mandatory Clause/Language - includes the model clause, identified by FTA as either a required (specified) clause or a suggested-language clause.

The narratives provided with the individual clauses in the Appendix indicate the source of the clause, if required. Many of the required clauses come directly from requirements in various sections of the Code of Federal Regulations (CFR) which is published by various executive departments of the federal government. The most common requirements for FTA grantees come from various parts of Title 49 of the CFR, published by the Department of Transportation. Requirements of the Department of Labor (such as Davis-Bacon Act clauses) originate as specific language in Title 29 of the CFR. Where clauses are not mandated by an executive department, they are frequently modeled after clauses in the Federal Acquisition Regulations (FAR) which are applicable to those executive departments.

Even though the FAR does not apply to grantee procurements, one advantage of using FAR clauses in the absence of a specific requirement imposed upon your Agency is that a body of federal law has been developed which interprets those clauses.

Your State, local jurisdiction, or transit Agency may have enacted a procurement code or body of regulations that actually establishes specific clauses which you must use. In that case, you will be obligated to use what has been established for you. Many of the recent enactments of those codes or regulations are adaptations of the American Bar Association's Model Procurement Code for State and Local Governments.

You may have the ability to incorporate clauses by reference (such as, title, date and where it can be found) in your contracts. To the extent clauses you want to incorporate are published in a Federal, State, or local statute, code, or ordinance, or in an official regulation such as the CFR, you should be able to incorporate those provisions directly into your contractual document by reference only. You can check with your supporting legal counsel on what clauses you can and cannot incorporate by reference and the manner in which they may be incorporated. It is doubtful you would ever be able to incorporate by reference a clause that was only published in an FTA Circular, because of the way FTA Circulars are published (i.e. they are not officially published in the Federal Register).

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4 - Although the relevance of that law will vary from state to state, most individual states will not have interpreted federal statutes and clauses and will frequently look to the federal common law, as interpreted by the Comptroller General of the United States and the various boards and courts, for guidance in interpreting that law and those clauses.

5 - The Model Procurement Code and recommended Regulations may be available in your local public library or may be purchased from the American Bar Association. It is recommended that you contact the following for further information: Member Services, P.O. Box 10892, Chicago, Illinois 60612-0892.
Corrective Action and Schedule

PRTC/VRE should review the Master Agreement annually and update their General Terms and Conditions as necessary. PRTC has updated their terms and conditions to include the “Veterans Preference” clause.

The recipient should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft report.

OTHER MATTERS:

Pre-Award/Post Delivery:

The recipient is in compliance with the pre-award and post-delivery requirements. Contract files were documented to show that the recipient visited manufacturing facilities prior to award to ensure Buy America compliance, had an inspector on site at the manufacturing facility during assembly, and also performed a detailed inspection and road test upon delivery to ensure compliance.

Kudo:

The Team would like to congratulate Betsy Massie for her hard work in support of the Team both before and during the review. Her dedication and tireless efforts in providing the very best procurement support to her PRTC customers is unquestionable.

Kudo:

The Team would also like to congratulate Gerri Hill Manager of Purchasing and Contract Administration and her team of contract specialists and contract administrator, Kristin Nutter, Amanda Vitko, and Amy Keady for the job they do maintaining VRE Contract Files. The files are among the best the team has seen and this helped us do our job in a timely manner.

DBE:

The PRTC/VRE has submitted its DBE report to the FTA as required.

Bids Due/Bid Openings:

The Team recommends VRE consider making bids due the same time and date as bid opening. VRE Section B titled “Procurement Schedule” establishes bids due 15 minutes before bid opening. This may give grounds for a contractor to protest a late bid.

Procurement Planning:

PRTC should consider issuing an IFB versus a RFQ when the independent cost estimate is close (i.e. $90,000) to the small purchase threshold, currently $100,000. This would prevent having to cancel the solicitation and starting over if the low bid exceeds the small purchase threshold, thus saving valuable procurement lead time and enhancing customer service.
Training:

The Team recommends that PRTC/VRE contact NTI and secure training slots for any NTI Training courses. We suggest PRTC/VRE offer to host an NTI training course. As PRTC/VRE have their program managers perform most of the procurement functions we highly recommend that they receive NTI training.
Appendix A:

List of Individuals Attending Entrance or Exit Conferences

**FTA Headquarters**

<table>
<thead>
<tr>
<th>Name/Title</th>
<th>Phone Number</th>
<th>Email Address</th>
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<tbody>
<tr>
<td>Jim Muir, Program Manager PSR Program</td>
<td>202-366-2507</td>
<td><a href="mailto:Jim.Muir@dot.gov">Jim.Muir@dot.gov</a></td>
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**FTA Region**

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<tr>
<td>Terry Garcia Crews</td>
<td>215-656-7263</td>
<td><a href="mailto:Terry.GarciaCrews@dot.gov">Terry.GarciaCrews@dot.gov</a></td>
</tr>
<tr>
<td>Regional Administrator</td>
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<td></td>
</tr>
<tr>
<td>Tony Tarone</td>
<td>215-656-7072</td>
<td><a href="mailto:Tony.Tarone@dot.gov">Tony.Tarone@dot.gov</a></td>
</tr>
<tr>
<td>Deputy Regional Administrator</td>
<td></td>
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</tr>
<tr>
<td>Tony Cho</td>
<td>215-656-7250</td>
<td><a href="mailto:Tony.Cho@dot.gov">Tony.Cho@dot.gov</a></td>
</tr>
<tr>
<td>Director Office of Program Management</td>
<td></td>
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<tr>
<td>and Oversight</td>
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<tr>
<td>Karen Roscher</td>
<td>215-656-7002</td>
<td><a href="mailto:Karen.Roscher@dot.gov">Karen.Roscher@dot.gov</a></td>
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<tr>
<td>Transportation Programs Specialist</td>
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# PRTC/VRE

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<tr>
<td>Doug Allen, CEO VRE</td>
<td>703-838-5411</td>
<td><a href="mailto:dallen@vre.org">dallen@vre.org</a></td>
</tr>
<tr>
<td>Eric Marx, Interim CEO PRTC</td>
<td>703-580-6117</td>
<td><a href="mailto:emarx@omniride.com">emarx@omniride.com</a></td>
</tr>
<tr>
<td>Donna Boxer, CFO VRE</td>
<td>703-838-5413</td>
<td><a href="mailto:dboxer@vre.org">dboxer@vre.org</a></td>
</tr>
<tr>
<td>Joyce Embry, Director of Finance PRTC</td>
<td>703-580-6123</td>
<td><a href="mailto:jembry@omniride.com">jembry@omniride.com</a></td>
</tr>
<tr>
<td>Betsy Massie, Director of Grants PRTC</td>
<td>703-580-6113</td>
<td><a href="mailto:bmassie@omniride.com">bmassie@omniride.com</a></td>
</tr>
<tr>
<td>Gerri Hill, Contract Manager VRE</td>
<td>703-838-5475</td>
<td><a href="mailto:ghill@vre.org">ghill@vre.org</a></td>
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<tr>
<td>Joe Swartz, Chief of Staff</td>
<td>703-878-5425</td>
<td><a href="mailto:jswartz@vre.org">jswartz@vre.org</a></td>
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<tr>
<td>Cynthia Porter-Johnson, Transportation Project Manager</td>
<td>703-580-6417</td>
<td><a href="mailto:cporter-johnson@omniride.com">cporter-johnson@omniride.com</a></td>
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# Business Management Research Associates, Inc.

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<td>Phil Hanley, BMRA Reviewer</td>
<td>703-691-0868</td>
<td><a href="mailto:hanleybp@aol.com">hanleybp@aol.com</a></td>
</tr>
<tr>
<td>Earl Atkinson, BMRA Reviewer</td>
<td>512-573-7293</td>
<td><a href="mailto:atkinsonec1947@gmail.com">atkinsonec1947@gmail.com</a></td>
</tr>
<tr>
<td>Eric King, BMRA Reviewer</td>
<td>202-285-6555</td>
<td><a href="mailto:ceking@mitacc.com">ceking@mitacc.com</a></td>
</tr>
<tr>
<td>Gray Coyner, BMRA</td>
<td>703-691-0868</td>
<td><a href="mailto:gcoyner@bmra.com">gcoyner@bmra.com</a></td>
</tr>
<tr>
<td>Kristin Coyner, BMRA</td>
<td>703-691-0868</td>
<td><a href="mailto:kcoyner@bmra.com">kcoyner@bmra.com</a></td>
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### APPENDIX B: REPORT SUMMARY TABLE

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<td>Establish in house training for personnel involved in procurement, stressing the importance of following established policies and procedures.</td>
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<td>42</td>
<td>Written Record of Procurement History</td>
<td>FTA C 4220.1F, III, 3.d.</td>
<td>28</td>
<td>6</td>
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<td>Establish in house training for personnel involved in procurement, stressing the importance of following established policies and procedures.</td>
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<td>43</td>
<td>Exercise of Options</td>
<td>FTA C4220.1F, IV, 1.d.; FTA C4220.1F, V, 7.a.(1)</td>
<td>2</td>
<td>0</td>
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<td>Out of Scope Changes</td>
<td>FTA C4220.1F, VI, 3.i.(1)(b)</td>
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<td>Advance Payments</td>
<td>FTA C4220.1F, IV, 2.b.(5)(b), 1.2.; FTA C4220.1F, III, 3.d.(1)(c)(d)</td>
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<td>The PRTC/VRE should develop a procedure that ensures that written approval is received from the FTA prior to paying advance payments.</td>
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<td>Progress Payments</td>
<td>FTA C4220.1F, IV, 2.b.(5)(c)</td>
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<td>Time and Materials Contracts</td>
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<td>Cost Plus Percentage of Cost</td>
<td>FTA C4220.1F, VI, 2.c.(2)(a)</td>
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<td>Liquidated Damages Provisions</td>
<td>FTA C 4220.1F, IV, 2.b.(6)(b)(I)</td>
<td>1</td>
<td>5</td>
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<td>Establish in house training for personnel involved in procurement, stressing the importance of following established policies and procedures.</td>
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<td>Piggybacking</td>
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<td>Qualifications Exclude Price (A&amp;E and Other Services)</td>
<td>FTA C4220.1F, VI, 3.f.(1)</td>
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<td>Serial Price Negotiations (A&amp;E and Other Services)</td>
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<td>Bid Security (Construction over $100,000)</td>
<td>FTA C4220.1F, IV, 2.h.(1)(a)</td>
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<td>0</td>
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<td>Performance Security (Construction over $100,000)</td>
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<td>Payment Security (Construction over $100,000)</td>
<td>FTA C4220.1F, IV, 2.h.(1)(c)</td>
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<td>55)</td>
<td>Clauses</td>
<td>FTA C4220.1F, VI, 2.</td>
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<td>Recipient needs to revise its General Terms and Conditions and Review the Master Agreement Annually for any required updates.</td>
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<td>57)</td>
<td>Veterans Hiring Preference</td>
<td>FTA C4220.1F, VI, 2.e.(1)</td>
<td>0</td>
<td>9</td>
<td>0</td>
<td>9</td>
<td>At the beginning of the PSR, the Recipient was Deficient for this element. However, during the on-site review, they revised their General Terms and Conditions to include this hiring preference. The PRTC can now be considered Not Deficient for this element. Recipient needs to Review the Master Agreement Annually for any required updates.</td>
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APPENDIX C:

Procurement Elements for which the Recipient is Not Deficient

SYSTEMWIDE ELEMENTS

01) Written Standards of Conduct

(1) 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.

(FTA C4220.1F, III, 1. a., b., c.)

02) Contract Administration System

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 responsibilities.

(FTA C4220.1F, III, 3.)
03) Written Protest Procedures

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.

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.

4(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.

(FTA C4220.1F, VII, 1.a.b.)

04) **Prequalification System**

A recipient may prequalify people, firms, or products for participation in its procurements provided that:

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:

**Lists.** The recipient ensures that all prequalification lists it uses are current.

**Sources.** The recipient ensures that all prequalification lists it uses include enough qualified sources to provide maximum full and open competition.

**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.
(Note: Recipients are not required, or encouraged, to have a prequalification system. Prequalification systems are difficult and costly to maintain in a way that does not inhibit competition. The intent of this element is to ensure that, if a recipient maintains a prequalification list for one or more products or services, or a qualified manufacturers list, such lists are current and provide full and open competition.)

FTA 4220.1F, VI, 1.c.

05) Procedures for Ensuring Most Efficient and Economic Purchase

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 $100,000 or less ($100,000 is the current 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.
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.

(FTA C4220.1F, IV, 1.)

**06) Procurement Policies and Procedures**

*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.

(FTA C4220.1F, III, 3.a.)

**INDIVIDUAL PROCUREMENT ELEMENTS**

**08) A&E Geographic Preference**

*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.

(FTA C4220.1F, VI, 2.a.(4)(g)(1))

**09) Unreasonable Qualification Requirements**

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:

(FTA C4220.1F, II, 3.3.4.2)
(a) **Excessive Qualifications.** Imposing unreasonable business requirements for bidders or offerors.

(FTA C4220.1F, VI, 2.a.(4))

10) **Unnecessary Experience and Excessive Bonding**

Example of situation restrictive of competition:

*Imposing unnecessary experience requirements for bidders and offerors.*

FTA C4220.1F, VI, 2.(4)

**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.

(FTA C4220.1F, VI, 2.a.(4)(e))

11) **Organizational Conflict of Interest**

Example of situation restrictive of competition:

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.

(FTA C4220.1F, VI, 2.a.(4)(h) 1., 2.)

12) Arbitrary Action

Example of situation restrictive of competition:

Taking any arbitrary action in the procurement process.

(FTA C4220.1F, VI, 2.a.(4)(j))

13) Brand Name Restrictions

All procurement transactions will be conducted in a manner providing full and open competition. One of the situations considered to be restrictive of competition is 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.

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.

(FTA C 4220.1F., VI, 4.)

14) Geographic Preferences

(g) In-State or Local Geographic Restrictions. Specifying in-State or local geographical preferences, or evaluating bids or proposals in light of in-State or local geographic preferences, even if those preferences are imposed by State or local laws or regulations. In particular, 49 U.S.C. Section 5325(i) prohibits an FTA recipient from limiting its bus purchases to in-State dealers. Exceptions expressly mandated or encouraged by Federal law include the following:

1. **Architectural Engineering (A&E) Services.** Geographic location may be a selection criterion if an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project.

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

(FTA C 4220.1F, VI, 2.(4)(g))

15) Contract Term Limitation

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.

(FTA C4220.1F, IV, 2.e.(10))

FTA expects the recipient to use sound business judgment and be judicious in establishing and extending a contract's period of performance.

(FTA C4220.1F, IV, 2.e.(10))

16) Written Procurement Selection 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.

(FTA C4220.1F, III, 3.a.)

The solicitation and resulting contract must identify those Federal requirements that will affect contract scope and performance.

(FTA C4220.1F, VI, 2.d.)
17) Solicitation Prequalification Criteria

*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.

(FTA C4220.1F, VI, 1.c.)

20) No Splitting (Micro-purchase)

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

(FTA C4220.1F, VI, 3.a.2)
21) Fair and Reasonable Price Determination (Micro-purchase)

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

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

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

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

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

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

   (FTA C4220.1F, VI, 3.a.)

22) Micro-Purchase Davis-Bacon

Davis-Bacon prevailing wage requirements, however, will apply to construction contracts exceeding $2,000, even though the recipient uses micro-purchase procurement procedures.

   (FTA C4220.1F, VI, 3.a.(1))

25) Adequate Competition – Two or More Competitors

In order for sealed bidding to be appropriate:

Two or more responsible bidders are willing and able to compete effectively for the business.

   (FTA C4220.1F, VI, 3.c.(1)(b))

In order for competitive proposal procedures to be appropriate:
Proposals are solicited from an adequate number of qualified sources.

(FTA C4220.1F, VI, 3.d.2(c))

26) Firm Fixed Price (Sealed Bid)

The procurement generally lends itself to a firm fixed price contract.

(FTA C4220.1F, VI, 3.c.(1)(c))

27) Selection on Price (Sealed Bid)

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.

(FTA C4220.1F, VI, 3.c.(d))

28) Discussions Unnecessary (Sealed Bid)

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.

