

FTA

FEDERAL TRANSIT ADMINISTRATION

Procurement System Review Guide Fiscal Year 2019



U.S. Department of Transportation
Federal Transit Administration

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P1. Does the recipient have written procurement policies and procedures that include required state, local, and Federal provisions?

BASIC REQUIREMENT

All recipients must have written procurement policies and procedures.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

All recipients must have written procurement policies and procedures.

Policies and procedures must explain how the recipient will ensure compliance with the standards and requirements identified in 2 CFR 200.318 (General Procurement Standards) through 200.326 (Contract Provisions) including:

General procurement standards

- **Contract oversight**: Recipients must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
- **Standards of conduct**: Recipients must maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent must participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity. If the recipient has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the recipient must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the recipient is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.
- **Unnecessary or duplicative items**: The recipient's procedures must avoid the acquisition of unnecessary or duplicative items.
- **Award to responsible contractors**: The recipient must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.
- **Procurement history**: The recipient must maintain records sufficient to detail the history of the procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.
- **Time and Material contracts**: The recipient may use time and material type contracts only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Since this contract type generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the recipient awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

- Contract dispute resolution: The recipient alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims.

Competition

- Full and open competition: All procurement transactions must be conducted in a manner that provides full and open competition. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:
 - Placing unreasonable requirements on firms in order for them to qualify to do business;
 - Requiring unnecessary experience and excessive bonding;
 - Noncompetitive pricing practices between firms or between affiliated companies;
 - Noncompetitive contracts to consultants that are on retainer contracts;
 - Organizational conflicts of interest;
 - Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and
 - Any arbitrary action in the procurement process.
- Geographic Preference: The recipient must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in 2 CFR Part 200 preempts state licensing laws. When contracting for A&E services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.
- Procedures for procurement transactions: The recipient must have written procedures for procurement transactions. These procedures must ensure that all solicitations:
 - Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which 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, must 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 equivalent" description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offerors must be clearly stated; and
 - Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.
- Prequalification: The recipient must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources

to ensure maximum full and open competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period.

Methods of procurement

- Allowed methods of procurement: Recipients must use one of the following methods of procurement: (1) micro-purchases; (2) small purchase procedures; (3) sealed bid; (4) competitive proposals; (5) non-competitive proposals

DBE participation

- To the extent authorized by applicable federal laws, regulations, or requirements, the Recipient agrees to facilitate, and assures that each Third Party Participant will facilitate, participation by small business concerns owned and controlled by socially and economically disadvantaged individuals, also referred to as "Disadvantaged Business Enterprises" (DBE).

Contract cost and price

- Cost or price analysis: Recipients must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.
- Profit: Recipients must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where a cost analysis is performed. To establish a fair and reasonable profit, consideration must 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.
- Estimated costs: Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the recipient under 2 CFR Part 200 Subpart E—Cost Principles. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.
- Cost plus: The cost plus a percentage of cost and percentage of construction cost methods of contracting may not be used.

Bonding requirements

- Bonding requirements: For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, FTA may accept the bonding policy and requirements of the non-Federal entity provided that FTA has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be applied as follows:
 - A bid guarantee from each bidder equivalent to five percent of the 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 as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.
 - A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.
 - A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as

required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

Contract provisions

- Contract provisions: Recipient’s contracts must contain the applicable provisions described in Appendix II to 2 CFR Part 200—Contract Provisions for non-Federal Entity Contracts Under Federal Awards, and any other provisions required under Federal law.

Other requirements

- Exclusionary or discriminatory specification: Federal funds may not be used to support a procurement that uses an exclusionary or discriminatory specification.
- Buy America: Recipient’s procurements must comply with Buy America requirements in 49 U.S.C 5323(j) and 49 CFR Parts 661 and 663.

INDICATORS OF COMPLIANCE

- Does the recipient have written procurement policies and procedures? (PSR-6)*
- Does the recipient have procurement policies and procedures that conform, and are not contrary, to 2 CFR 200.318 (General Procurement Standards) through 200.326 (Contract Provisions?) (PSR-6)*

INSTRUCTIONS FOR REVIEWER

Request and review the recipient’s procurement policies and procedures. Through review of the policies and procedures, interviews with recipient personnel, and examination of procurements selected, evaluate if the recipient can demonstrate compliance with the following requirements of 2 CFR Part 200. Additionally, review procurement procedures to determine if anything in their policies and procedures is contrary to the requirements below.

Requirements	Addressed? (Y/N)	Page Reference	Comments/Notes
Does the recipient have written procedures for procurement transactions that ensure that all procurements <ul style="list-style-type: none"> • incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured, and • identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals? 			
General Procurement Standards			
Maintenance of contract oversight (Contract Administration System)			
Maintenance of written standards of conduct			
Avoidance of unnecessary or duplicative items			
Contracting with responsible contractors			

Requirements	Addressed? (Y/N)	Page Reference	Comments/Notes
Maintenance of written procurement history			
Use of time and material contracts			
Procedures for contract dispute resolution			
Competition			
Promotion of full and open competition			
Prohibition on geographic preference			
Procedures for procurement transactions			
Use and maintenance of prequalification lists, if permitted			
Methods of procurement <i>(Recipient is not required to use a listed method if such method is prohibited by state or local law)</i>			
Allowed methods of procurement:			
(1) micro-purchases;			
(2) small purchases;			
(3) sealed bid;			
(4) competitive proposals;			
(5) non-competitive proposals;			
DBE participation			
Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms			
Cost and price			
Cost or price analysis			
Negotiation of contractor profit			
Use of estimated costs			
Prohibition of cost plus contracts			
Contract provisions			
Inclusion of required contract provisions			
Bonding requirements			
Bonding requirements for construction or facility improvement contracts			
Other requirements			
Prohibition of exclusionary or discriminatory specifications			
Compliance with Buy America			

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not have written procurement policies and procedures.

DEFICIENCY CODE: P1-1: Procurement policies and procedures not evident

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office procurement policies that include all required provisions.

The recipient is deficient if it does not have written procedures for procurement transactions to ensure that all procurements 1) incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured, and 2) identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

DEFICIENCY CODE: P1-2: Procurement transaction procedures missing or incomplete

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office procurement transaction procedures that include all required provisions.

The recipient is deficient if procurement policies and procedures contain provisions that are contrary to the provisions outlined above or the recipient cannot demonstrate how it ensures compliance with the provisions.

DEFICIENCY CODE P1-3: Procurement policies and procedures not current/complete

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office revised procurement policies that include all required provisions and identify procedures that ensure compliance with 2 CFR 200.318 through 200.326.

GOVERNING DIRECTIVES

2 CFR 200.317 Procurements by states

"When procuring property and services under a Federal award, a state must follow the same policies and procedures it uses for procurements from its non-Federal funds. The state will comply with §200.322 Procurement of recovered materials and ensure that every purchase order or other contract includes any clauses required by section §200.326 Contract provisions. All other non-Federal entities, including subrecipients of a state, will follow §§ 200.318 General procurement standards through 200.326 Contract provisions."

2 CFR 200.318 General procurement standards

"(a) The non-Federal entity must use its own documented 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 this section.

(b) Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(c)(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the performance of its employees engaged in the selection, award, and administration of contracts. No employee, officer, or agent must participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity must neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for

disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

(2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

(d) The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(e) To foster greater economy and efficiency, and in accordance with efforts to promote cost-effective use of shared services across the Federal government, the non-Federal entity is encouraged to enter into state and local intergovernmental agreements or inter-entity agreements where appropriate for procurement or use of common or shared goods and services.

(f) The non-Federal entity is encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(g) The non-Federal entity is encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions. Value engineering is a systematic and creative analysis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(h) The non-Federal entity must award contracts only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(i) The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(j)(1) The non-Federal entity may use time and material type contracts only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time-and-materials type contract means a contract whose cost to a non-Federal entity is the sum of:

- (i) The actual cost of materials; and
- (ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit.

(2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

(k) The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its

contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction."

2 CFR 200.319 Competition

"(a) All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, and invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to:

- (1) Placing unreasonable requirements on firms in order for them to qualify to do business;
- (2) Requiring unnecessary experience and excessive bonding;
- (3) Noncompetitive pricing practices between firms or between affiliated companies;
- (4) Noncompetitive contracts to consultants that are on retainer contracts;
- (5) Organizational conflicts of interest;
- (6) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; and
- (7) Any arbitrary action in the procurement process.

(b) The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for A&E services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(c) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

- (1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which 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, must 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 equivalent" description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offerors must be clearly stated; and
- (2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(d) The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period."

2 CFR 200.320 Methods of procurement to be followed.

"The non-Federal entity must use one of the following methods of procurement.

(a) Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (\$200.67 Micro-purchase). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable.

(b) Procurement by small purchase procedures. Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.

(c) Procurement by sealed bids (formal advertising). Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply.

(1) In order for sealed bidding to be feasible, the following conditions should be present:

- (i) A complete, adequate, and realistic specification or purchase description is available;
- (ii) Two or more responsible bidders are willing and able to compete effectively for the business; and
- (iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If sealed bids are used, the following requirements apply:

- (i) The invitation for bids will be publicly advertised and bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids;
- (ii) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;
- (iii) All bids will be publicly opened at the time and place prescribed in the invitation for bids;
- (iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and
- (v) Any or all bids may be rejected if there is a sound documented reason.

(d) Procurement by competitive proposals. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

- (1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical;
- (2) Proposals must be solicited from an adequate number of qualified sources;

(3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients;

(4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(5) The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(f) Procurement by noncompetitive proposals. Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply:

(1) The item is available only from a single source;

(2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or

(4) After solicitation of a number of sources, competition is determined inadequate.”

2 CFR 200.321 Contracting with small and minority businesses, women's business enterprises, and labor surplus area firms

“(a) The non-Federal entity must take all necessary affirmative steps to assure that minority businesses, women's business enterprises, and labor surplus area firms are used when possible.

(b) Affirmative steps must include:

(1) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(2) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority businesses, and women's business enterprises;

(4) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority businesses, and women's business enterprises;

(5) Using the services and assistance, as appropriate, of such organizations as the Small Business Administration and the Minority Business Development Agency of the Department of Commerce; and

(6) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (1) through (5) of this section.”

2 CFR 200.322 Procurement of recovered materials

"A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired by the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines."

2 CFR 200.323 Contract cost and price

"(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration must 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.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under Subpart E—Cost Principles of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used."

2 CFR 200.325 Bonding requirements

"For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows:

(a) A bid guarantee from each bidder equivalent to five percent of the 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 as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

(b) A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(c) A payment bond on the part of the contractor for 100 percent of the contract price. A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract."

2 CFR 200.326 Contract provisions

"The non-Federal entity's contracts must contain the applicable provisions described in Appendix II to 2 CFR Part 200—Contract Provisions for non-Federal Entity Contracts Under Federal Awards."

Additional Guidance:
FTA C 4220.1F, III, 3.a.

Each recipient and subrecipient may use its own procurement procedures, provided that its procurements conform to applicable Federal law and regulations.

P2. Does the recipient maintain written standards of conduct for its representatives engaged in the selection, award, and administration of FTA-funded contracts?

BASIC REQUIREMENT

The recipient must have and implement written standards of conduct for those involved in its procurement and contract administration actions.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Recipients are required to maintain written standards of conduct governing the performance of their employees engaged in the award and administration of contracts supported by Federal funds. The standards must:

- Preclude any 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 from participating in the election, award, or administration of a contract supported with FTA assistance. Such a conflict would arise when any of those previously listed has a financial or other interest in a firm considered for a contract.
- Include information that the recipient's officers, employees, or agents may neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements. The recipient may set minimum rules when the financial interest is not substantial or the gift is an unsolicited item of nominal value.
- Provide for disciplinary action for violation of such standards by the recipient's officers, employees, or agents, or by contractors or subrecipients or their agents to the extent permitted by state or local law or regulations.

If the recipient has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the recipient must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.

INDICATORS OF COMPLIANCE

- a. *Does the recipient have written standards of conduct? (PSR-1)*
- b. *Do the recipient's standards of conduct include all required elements? (PSR-1)*
- c. *Does it appear that any person covered by the standards of conduct violated the recipient's standards during the last two years? (PSR-1)*

INSTRUCTIONS FOR REVIEWER

Request and review the recipient's standards of conduct for procurement-related actions. These may be contained in the recipient's policies and procedures, in a separate document(s), or different documents for employees and governing board members. Please note that state and/or local laws may have requirements that are more restrictive than the Federal requirements below. Recipients must adhere to those state and local requirements.

Review standards of conduct to ensure that, at a minimum, they:

- Preclude any 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 from participating in the selection, award, or administration of a contract supported with FTA assistance.
- Include information that the recipient's officers, employees, or agents may neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to sub-agreements.
- Provide for disciplinary action for conflict of interest violations by the recipient's officers, employees, or agents, or by contractors or subrecipients or their agents to the extent permitted by state or local law or regulations.
- If the recipient has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, verify the written standards of conduct cover organizational conflicts of interest.

Prior to the site visit, research procurement actions of the recipient on the internet and request any relevant information from the regional office and FTA's Chief Counsel's Office relating to violations of the standards of conduct. Record any issues regarding standards of conduct that the region has noted in the recipient's OAT. Onsite, during interviews with the CEO and the Head of Procurement, follow up on any issues found during the pre-site review and inquire if there have been any covered employees that violated any part of the written standards of conduct during the last two years. Obtain documentation of the disciplinary action taken in each case.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not have written standards of conduct.

DEFICIENCY CODE P2-1: No written standards of conduct

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office written standards of conduct that include all required provisions.

The recipient is deficient if its written standards of conduct do not contain required elements.

DEFICIENCY CODE P2-2: Incomplete standards of conduct

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office written standards of conduct that include all missing provisions.

The recipient is deficient if there have been violations to its written standards of conduct and no disciplinary action was taken.

DEFICIENCY CODE P2-3: Lack of enforcement of written standards of conduct

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office procedures for ensuring that disciplinary action is taken when there is a violation of the written standards of conduct.

GOVERNING DIRECTIVES

2 CFR 200.318 (c)(1) & (2)

“(1) The non-Federal entity must maintain written standards of conduct covering conflicts of interest and governing the actions of its employees engaged in the selection, award and administration of contracts. No employee, officer, or agent may participate in the selection, award, or administration of a contract supported by a Federal award if he or she has a real or apparent conflict of interest. Such a conflict of

interest would arise when the employee, officer, or agent, any member of his or her immediate family, his or her partner, or an organization which employs or is about to employ any of the parties indicated herein, has a financial or other interest in or a tangible personal benefit from a firm considered for a contract. The officers, employees, and agents of the non-Federal entity may neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or parties to subcontracts. However, non-Federal entities may set standards for situations in which the financial interest is not substantial or the gift is an unsolicited item of nominal value. The standards of conduct must provide for disciplinary actions to be applied for violations of such standards by officers, employees, or agents of the non-Federal entity.

(2) If the non-Federal entity has a parent, affiliate, or subsidiary organization that is not a state, local government, or Indian tribe, the non-Federal entity must also maintain written standards of conduct covering organizational conflicts of interest. Organizational conflicts of interest means that because of relationships with a parent company, affiliate, or subsidiary organization, the non-Federal entity is unable or appears to be unable to be impartial in conducting a procurement action involving a related organization.”

FTA Master Agreement (23), Section 4

“Standards of Conduct. At a minimum, the Recipient agrees to, and assures that its Subrecipients will, establish and maintain written Standards of Conduct covering conflicts of interest that:

(1) Apply to the following individuals who have a present or potential financial interest, or other significant interest, such as a present or potential employment interest in the selection, award, or administration of a third party contract or subcontract:

(a) The Recipient or its Subrecipients’ officers, employees, board members, or agents engaged in the selection, award, or administration of any third party agreement,

(b) The immediate family members or partners of those listed above in section 4.a(1)(a) of this Master Agreement, and

(c) An entity or organization that employs or is about to employ any person that has a relationship with the Recipient or its Subrecipient listed above in sections 4.a(1)(a) and (b) of this Master Agreement;

(2) Prohibit those individuals listed above in section 4.a(1) from:

(a) Engaging in any activities involving the Recipient’s or any of its Subrecipients’ present or potential Third Party Participants at any tier, including selection, award, or administration of a third party agreement in which the individual has a present or potential financial or other significant interest, and

(b) Accepting a gratuity, favor, or anything of monetary value from a present or potential Third Party Participant in the Recipient’s Underlying Agreement, unless the gift is unsolicited and has an insubstantial financial or nominal intrinsic value; and

(3) Establish penalties, sanctions, or other disciplinary actions for violations, as permitted by state or local law or regulations, that apply to those individuals listed above in section 4.a(1) and the Recipient’s or Subrecipient’s Third Party Participants.

Additional Guidance:

FTA Circular. 4220.1F Chapter III

P3. Does the recipient have and follow written procurement protest procedures?

BASIC REQUIREMENT

The recipient must have and follow written protest procedures in compliance with all applicable Federal, state, and local laws and regulations.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Written Protest Procedures (PSR – 3)

Recipients must have written procedures that allow bidders or proposers to protest a procurement action. Notice of protest procedures must be available to all potential bidders or proposers, either by inclusion in the solicitation documents or available to the public. Protest procedures should allow for the filing of protests prior to receipt of bids or proposals, after receipt of bids or proposals, and prior to award of a contract.

FTA recipients are responsible for resolving all contractual and administrative issues arising out of their third party procurements, including source evaluation and selection, protests of awards, disputes, and claims using good administrative practices and sound business judgment.

INDICATORS OF COMPLIANCE

- a. *Does the recipient have written protest procedures? Are those procedures included in solicitations for bids or proposals and/or publicly available?*
- b. *Has the recipient received any procurement protests since the last Comprehensive Review?*
 - *If yes, did it follow its protest procedures?*
 - *If yes, does the number of protests received indicate potential issues with the recipient's procurement process?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, request and review the recipient's written protest procedures. Protest procedures may be contained in the recipient's policies and procedures or in a separate document. Confirm that protest procedures are available to bidders and the public.

Review milestone progress reports in TrAMS for protests noted. Onsite, ask the recipient for any bid protests received, granted, or denied. If there have been any protests during the review period, review related documentation to determine if the recipient followed its written protest procedures. Discuss the number and nature of protests with the regional office. If the recipient has received more than three protests over the past three years, determine if there are any trends that may indicate issues in other areas of the recipient's procurement processes.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not have written protest procedures.

DEFICIENCY CODE P3-1: No written protest procedures or procedures are not accessible to potential bidders.

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office with a copy of written protest procedures. If the procedures are not accessible to potential bidders or proposers, recipient must take action to make them available.

The recipient is deficient if it has written protest procedures and received protests, but did not follow its procedures.

DEFICIENCY CODE P3-2: Protest procedures not followed

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation of implemented procedures or documentation of the process that will be followed to ensure that its protest procedures are followed. If the number of protests appear to be high, the recipient must provide the regional office with details on the next protest received within 10 business days of receiving such protest.

GOVERNING DIRECTIVES

2 CFR §200.318(k)

“Section 200.318(k) provides that a recipient “alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the [recipient] of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the [recipient] unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.”

FTA Master Agreement (24), Section 16.w

Bid Protests. The Recipient agrees to provide FTA, as part of the annual or quarterly Milestone Progress Report, with a list of all bid protests and appeals for solicitations or contracts in excess of \$500,000. The Recipient also should be mindful of the requirement in Section 39, Disputes, that the Recipient must promptly notify the FTA Chief Counsel, or FTA Regional Counsel for the Region in which the Recipient is located, of significant current or prospective legal matters that may affect the Federal Government.

Guidance note regarding notifying FTA of Protests and Appeals to FTA

FTA's involvement in bid protests is limited. The Uniform Guidance, as adopted by DOT, no longer includes the language in 49 C.F.R. §18.36(b)(12) that provided for a direct appeal to FTA of a recipient's final decision on a bid protest. The Uniform Guidance provides that:

“The non-Federal entity alone must be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the non-Federal entity of any contractual responsibilities under its contracts. The Federal awarding agency will not substitute its judgment for that of the non-Federal entity unless the matter is primarily a Federal concern. Violations of law will be referred to the local, state, or Federal authority having proper jurisdiction.” – 2 C.F.R. § 200.318(k)

Thus, the FTA's role is limited to considering matters that are “primarily a Federal concern.” Accordingly, Section (1)(b)(2)(a) of Chapter VII of FTA Circular 4220.1F, which provides for direct appeals to FTA, is no longer applicable.

P4. Does the recipient make awards only to responsible contractors as described in its policies and procedures and in compliance with the requirements of 49 U.S.C. 5325(j)?

APPLICABILITY

All recipients

BASIC REQUIREMENT

The recipient must only contract with responsible firms.

EXPLANATION FOR RECIPIENT

Award to Responsible Contractors (PSR – 18)

49 U.S.C. Section 5325 (j) requires recipients to make FTA-assisted contract awards only to “responsible” contractors possessing the ability to successfully perform under the terms and conditions of a proposed procurement. Before making an award to a contractor, a recipient shall consider the integrity of the contractor; the contractor’s compliance with public policy; the contractor’s past performance; and the contractor’s financial and technical resources. Responsibility is determined by the recipient after receiving bids or proposals and before making contract award.

Factors that may be considered when making responsibility determinations include:

- Integrity and Ethics. Contractor has a satisfactory record of integrity and business ethics.
- Public Policy. Contractor is in compliance with the public policy.
- Administrative and Technical Capacity. Contractor has the necessary organization, experience, accounting, and operational controls, and technical skills, or the ability to obtain them.
- Financial Resources. Contractor has, or can obtain, sufficient financial resources to perform the contract.
- Performance Record. Contractor is able to provide a satisfactory current and past performance record.

Recipients also are required to ensure, to the best of their knowledge and belief, that none of its principals, affiliates, third party contractors, and subcontractors is suspended, debarred, ineligible, or voluntarily excluded from participation in federally assisted transactions or procurements. For each third party contract expected to equal or exceed \$25,000, recipients must verify that the bidder is not excluded or disqualified by:

- Checking System for Award Management (SAM) Exclusions (at SAM.gov); or
- Collecting a certification; or
- Adding a clause or condition to the covered transaction

FTA notes that affirmative actions, such as checking SAM.gov or including a requirement for a signed certification, are preferred. A best practice is for the recipient to print the screen with the results of the search to include in the award or procurement file, or to have a checklist noting when the SAM was reviewed.

2 CFR Part 180 defines a principal as an officer, director, owner, partner, principal investigator, or other person with management or supervisory responsibilities related to a covered transaction. The recipient should have a similar review process for its principals as it does for its contractors and subrecipients regarding suspension and debarment.

In the event that a recipient becomes aware, after the award of a contract, that an excluded party is participating in a covered transaction, it must promptly inform the FTA regional office in writing of this information. The recipient may continue any covered transaction in existence at the time a party was debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded. The recipient is not required to continue the transaction and may consider termination. However, the recipient may not renew or extend the covered transaction (other than through a fully documented no-cost time extension) with the excluded party.

INDICATORS OF COMPLIANCE

- a. *Do procurement files contain documentation that the recipient made written responsibility determinations prior to award, considering all required information?*
- b. *Prior to award, does the recipient have documentation that third party contractors are not suspended or debarred?*
- c. *Did the recipient extend a contract with a contractor after it determined that the contractor had been suspended or debarred?*

INSTRUCTIONS FOR REVIEWER

Review the recipient's policies and procedures for its process of conducting and documenting responsibility determinations and ensuring it does not award contracts to debarred or suspended contractors or individuals. Since the requirement for a written responsibility determination only applies to award of contracts, a responsibility determination is only required for procurements that exceed the Simplified Acquisition Threshold.

During the site visit, examine selected procurement files, in accordance with records sampling procedures, to determine if the recipient makes written responsibility determinations prior to awarding contracts.

Examine responsibility determinations to verify that a written responsibility determination was made for each successful bidder prior to award and that consideration was given to matters such as:

- Contractor integrity - The contractor should have a satisfactory record of integrity and business ethics.
- Compliance with public policy – The contractor should have record of compliance with local, state and federal laws and regulations such as compliance with prevailing wage requirements and permitting.
- Record of past performance – The contractor should have a satisfactory record of completing similar projects on time and within budget.
- Financial and technical resources – The contractor's organization and staffing should indicate adequate technical skills. Financial statements or Dun & Bradstreet reports should indicate the contractor's organization is financially stable.

Review contract and subrecipient files to verify if the recipient or subrecipient is determining that bidders were not excluded or disqualified before entering into any third party contracts. Document that the recipient makes this verification by:

- checking SAM Exclusions (at SAM.gov), or
- collecting a certification, or
- adding a clause or condition to the covered transaction

Commented [DB1]: This was taken from FTA FAQs (under Determining Responsibility) dated 9/9/09 which states "The Federal Transit Administration does not require its grantees to make a written determination of contractor responsibility for small purchases (those under \$100,000)" We do not think that FTA currently has that interpretation, but we would like to clarify and recommend that if this is not correct that the FAQ be removed.

Discuss with the recipient if it has become aware of any situation in which an excluded party is participating in a covered transaction. For the procurements reviewed, check SAM.gov to determine if the contractors are suspended or debarred. Determine if the recipient received FTA approval to extend (other than a no-cost extension) or renew a contract with a suspended or debarred contractor prior to taking those actions.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not make written responsibility determinations that include the required elements prior to award.

DEFICIENCY CODE P4-1: Responsibility determination deficiencies

SUGGESTED CORRECTIVE ACTION: For any contracts where the recipient was found to have failed to verify that the contractor was responsible, the recipient must verify the responsibility of contractors. The recipient must provide the FTA regional office documentation of an implemented process to make adequate responsibility determinations prior to award of a contract. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it has not verified that excluded parties are not participating prior to applicable awards or actions.

DEFICIENCY CODE P4-2: No verification that excluded parties are not participating

SUGGESTED CORRECTIVE ACTION: For any contracts where the recipient was found to have failed to verify that the contractor was in compliance with suspension/debarment requirements, the recipient must either amend the contract with the appropriate clause or obtain the applicable certification from the third-party contractor(s). The recipient must submit to the FTA regional office procedures for making excluded party determinations before entering into applicable transactions. For the next procurement, submit to FTA documentation that the required process was implemented.

The recipient is deficient if it extended (other than a no-cost time extension) or renewed a contract with a contractor subsequent to it becoming suspended or debarred, unless approved by FTA.

DEFICIENCY CODE P4-3: Excluded parties participating in covered transactions

SUGGESTED CORRECTIVE ACTION: The recipient must confer with the FTA regional office for any contract that was extended or renewed with a suspended or debarred contractor. The recipient must submit to the FTA regional office procedures for making excluded party determinations before entering into applicable transactions.

GOVERNING DIRECTIVES

49 U.S.C 5325(j) AWARDS TO RESPONSIBLE CONTRACTORS

“(1) IN GENERAL. Federal financial assistance under this chapter may be provided for contracts only if a recipient awards such contracts to responsible contractors possessing the ability to successfully perform under the terms and conditions of a proposed procurement.

(2) CRITERIA. Before making an award to a contractor under paragraph (1), a recipient shall consider:

- A. the integrity of the contractor;
- B. the contractor’s compliance with public policy;

C. the contractor's past performance, including the performance reported in the Contractor Performance Assessment Reports required under section 5309(l)(2); and

D. the contractor's financial and technical resources."

2 CFR 180.300

"What must I do before I enter into a covered transaction with another person at the next lower tier? When you enter into a covered transaction with another person at the next lower tier, you must verify that the person with whom you intend to do business is not excluded or disqualified. You do this by: (a) Checking SAM Exclusions; or (b) Collecting a certification from that person; or (c) Adding a clause or condition to the covered transaction with that person."

2 CFR 180.310

"What must I do if a Federal agency excludes a person with whom I am already doing business in a covered transaction? (a) You as a participant may continue covered transactions with an excluded person if the transactions were in existence when the agency excluded the person. However, you are not required to continue the transactions, and you may consider termination. You should make a decision about whether to terminate and the type of termination action, if any, only after a thorough review to ensure that the action is proper and appropriate. (b) You may not renew or extend covered transactions (other than no-cost time extensions) with any excluded person, unless the Federal agency responsible for the transaction grants an exception under §180.135."

Additional Guidance:

FTA Master Agreement (23), Section 4(b)

FTA Circular 4220.1F Chapter III. d. (1) (c)

P5. Does the recipient maintain records sufficient to detail the history of each procurement as described in its policies and procedures and in compliance with 2 CFR Part 200?

BASIC REQUIREMENT

The recipient must maintain a written history of each procurement.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Written Record of Procurement History (PSR – 42)

Recipients must maintain records sufficient to detail the significant history of a procurement. At a minimum, such records must include:

- Rationale for the method of procurement (i.e., request for proposals, invitation for bids, sole source)
- Selection of contract type (i.e., fixed price, cost reimbursement)
- Reason for contractor selection or rejection
- Basis for the contract price (i.e., cost/price analysis)

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 may vary greatly for different procurements or procurement methods.

INDICATORS OF COMPLIANCE

a. Does the recipient have policies and/or procedures for documenting procurement files?

b. Do procurement files reviewed include required historical information?

INSTRUCTIONS FOR REVIEWER

Review recipient's policies and/or procedures for documenting procurement files to ensure that the policy requires, at a minimum, written documentation of the following:

- Rationale for the method of procurement (i.e., request for proposals, invitation for bids, sole source)
- Selection of contract type (i.e., fixed price, cost reimbursement)
- Reason for contractor selection or rejection
- Basis for the contract price (i.e., cost/price analysis)

During the site visit, examine selected procurement files, in accordance with records sampling procedures, to determine if procurement records include the minimum information listed above, as well as all documentation required in the recipient's policies and/or procedures. The documentation in the procurement file should allow the reviewer to understand the major procurement milestones undertaken as well as the procurement decisions of the recipient. Examples of documents to review include:

- The solicitation document
- Solicitation addenda
- A listing of bids/proposals received
- Protest documentation
- A copy of the contract document or purchase order
- Contract administration correspondence
- Contract change orders with justifications and cost analysis

- Contract dispute documentation

The procurement history documentation should begin at the procurement planning stage and continue until project closeout.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if, for any procurement examined, procurement records do not contain the minimum documentation required and any additional information noted in the recipient's policies and/or procedures.

DEFICIENCY CODE P5-1: Incomplete written documentation of procurement history

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that the deficiencies identified in its record-keeping process have been corrected and that procurement staff have been trained on documenting procurement history.

GOVERNING DIRECTIVE

2 CFR 200.318(j)

"The non-Federal entity must maintain records sufficient to detail the history of procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price."

P6. Does the recipient ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders in its policies and procedures and in compliance with 2 CFR Part 200?

BASIC REQUIREMENT

Recipients must have oversight mechanisms to ensure that contractors perform in accordance with the terms of their contracts.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Contract Administration System (PSR – 2)

Recipients are required to have mechanisms in place to ensure that contractors perform in accordance with the terms, conditions, and specifications contained in their contracts or purchase orders. 2 CFR Part 200 assigns responsibility to the recipient for resolving all contractual and administrative issues arising out of their third party procurements, including protests of awards, disputes, and claims using good administrative practices and sound business judgment. Neither FTA nor 2 CFR part 200 relieves the recipient of any responsibility under its contracts to resolve disagreements that may arise in the course of contract formation or contract administration.

Many FTA recipients assign contracting duties to technical, financial, or management personnel. If the recipient lacks qualified personnel within its organization to undertake the various procurement tasks, such as drafting specifications, evaluating contracts, or performing internal audits for the recipient, FTA expects the recipient to acquire the necessary services from sources outside the recipient's organization. When using outside sources, the recipient should take appropriate steps to prevent or mitigate organizational conflicts of interest that would result in conflicting roles that might bias a contractor's judgment or would result in unfair competitive advantage.

INDICATOR OF COMPLIANCE

- a. Does the recipient conduct oversight of third party contractors to ensure performance in accordance with contract terms?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, review milestone progress reports in TrAMS and information provided by the recipient to determine if there were any contracts noted as having issues with the contractor not performing in accordance with the terms, conditions, and specifications of their contracts or purchase orders. Review information in TrAMS on the resolution of disputes or claims. Ask the regional office if there are any procurements that should be reviewed for contractor performance issues. Prior to the site visit, request and review the recipient's policies and procedures, which should include procedures to ensure contract performance and to resolve third party contracting issues, for any described contract administration processes and responsibilities.

The extent and complexity of a contract administration system will vary with the type, size and complexity of the procurement.

A simple materials or equipment purchase may only require documentation that the material or equipment was delivered, was in accordance with the purchase requirements, was accepted by the user, approved for payment, and added to the fixed asset listing, if applicable.

A professional services contract may require holding periodic progress meetings, approving invoices for progress payments, monitoring the project schedule and budget, verifying that deliverables are in compliance with the scope of work, and approving any change orders.

A construction contract often involves the most extensive level of contract administration. Based on the recipient size and staffing, the contract administration system may require use of a design and engineering firm and/or a construction manager to verify compliance with specifications, attend and keep records of project progress meetings, provide responses to requests for interpretation of specifications, manage the recommendations associated with change orders, certify payment applications, prepare punch lists, and oversee project close out.

Contracts for transit service management or operations often include numerous items to administer, such as on-time performance, staffing, maintenance and compliance with regulations such as Americans with Disabilities Act and FTA's Drug and Alcohol Testing Program.

Onsite, during review of selected procurements, determine if contract administration and oversight procedures are being implemented as described in policies and procedures. Determine if the recipient is monitoring the contractor's on-time delivery of products or services as detailed in any contractual milestones, receiving any required contractor reporting, or verifying any required coordination meetings. Determine if the recipient is analyzing the cause of cost overruns, scope changes, or slippages in delivery schedules or milestone dates. In these cases there should be documentation of correspondence between the recipient and contractor regarding contractor performance. Multiple delays in contract completion should be supported by legitimate reasons provided from the contractor to the recipient.

For procurements reviewed, identify any contractual remedies included. For any procurements examined for which enforcement of contract administration remedies appeared to be warranted (i.e. liquidated damages, remedies related to milestone or delivery dates or performance standards), determine if appropriate actions were taken. In accordance with 2 CFR §200.318(j)(1), recipients must assert a high degree of oversight for time and materials type contracts in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if the recipient does not have documentation evidencing contract oversight pursuant to its internal policies and/or procedures. For example, the recipient is deficient if non-performance of contractors is a persistent problem, with contractors either not performing in accordance with the terms and conditions of their contracts, or issues remain unresolved for a substantial length of time, and the recipient cannot demonstrate that it has taken remedial action in accordance with its policies and procedures.

DEFICIENCY CODE P6-1: Contract administration system not implemented

SUGGESTED CORRECTIVE ACTION: The recipient must develop and submit to the FTA regional office revised procurement procedures that include oversight procedures and remedies for non-performance, along with evidence of implementation.

GOVERNING DIRECTIVE

2 CFR 200.318(b)

"Non-Federal entities must maintain oversight to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders."

P7. Does the recipient ensure that it conducts all procurement transactions in a manner that provides full and open competition and does not unduly restrict competition in its procurement process and as described in its policies and procedures and in compliance with 2 CFR Part 200?

BASIC REQUIREMENT

Procurement transactions must be non-restrictive.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Restricting Competition:

Recipients must conduct procurement transactions in a manner providing full and open competition. Recipients are prohibited from restricting competition in federally supported procurement transactions. Some of the situations considered to be restrictive of competition include but are not limited to:

- Placing unreasonable requirements on firms in order for them to qualify to do business;
- Requiring unnecessary experience and/or excessive bonding;
- Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement;
- Having overly burdensome requirements for approval of an equal product;
- Noncompetitive pricing practices between firms or between affiliated companies;
- Noncompetitive contracts to consultants that are on retainer contracts;
- Organizational conflicts of interest; and
- Any arbitrary action in the procurement process.

Unreasonable Qualification Requirements: (PSR-9)

In order to ensure objective contractor performance and eliminate unfair competitive advantage, recipients that develop or draft specifications, requirements, statements of work, and invitations for bids or requests for proposals must not include provisions considered to be restrictive of competition. Some of the situations considered to be restrictive of competition include but are not limited to:

Unnecessary Experience and Excessive Bonding (PSR-10)

Bonds are required for all construction contracts exceeding the Simplified Acquisition Threshold, unless FTA determines that other arrangements adequately protect the Federal interest. FTA's bonding policies for those construction projects are as follows:

- Bid Guarantee – Each bidder is generally required to provide a bid guarantee equivalent to 5 percent of its bid price.
- Performance Bond – Contractors generally must 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.
- Payment Bond – Contractors generally must obtain a standard payment bond. 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 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:
 - Less Than \$1 Million – Fifty percent of the contract price if the contract price is not more than \$1 million;

- 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;
- More Than \$5 Million – Two and one half million dollars if the contract price is more than \$5 million.

Brand Name Restrictions (PSR-13)

Procurement documents must incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which 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, must 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 equivalent” description may be used as a means to define the performance or other salient requirements of the procurement. The specific features of the named brand which must be met by offerors must be clearly stated.

Organizational Conflicts of Interest: (PSR-11)

When using outside sources, the recipient should take appropriate steps to prevent or mitigate organizational conflicts of interest that would result in conflicting roles that might bias a contractor’s judgment or would result in unfair competitive advantage. An organizational conflict of interest occurs when any of the following circumstances arise:

- 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.
- Unequal Access to Information. The contractor has an unfair competitive advantage through obtaining access to nonpublic information during the performance of an earlier contract.
- 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.

Arbitrary Action (PSR-12)

Recipients are prohibited from taking any arbitrary action when awarding contracts. Arbitrary actions include lack of adhering to the requirements contained in the procurement solicitation when awarding contracts. An arbitrary action can also be found when there is lack of documentation for awarding a contract to other than the low responsive and responsible bidder or the most qualified proposal when price and other factors are considered.

Geographic Preference: (PSR-8, PSR-14)

Recipients are prohibited from specifying in-state or local geographic 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 law include the following:

- 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. Although geographic preferences are permissible in procurements for A&E services, the reviewer should ensure that their use does not restrict competition (i.e., the use of geographic preference leaves only one or two qualified firms to bid on the contract).
- Licensing. A state may enforce its licensing requirements, provided that those requirements do not conflict with Federal law.
- 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 an area affected by a major disaster or emergency.

Section 418 of the fiscal year (FY) 2015 Appropriations Act and Section 415 of the Consolidated Appropriations Act, 2016, Public Law 114-113 (FY 2016 Appropriations Act) prohibit FTA from using FY2015 or FY2016 funds to implement, administer, or enforce the prohibition of geographic preferences under 49 CFR 18.36(c)(2), (now 2 CFR 200.319(b)) for construction hiring purposes. "Construction hiring purposes" means hiring of the construction labor workforce for a construction project. Section 418 applies to all FTA awards, including awards funded under the Hurricane Sandy Emergency Relief and Transportation Investment Generating Economic Recovery (TIGER) programs. Recipients are asked to provide the FTA Regional Office notice of using local hiring preferences on construction projects.

On March 6, 2015, US DOT announced an initiative to permit, on an experimental basis, FTA recipients and subrecipients to utilize various contracting requirements that generally have been disallowed due to concerns about adverse impacts on competition. This initiative, being initially carried out as a pilot program was extended until March 6, 2017. Unless accepted into the pilot program, FTA recipients may not include local hiring or geographic preferences in FTA-funded projects, except for construction hiring purposes and other exceptions described above.

Prequalification Lists: (PSR-4, PSR-17)

Except for small and micro purchases, proposals and/or bids must be publicly solicited from an adequate number of sources. Recipients are prohibited from restricting competition in federally supported procurement transactions. Recipients are not required to prequalify potential bidders. However, recipients that place such a requirement on potential bidders must adhere to FTA's requirements. If a recipient requires prospective bidders to prequalify, it must ensure that all lists of prequalified persons, firms, or products that are used in acquiring goods and services are current and include enough sources to ensure full and open competition. Recipients must permit potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date). Prequalification should not be confused with reviews of technical qualifications that are an essential process in two-step and qualifications-based procurements.

Revenue Contracts: (PSR-61)

Revenue contracts are those in which the recipient or subrecipient provides access to public transportation assets for the primary purpose of either producing revenue in connection with an activity related to public transportation, or creating business opportunities with the use of FTA-assisted property. If there are several potential competitors for a limited opportunity (such as advertising space on the side of a bus), then the recipient should use a competitive process to permit interested parties an equal chance to obtain that limited opportunity. If, however, one party seeks access to a public transportation asset (such as a utility that might seek cable access in a subway system), and the recipient is willing and able to provide contracts or licenses to other parties similarly situated (since there is room for a substantial number of such cables without interfering with transit operations), then competition would not be necessary because the opportunity to obtain contracts or licenses is open to all similar parties. In the case of joint development, FTA will work with the recipient to determine appropriate procedures, as necessary.

INDICATORS OF COMPLIANCE

- a. *Does the recipient restrict competition by applying unreasonable requirements? (PSR-9)*
- b. *Does the recipient restrict competition by requiring unnecessary experience or excessive bonding? (PSR-10)*
- c. *Does the recipient, specify only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance or other relevant requirements of the procurement; or are the requirements for approval of equal products overly burdensome? (PSR-13)*
- d. *Does the recipient implement mechanisms to identify and mitigate organizational conflicts of interest? (PSR-11)*
- e. *Does a review of procurement files indicate any arbitrary action(s) by the recipient? (PSR-12)*
- f. *Does the recipient include prohibited geographic preferences in procurements? (PSR-8, PSR-14)*
- g. *If the recipient uses prequalification lists for any of its procurements, does it do so properly? (PSR-4, PSR-17)*
- h. *If the recipient awarded revenue contracts during the review period did it use a competitive process for the award, as applicable?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, request and review the recipient's written procurement policies for discussion of the requirements in the above indicators. Obtain and review the listing of FTA-funded procurements.

During the site visit:

- Review procurement files, particularly legal notices and solicitation documents, to determine whether procurements were unreasonably restrictive. If a procurement only received one or two responses, did the specifications include non-essential requirements that only a single or a few bidders could meet? Did potential bidders submit pre-submission questions regarding compliance with the specifications or other contract requirements? Examine any bid protests and any questions and answers to solicitations to determine if there are any perceived restrictions from potential bidders.
- Review construction and non-construction procurements to determine if the recipient's bonding policies far exceed FTA's requirements. Determine through document review or interviews if the recipient has a sound reason for bonding requirements that far exceed FTA requirements.
- Review procurement specifications and/or scope of work to determine if there are any product descriptions that are limited to brand name only without containing the phrase "or approved equal". Determine if the specification and/or scope of work also contains the salient characteristics of the brand name product referenced. Review policies and procedures on brand names or equals. Determine, through review of procurement documents and interviews with procurement staff, what the process is for requesting an approved equal, how these requests are processed, and what the results were?
- Review procurement policies and procedures for how organizational conflicts of interest are defined. Review procurement files to determine if there were any potential organizational conflicts of interest and how the recipient mitigated the conflict.
- Review procurement files to determine if it is clear that the awarded vendor's file clearly documents that there was no arbitrary action. Determine that the award for each of the procurements reviewed followed the recipient's conditions for award detailed in its procurement

policies and procedures and the solicitation. For example, for sealed bids, if the awarded bidder was not the lowest bidder ensure that documentation exists that reasons for this; for requests for proposals, determine if the results of evaluations clearly identify that the recipient followed its evaluation criteria.

- Review procurement files for use of geographic preferences outside of the allowable exceptions. Examine any bid protests and any questions and answers to solicitations to determine if there are any potential geographic preference issues. These may include bid/evaluation preferences for, or restricting competition to, in-state or local firms. In-state licensing requirements do not constitute geographic preference. When contracting for A&E services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.
- