FTA Circular 4220.1F Changes

Revision 4 Changes dated March15, 2013

The cover page of this circular is changed to read as follows:

PURPOSE. This circular provides contracting guidance for recipients of Federal assistance awarded by the Federal Transit Administration (FTA) when using that Federal assistance to finance its procurements (third party contracts). This revision incorporates the new procurement provisions of the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, July 6, 2012, and includes the most current available guidance for the Federal public transportation program as of the date of publication.

1. Under authority of Chapter 53 of title 49, U.S.C. as amended by Moving Ahead for Progress in the 21st Century Act (MAP-21), Section 5325, Contract Requirements, Paragraph (k), make changes as indicated below:[[1]](#footnote-1)

**CHAPTER I**

**INTRODUCTION AND ROLE OF THE FEDERAL TRANSIT ADMINISTRATION**

Chapter I, Section 2 is changed to read as follows:

2. AUTHORIZING LEGISLATION. Most Federal transit laws are codified at 49 U.S.C. Chapter 53. Authorizing legislation is substantive legislation enacted by Congress that establishes or continues the legal operation of a Federal program or agency. Congress has generally amended FTA’s authorizing legislation every four to six years. FTA‘s most recent authorizing legislation, in effect for two fiscal years, is the Moving Ahead for Progress in the 21st Century Act (MAP-21) Pub. L. 112-141, July 6, 2012, however, authorizes FTA programs for two years, from the beginning of Federal Fiscal Year 2013 through the end of Federal Fiscal Year 2014. Revisions to this edition of the circular encompass the MAP-21 changes to Federal transit law and changes required by other laws that have become effective since FTA last issued this circular in 2003.

**CHAPTER II**

**APPLICABILITY**

1. APPLICABILITY OF THE CIRCULAR.

b. Project Types and Third Party Contracts.

(2) Operations Contracts.

(b) Operations Contracts Financed Entirely Without FTA Assistance. Line 15, insert the word “to” between “apply” and “a.”

**CHAPTER III**

**THE RECIPIENT’S RESPONSIBILITIES**

3. THIRD PARTY CONTRACTING CAPACITY

b. Adequate Third Party Contract Provisions.

*Because bids and offers can at times be ambiguous, FTA recommends that your procedures include a second paragraph or provisions similar to the following:*

“Because bids and offers can at times be ambiguous, in its solicitation documents, the Recipient reserves the right to request additional information before making an award. The Recipient also reserves the right to seek clarification from any bidder or offeror about any statement in its bid or proposal that the Recipient finds ambiguous.”

d. Record Keeping.

(2) Access to Records. Apart from the more limited record access provisions of the Common Grant Rules, 49 U.S.C. Section 5325(g) provides FTA and DOT officials, the U.S. Comptroller General, or any of their representatives, access to and the right to examine and inspect all records, documents, and papers, including contracts, related to any FTA project financed with Federal assistance authorized by 49 U.S.C. Chapter 53.

**CHAPTER IV**

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

1. FEDERAL REQUIREMENTS THAT AFFECT A RECIPIENT’S ACQUISITIONS.
2. Contractor Qualifications
3. Responsibility Requirements. Remove last sentence in its entirety.
4. Debarment and Suspension.

(b) General Services Administration (GSA) Excluded Parties List System. Even though the recipient may collect a debarment and suspension certification from the prospective third party contractor, or include a clause in the third party contract requiring disclosure, FTA strongly recommends that the recipient check the Excluded Parties List System (EPLS). Now a part of the System for Awards Management (SAM) the EPLS is an electronic, web-based system that identifies those parties excluded from receiving Federal contracts, certain subcontracts, and certain types of Federal financial and non-financial assistance and benefits. The EPLS keeps its user community aware of administrative and statutory exclusions across the entire government, and individuals barred from entering the United States. Go to [www.sam.gov](http://www.sam.gov) and the Extracts and Data Access area and click on the Public Data Access box to find the individual firm, individual or vessel you may be seeking.

(6) Socio-Economic Development.

(a) Disadvantaged Business Enterprises (DBEs). Section 1101(b) of MAP-21, 23 U.S.C. Section 101 note, extends the Federal statutory requirement that FTA make available at least 10 percent of its funding under that Act for contracts with small business concerns owned and controlled by socially and economically disadvantaged people. Each FTA recipient and subrecipient of FTA funding assists FTA in meeting this national goal. To receive FTA assistance, each FTA recipient and subrecipient of FTA funding must comply with applicable requirements of DOT regulations, “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,” 49 CFR Part 26. If the recipient is required to have a DBE program, the third party contracts that the recipient has included in its DBE program determine whether the recipient meets the DBE threshold for goal setting, and the goal if the threshold is met.

b. Administrative Restrictions on the Acquisition of Property and Services.

(3) Period of Performance.

(b) Federal Restrictions. Except for procurements of rolling stock and replacement part contracts, which are limited by law to five (5) or seven (7) years as discussed in subsection 2.e of this Chapter, the recipient‘s other third party contracts (such as property, services, leases, construction, revenue, and so forth) are not encumbered by Federal requirements restricting the maximum periods of performance. Nevertheless, the duration of the recipient‘s other contracts must be reasonable.

c. Socio-Economic Requirements for the Acquisition of Property and Services.

(1) Labor.

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

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

1. Intelligent Transportation Systems. Intelligent transportation system (ITS) property and services must comply with the National ITS Architecture and Standards to the extent required by 23 U.S.C. Section 517(d) and FTA Notice, “FTA National ITS Architecture Policy on Transit Projects,” 66 FR 1455 et seq., January 8, 2001, and later published policies or implementing directives FTA may issue. Consequently, third party contracts involving ITS are likely to require provisions to ensure compliance with Federal requirements.

e. Rolling Stock – Special Requirements.

(7) Bus Testing. Each third party contract to acquire a new bus model or a bus with significant alterations to an existing model must include provisions to assure compliance with applicable requirements of 49 U.S.C. Section 5318, as amended by MAP-21, and FTA regulations, “Bus Testing,” 49 CFR Part 665.

*Please substitute the following for paragraph 2.e(10)*

(10) Time Limits for Options on Rolling Stock Contracts. MAP-21 amended 49 U.S.C. Section 5325(e)(1) by adding subsections (A) and (B), retaining the five (5) year option for the procurement of buses, while extending the option for rail procurements to seven (7) years. Consequently:

(a) Buses. A recipient:

1 May enter into a multi-year contract to acquire buses or replacement parts, with an option not exceeding five(5) years to buy additional buses or replacement parts, 49 U.S.C. Section 5325(e)(1)(A), but

2 May not exercise the option to acquire buses or replacement parts later than five (5) years after the date of its original contract.

(b) Rail. A recipient:

1 May enter into a multi-year contract to acquire railcars or replacement parts, with an option not exceeding five(5) years to buy additional railcars or replacement parts, 49 U.S.C. Section 5325(e)(1)(B), but

2 May not exercise the option to acquire railcars or replacement parts later than seven (7) years after the date of its original contract.

FTA interprets these five and seven-year periods 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 or seventh year, as applicable. 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 the applicable five or seven-year period. This does not mean the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. Instead it means only that FTA limits a contract to purchasing no more than the recipient‘s material requirements for rolling stock or replacement parts for five or seven years based on the effective date of the contract.

**CHAPTER V**

**SOURCES**

4. STATE OR LOCAL GOVERNMENT PURCHASING SCHEDULES OR PURCHASING CONTRACTS. FTA uses the term “state or local government purchasing schedule” to mean an arrangement that a State or local government has established with several or many vendors in which those vendors agree to provide essentially an option to the State or local government, and its subordinate government entities, to acquire specific property or services in the future at established prices. These arrangements are somewhat similar to the General Services Administration‘s (GSA) Cooperative Purchasing Program available for Federal Government use. If the State or local government wishes to permit others to use its schedules, the State or local government might seek the agreement of the vendor to provide the listed property or services to others with access to the schedules, or it may permit the vendor to determine whether or not it wishes to do so. CAUTION: The term “state of local government purchasing schedule” does not include intergovernmental purchasing schedules to be the type of State or local intergovernmental agreement.

a. Use.

(1) Use Permitted. FTA’s policies are as follows:

(a) General. The Common Grant Rule for governmental recipients encourages recipients and subrecipients to enter into State and local intergovernmental agreements for procurements of property or services, and

(b) State or Local Government Permission Required. If so permitted by State or local authorities, a non-governmental recipient may also use State and local sources of property and services. This is because 49 C.F.R. § 18.36(a) permits States to use their own policies and procedures they use for their own purchases, not because those schedules are “State intergovernmental agreements,” and

b. Use Restricted. Although the Common Grant Rule for governmental recipients, 49 C.F.R. § 18.36(b)(5), provides that “grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurements of common goods and services”:

(1) Prohibited. FTA does not authorize grantees to consider intergovernmental purchasing schedules to be the type of State or local intergovernmental agreement to which that Common Grant Rule is referring, but

(2) Permitted. FTA recognizes joint purchases to be the only type of intergovernmental agreement suitable for use by its grantees and subgrantees.

**CHAPTER VI**

**PROCEDURAL GUIDANCE FOR OPEN MARKET PROCUREMENTS**

1. METHODS OF PROCUREMENT.

i. Other Than Full and Open Competition. Normally, the recipient must provide for full and open competition when soliciting bids or proposals. The Common Grant Rule for governmental recipients, however, acknowledges that under certain circumstances, a recipient may conduct procurements without providing for full and open competition.

(1) When Appropriate. A recipient may use noncompetitive proposals only when the procurement is inappropriate for small purchase procedures, sealed bids, or competitive proposals and at least one of the following circumstances are present:

\* \* \* \* \*

(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 Team, Consortium, Joint Venture, Partnership. With some exceptions, when FTA awards a grant agreement or enters into a cooperative agreement with a team, consortium, joint venture, or partnership, or provides FTA assistance for a research project in which FTA has approved the participation of a particular firm or combination of firms in the project work, the grant agreement or cooperative agreement constitutes approval of those arrangements. In such cases, FTA expects the recipient to use competition, as feasible, to select other participants in the project. It can sometimes be difficult to determine whether a bidder or offeror is submitting its bid or offer as a team or other group with committed parties. The Recipient should clarify with the bidder or offeror how other entities included in its bid or offer are to be treated.

5. ADJUSTMENTS TO PROJECT COSTS. MAP-21 amended 49 U.S.C. Section 5309(l) to permit FTA to approve an adjustment of the final net capital project cost of a new fixed guideway capital project or core capacity improvement project to include the cost of eligible activities not included in the original project if FTA determines that the original project has been completed at a cost that is significantly below the original estimate.

2. Moving Ahead for Progress in the 21st Century Act (MAP 21), Pub. L. 112-141, July 6, 2012,

*b. Add the following references:*

* Arms Export Control Act, as amended, 22 U.S.C. Sections 2751 *et seq*.
* Trading with the Enemy Act, 50 U.S.C. app. Sections 1 *et seq*.
* International Emergency Economic Powers Act, as amended, 50 U.S.C. Sections 1701 *et seq*.
* Export Administration Act of 1979, as amended, 50 U.S.C. app. Sections 2401 *et seq.*
* U.S. Department of Commerce, “Export Administration Regulations,” 15 C.F.R. Parts 730 *et seq*.
* U.S. Department of State regulations, “International Traffic in Arms Regulations,” (ITAR), 22 C.F.R. Subchapter M.
* U.S. Department of Treasury, regulations “Office of Foreign Assets Control,” [OFAC] 31 C.F.R. Chapter V.
* FTA Circular 4220.1F, “Third Party Contracting Guidance,” November 1, 2008, as revised.
1. The horizontal line indicates new material. [↑](#footnote-ref-1)