



U.S. Department
of Transportation
**Federal Transit
Administration**

Office of Chief Counsel

1200 New Jersey Avenue S.E.
Washington DC 20590

JUL - 8 2013

Mr. Joel S. Abraman
Director of Government Relations
New Flyer of America, Inc.
116 Conrad Drive
New Haven, CT 06515

Dear Mr. Abraman:

I write in response to your e-mail dated April 8, 2013, and your subsequent meeting with my Acting Assistant Chief Counsel Jayme Blakesley, in which you requested a formal opinion regarding whether Federal Transit Administration (FTA) funds may be used to purchase New Flyer buses through the State of Minnesota's Cooperative Purchasing Venture (CPV), Release No. B-347(5), Contract No. 56191 (Minnesota CPV Contract).

Your request for an opinion is timely. Following a March 2013 decision by FTA to disallow the use of three large-quantity bus contracts by entities that are not parties to those agreements, I learned that some transit agencies are procuring buses through the Minnesota CPV Contract instead. In light of this information, I initiated a review of the Minnesota CPV Contract. Your letter followed shortly thereafter.

Based on our review of the large-quantity bus contracts and the Minnesota CPV Contract, it appears that to varying degrees many FTA grantees prefer to procure buses through such methods as joint procurements, the purchase of options from an existing contract (piggybacking), or the use of State schedules, rather than stand-alone procurements.

Unfortunately, FTA's reviews indicate that grantees are misusing these preferred methods in many circumstances, including the Minnesota CPV Contract. Accordingly, I write to provide specific guidance on the ability of FTA grantees to use the Minnesota CPV Contract to purchase buses, as well as general guidance on FTA's procurement rules as they relate to State schedules, joint procurements and piggybacking.

Background

Over the past several years FTA has reviewed several large-quantity bus contracts to determine whether they comply with FTA's procurement rules. Upon review, FTA concluded that several of these contracts violate the requirement for full and open competition.

Most recently, in March of this year my office completed a review of several large-quantity contracts between a bus manufacturer and three transit agencies. Several dozen transit agencies, many of which were not parties to the contracts, used these contracts to purchase buses. After reviewing the contracts and the known purchases, FTA concluded that, to varying degrees, the contracts failed to comply with federal procurement rules. In all of the contracts, the parties contracted for quantities in excess of their current and reasonably expected needs, and with the apparent purpose of assigning contract rights to others at a later date, as was evidenced by numerous “piggyback” purchases. Two of the three contracts were improperly styled as joint procurements, as many of the transit agencies that purchased vehicles were not, in fact, parties to the contract. Following the review, FTA disallowed the use of these contracts by all but the original and actual parties, and only for the amount specified by each party in the contract.

After FTA concluded these reviews, on March 8, 2013, FTA Administrator Peter Rogoff issued a “Dear Colleague” letter on the subject of large-quantity bus contracts. The Dear Colleague letter noted the widespread errors in how FTA recipients were conducting joint procurements and assigning options to others to purchase buses, and cautioned FTA grantees to “carefully review [FTA] requirements before purchasing buses through a joint procurement or an assignment of options.” It did not directly address state and local purchasing agreements like the Minnesota CPV Contract.

In 2011, FTA concluded that its grantees could not purchase assets with FTA assistance from certain buying cooperatives like those developed and marketed by the National Joint Powers Alliance (NJPA) and the Houston-Galveston Area Council (HGAC). The decision was based on the absence of State participation, and the fact that neither agreement identified a finite number of vehicles that was based on the parties’ reasonably anticipated needs. Thus, FTA rejected the NJPA and HGAC cooperatives as lacking full and open competition.

Following FTA’s decision to disallow purchases from the NJPA cooperative, New Flyer asked FTA Assistant Chief Counsel Kerry Miller whether FTA grantees could purchase buses through the Minnesota CPV. Mr. Miller reviewed Minnesota’s Transit Bus contract number B-347(5) for calendar year 2011. By e-mail dated September 13, 2011, Mr. Miller concluded that “the inherent limitations associated with non-governmental buying cooperatives such as NJPA and HGAC are not present in direct state schedule procurements such as the Minnesota contract,” and that “FTA has no objection to grantees purchasing buses using the Minnesota contract.”

Now, in preparing a response to your question and in the course of FTA’s most recent review of the Minnesota CPV, I have learned of purchases made through the Minnesota CPV Contract by transit agencies that only recently joined the CPV and are located outside the State of Minnesota. Some of these transit agencies applied to the Minnesota CPV only after FTA disallowed purchases through other non-competitive agreements.

FTA Procurement Rules

Recipients of FTA financial assistance are required by both 49 U.S.C. § 5325(a) and the common grant rule (49 C.F.R. § 18.36(c)) to use full and open competition when making purchases. Usually a grantee fulfills this requirement by one of three procurement methods: (1) conducting a stand-alone procurement for a finite number of vehicles; (2) jointly procuring a finite number of vehicles with one or more grantees; or (3) accepting the assignment of another grantee's contractual right to purchase a finite number of vehicles (aka "piggybacking"). One common requirement in all methods is that the number of vehicles to be purchased is based on the grantee's actual needs and is advertised with the solicitation. Thus, all respondents to the solicitation can provide a bid price based on the number of vehicles to be purchased as well as other salient factors contained in the solicitation. When the contract is formed, the grantee commits to purchasing vehicles at the agreed upon price and the vendor commits to furnishing the vehicles at that price. A fourth procurement method—(4) State purchasing schedules—is available to States only.

1. Stand-alone procurements

All stand-alone procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of 49 C.F.R. § 18.36. Grantees and subgrantees will use their own procurement procedures, which reflect applicable State and local laws and regulations provided that the procurements conform to applicable Federal law and the standards identified in the common grant rule. FTA's Third Party Procurement Guidance, Circular 4220.1F, elaborates upon the common grant rule's broad requirements.

2. Joint procurements

A joint procurement is "a method of contracting in which two or more purchasers agree from the outset to use a single solicitation document and enter into a single contract with a vendor."¹ The parties to a joint procurement may be from more than one state. FTA encourages the use of joint procurements when combining requirements into a larger order can result in a more advantageous contract for the participating recipients. FTA's current guidance does not require the needs of each joint procurement participant to be separately written into the contract. And, as with regular procurements, a joint procurement may take the form of an indefinite delivery/indefinite quantity contract (ID/IQ) if it contains "total minimum and total maximum" terms.²

Participation in a joint procurement does not relieve any recipient of the responsibilities it would have if it were procuring goods or services by itself.³ Recipients that participate in a joint procurement must adhere to all applicable federal requirements, including the prohibition against using federal money to procure unneeded items.

The Common Grant Rule requires that a recipient have procedures to "provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items,"⁴ including the

¹ C. 4220.1F, ch. V § 3.

² C. 4220.1F, ch. V §§ 3, 7(a)(2)(b)(1).

³ C. 4220.1F, ch. IV § 1(c)(1).

⁴ 49 C.F.R. § 18.36(b)(4).

acquisition of “quantities or options it does not intend to use or whose use is unlikely.”⁵ To prevent a recipient from purchasing unnecessary or duplicative items, a 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.”⁶ “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 the recipient entered into the contract.”⁷

A joint procurement may not be used as an opportunity to improperly expand the scope of a federally assisted contract. “A contract has been improperly expanded when excess capacity has been added primarily to permit assignment of those contract rights to another entity.”⁸

3. Assignment of options (“Piggybacking”)

For reasons of economy, FTA permits the assignment of unneeded contract rights, sometimes called “piggybacking.” FTA discourages the assignment of another recipient’s contract rights as a substitute for a stand-alone procurement.⁹ Assignments are intended to be used only when a recipient has “inadvertently acquired contract rights in excess of its needs”¹⁰ due to “changed circumstances or honest mistakes.”¹¹

Intentionally procuring excessive quantities using federal money is a violation of the Common Grant Rule described above. Furthermore, to the extent that an improper assignment of contract rights enables an assignee to avoid otherwise required procurement procedures, it also undermines the Common Grant Rule’s general purpose of full and open competition in federally assisted procurements.

4. State schedules

For reasons of federalism, States are accorded substantial deference under the common grant rule at 49 C.F.R. § 18.36(a) in the policies and procedures used in state procurements. By this authority, a State may follow the same policies and procedures it uses for procurements from its non-Federal funds, so long as it ensures that every purchase order or similar contract includes any clauses required by Federal law. Many States use this authority to create purchasing schedules by which the State and its subsidiaries may acquire goods.

Principles of federalism limit State powers, too. FTA grantees located outside of a State’s borders are not permitted to purchase from that State’s schedule.¹² Joint procurements (and in limited circumstances piggybacking) are the only forms of FTA-funded contracts permitted among grantees from different states.

⁵ C. 4220.1F, ch. IV § 1(b).

⁶ C. 4220.1F ch. IV § 1(b)(2).

⁷ C. 4220.1F, ch. IV § 1(b).

⁸ C. 4220.1F, ch. V § 7(b)(1).

⁹ C. 4220.1F, ch. V § 7(a)(2)(a).

¹⁰ C. 4220.1F, ch. V § 7(a)(2).

¹¹ C. 4220.1F, ch. IV § 1(b)(2)(b).

¹² C. 4220.1F, ch. V § 4.

The Minnesota Contract

Through its Cooperative Purchasing Venture (CPV)¹³ the State of Minnesota has entered into a number of contracts that provide eligible CPV members and state agencies the ability to order goods and services without having to solicit them on their own. This feature is openly advertised on the State's web site.¹⁴

One such contract, Contract Release B-347(5) is for "Accessible Small and Mid-Sized Body-on-Chassis Buses and Purpose Build Medium Duty Accessible Buses."¹⁵ Renewed annually, the duration of the current Minnesota CPV Contract is from January 1, 2013, through December 31, 2013. The version of the Minnesota CPV Contract available to CPV members does not indicate a minimum or maximum number of vehicles available for purchase; but the version signed by the State and New Flyer requires CPV members to purchase at least one New Flyer bus, with the option to purchase as many as 650 of each of three New Flyer model buses during calendar year 2013. A representative from the State of Minnesota indicated that the maximum number of 650 per model is derived from "historical data," but did not provide any data to FTA when requested.

To purchase a bus through the CPV, a transit agency need only submit a simple, one-third page application to the State of Minnesota, receive a membership permit number, and send a purchase order to the vendor listed in the contract.

CPV members include transit agencies in many states. According to information provided by New Flyer, at least thirteen transit agencies located outside the State of Minnesota have CPV orders pending.

¹³ The Cooperative Purchasing Venture is a program administered by the Minnesota State Department of Administration, Minnesota Materials Management Division. Through the CPV, the State enters into purchasing agreements from which members of the CPV can issue purchase orders without the need for additional competition. According to Minnesota State law, the entities eligible to participate in the CPV include governmental units within the State of Minnesota, as that term is defined at MS § 16C.03, and entities in other states that are eligible for their state's cooperative purchasing program, among others.

¹⁴ The web site is at: <http://www.mmd.admin.state.mn.us/>.

¹⁵ The contract lists the following transit bus providers:

1. Champion Bus, Inc. – Contract No. 56184.
2. Coach & Equipment Bus Sales – Contract No. 56185.
3. Creative Bus Sales – Contract No. 56186.
4. ElDorado-California – Contract No. 56187.
5. ElDorado-Kansas – Contract No. 56188.
6. Gillig LLC – Contract No. 56189.
7. Hoglund Bus Company – Contract No. 56190.
8. New Flyer of America, Inc. – Contract no. 56191.
9. North Central Bus Sales – contract No. 56192.
10. Nova Bus – Contract No. 56193.
11. Proterra, Inc. – Contract No. 56194.

Discussion

The purpose of this letter is to elaborate on FTA's March 8, 2013 Dear Colleague Letter by providing guidance on the use of State schedules like the Minnesota CPV Contract by FTA recipients, and to define the universe of FTA grantees eligible to purchase buses from New Flyer through the CPV.

The Minnesota CPV Contract is not a stand-alone procurement or a joint procurement within the meaning of Federal law as discussed above, and the State has not assigned options to entities outside the CPV.¹⁶ The contract is an agreement unique to the State of Minnesota.

As explained above, FTA grants substantial deference to State procurement practices. Thus, unlike stand-alone or joint procurement methods that must be restricted to a defined minimum and maximum, State schedules may be open-ended if such a structure is permitted by State law. However, although FTA permits intrastate entities to purchase from a State contract, State schedules may not be used nationally by out-of-state FTA grantees. State schedules are not substitutes for the GSA Schedule or other federally approved contracting methods. In other words, the use of the Minnesota CPV Contract should be limited to entities located within the State of Minnesota.

When FTA Assistant Chief Counsel Kerry Miller was asked to review the Minnesota CPV Contract in 2011, he distinguished it from the buying cooperatives such as NJPA and HGAC, correctly noting that States are accorded substantial deference under the common grant rule at 49 C.F.R. § 18.36(a) in the policies and procedures used in State procurements. Neither NJPA nor HGAC are state entities or even FTA grantees. Also, the 2011 Minnesota CVO Contract reviewed by Mr. Miller contained both a maximum and a minimum number of vehicles to be ordered, and allowed for full and open competition. Thus, it was a joint Indefinite Delivery-Indefinite Quantity contract that was supported by adequate consideration.

In practice, the Minnesota CPV Contract has not functioned in the manner described by Mr. Miller. Although minimum and maximum quantities are listed in the signed New Flyer contract, these quantities are not identified in the main Minnesota CPV Contract. The State of Minnesota does not monitor the number of vehicles ordered in real time, and it cannot explain to FTA how it derived the maximum of 650 for each model bus sold by New Flyer. All of the orders currently pending with New Flyer are with transit agencies located outside the State of Minnesota. Thus, the CPV Contract is not functioning as a valid State schedule with respect to out-of-state CPV members or as a valid joint procurement.

Conclusion

In conclusion, I find that the use of the Minnesota CPV Contract by out-of-state grantees is impermissible. FTA grantees located outside the State of Minnesota do not enjoy the deference afforded the State by 49 C.F.R. § 18.36(a) and may not continue to use the Minnesota CPV Contract to purchase buses or other goods and services with Federal funds.

¹⁶ By its express terms, the Minnesota CPV Contract is an "Intergovernmental Procurement." As such, "an assignability clause for piggybacking purposes is not required."

Letter from Dorval R. Carter, Jr. to Joel S. Abramam

However, in light of its good-faith efforts to comply with FTA requirements, as evidenced by the guidance it sought from FTA's Office of Chief Counsel in 2011 and 2013, FTA will honor all past and current purchase orders made with New Flyer through the Minnesota CPV Contract. Subsequent orders will not be permitted by FTA grantees located outside the State of Minnesota.

FTA grantees located within the state of Minnesota may continue to purchase goods and services through CPV contracts.

If you would like to discuss this matter further, please contact Acting Assistant Chief Counsel Jayme Blakesley at (202) 366-0304 or jayme.blakesley@dot.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Dorval R. Carter, Jr.", written in a cursive style.

Dorval R. Carter, Jr.
Chief Counsel