(FTA C4220.1F, VI, 3.c.(1)(e))

29) Advertised/Publicized (Sealed Bid) (RFP)

If this procurement method is used, ...the invitation for bids is publicly advertised

(FTA C4220.1F, VI, 3, c.(2)(a))

If this procurement method is used the following requirements apply: The request for proposals is publicly advertised.

(FTA C4220.1F, VI, 3.d.(2)(a))

30) Adequate Number of Sources Solicited (Sealed Bid) (RFP)

Adequate Sources. Two or more responsible bidders are willing and able to compete effectively for the business.

(FTA C4220.1F, VI, 3.c.(1)(b))

Adequate Sources. Proposals are solicited from an adequate number of qualified sources.

(FTA C4220.1F, VI, 3.d.(2)(c))

31) Sufficient Bid Time (Sealed Bid)
Sufficient Time. Bidders are allowed sufficient time to prepare bids before the date of bid opening.

(FTA C4220.1F, VI, 3.(d)(2))

32) Bid Opening (Sealed Bid)

If this procurement methods is used, ...all bids are publicly opened at the time and place prescribed in the invitation for bids.

(FTA C4220.1F, VI, 3.(c)(2)(e))

33) Responsiveness (Sealed Bid)

If this procurement method is used:

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.

(FTA C4220.1F, VI, 3.(c)(2)(f))

34) Lowest Price (Sealed Bid)

If this procurement method is used:

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.

(FTA C4220.1F, VI, 3.(c)(2)(f))

35) Rejecting Bids (Sealed Bid)

Any or all bids may be rejected if there is a sound documented business reason.

(FTA C4220.1F, VI, 3.(a)(2)(g))
36) Evaluation (RFP)

*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.

(FTA C4220.1F, VI, 3.d.(2)(b))

*Evaluation Method.* A specific method is established and used to conduct technical evaluations of the proposals received and to determine the most qualified offeror.

(FTA C4220.1F, VI, 3.d.(2)(d))

37) Price and Other Factors (RFP)

If this procurement method is used the following requirements apply:

*An award is made to the responsible offeror whose proposal is most advantageous to the recipient's program with price and other factors considered.*

(FTA C4220.1F, VI, 3.d.(2)(e))

38) Sole Source if Other Award is Infeasible

*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.

   b  **Inadequate Competition.** FTA acknowledges competition to be inadequate when, caused by conditions within the recipient's control. For example, if the specifications used were within the recipient's control and those specifications were unduly restrictive, competition will be inadequate.
(c) **Unusual and Compelling Urgency.** The Common Grant Rule for governmental recipients permits the recipient to limit the number of sources from which it solicits bids or proposals when a recipient has such an unusual and urgent need for the property or services that the recipient would be seriously injured unless it were permitted to limit the solicitation. The recipient may also limit the solicitation when the public exigency or emergency will not permit a delay resulting from competitive solicitation for the property or services.

(d) **Associated Capital Maintenance Item Exception Repealed.** SAFETEA-LU repealed the special procurement preference previously authorized for associated capital maintenance items. Thus, any sole source procurement of associated capital maintenance items must qualify for an exception under the same standards that would apply to other sole source acquisitions.

(e) **Authorized by FTA.** The Common Grant Rules provide Federal agencies authority to permit a recipient to use noncompetitive proposals. Under this authority, FTA has made the following determinations:

1. **Consortium, Joint Venture, Team, Partnership.** With some exceptions, when FTA awards a grant agreement or enters into a cooperative agreement with a consortium, joint venture, team, or partnership, or provides FTA assistance for a research project in which FTA has approved the participation of a particular firm or combination of firms in the project work, the grant agreement or cooperative agreement constitutes approval of those arrangements. In such cases, FTA expects the recipient to use competition, as feasible, to select other participants in the project.

2. **FAR Standards.** To ensure that the recipient has flexibility equal to that of Federal contracting officers, FTA authorizes procurement by noncompetitive proposals in all of the circumstances authorized by FAR Part 6.3. In addition to circumstances discussed in the Common Grant Rules, the FAR authorizes less than full and open competitive procurements in one or more of the following circumstances:

   a. **Statutory Authorization or Requirement.** To comply with Department of Transportation (DOT) appropriations laws that include specific statutory requirements, with the result that only a single contractor can perform certain project work.

   b. **National Emergency.** To maintain a facility, producer, manufacturer, or other supplier available to provide supplies
or services in the event of a national emergency or to achieve industrial mobilization.

c  Research. To establish or maintain an educational or other non-profit institution or a federally funded research and development center that has or will have an essential engineering, research, or development capability.

d  Protests, Disputes, Claims, Litigation. To acquire the services of an expert or neutral person for any current or anticipated protest, dispute, claim, or litigation.

e  International Arrangements. When precluded by the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or when prohibited by the written directions of a foreign government reimbursing the recipient for the cost of the acquisition of the supplies or services for that government.

f  National Security. When the disclosure of the recipient’s needs would compromise the national security.

g  Public Interest. When the recipient determines that full and open competition in connection with a particular acquisition is not in the public interest.

(2) When Prohibited. Less than full and open competition is not justified based on:

(a) Failure to Plan. The recipient’s lack of advance planning, or

(b) Limited Availability of Federal Assistance. Concerns about the amount of Federal assistance available to support the procurement (for example, expiration of Federal assistance previously available for award).

(3) Procurement Procedures. When less than full and open competition is available to the recipient, the Common Grant Rule for governmental recipients directs the recipient to:

(a) Potential Sources. Solicit offers from as many potential sources as is practicable under the circumstances.

(b) Sole Source Justification. If the recipient decides to solicit an offer from only one source, the recipient must justify its decision adequately in light of the standards of subparagraph 3.i(1)(b) of this Chapter. FTA expects this sole source justification to be in writing.

(c) Cost Analysis. Prepare or obtain a cost analysis verifying the proposed cost data, the projections of the data, and the evaluation of the costs and profits.
(d) **Preaward Review.** Submit the proposed procurement to FTA for preaward review if FTA so requests.

(FTA C4220.1F, VI, 3.i.)

39) **Cost Analysis Required (Sole Source)**

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

(FTA C4220.1F, VI, 6.a.)

40) **Evaluation of Options**

**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 that funds will not be available to permit it to exercise the option.

(FTA C4220.1F, VI, 7.b.(1))

43) **Exercise of Options**

**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.
(I) 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.

(FTA C4220.1F, V, 7.a.(1))

44) Out of Scope Changes

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.

(FTA C4220.1F, VI, 3.i.(1)(b))

46) Progress Payments

(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.

(FTA C4220.1F, IV, 2.b.(5)(c))

47) Time and Materials Contracts

The Common Grant Rule for government 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.

(FTA C4220.1F, VI, 2.c.(2)(b))

48) Cost Plus Percentage of Cost

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.

(FTA C4220.1F, VI, 2.c.(2)(a))

50) Piggybacking

(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.

(FTA C4220.1F, V, 7.a.(2))

51) Qualifications Exclude Price (A&E and Other Services)

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

(FTA C4220.1F, VI, 3.f.(1))

52) Serial Price Negotiations (A&E and Other Services)

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.

(FTA C4220.1F, VI, 3.f.(3))

53) Bid Security (Construction Over $100,000)

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.

(FTA C4220.1F, IV,2.h.(1)(a))

54) Performance Security (Construction Over $100,000)

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:
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.

(FTA C4220.1F, IV, 2.h.(1)b.)

55) Payment Security (Construction Over $100,000)

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:

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.

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.

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.

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.

(FTA C4220.1F, IV, 2.h.(1)(c))

57) Veterans Hiring Preference

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

(FTA C4220.1F, IV, 2.c.(1)(c))
Appendix D:

Procurement Elements
Determined to be Not Applicable

13) Brand Name Restrictions

All procurement transactions will be conducted in a manner providing full and open competition. One of the situations considered to be restrictive of competition is 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.

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 offerers 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.

(FTA C 4220.1F., VI, 4.)

14) Geographic Preferences

(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.
17) Solicitation Pre-qualification Criteria

*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.

44) Out of Scope Changes

*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.*

(FTA C4220.1F, VI, 3.i.(1)(b))

47) Time and Materials Contracts

*The Common Grant Rule for government 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.

(FTA C4220.1F, VI, 2.c.(2)(b))
50) Piggybacking

(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.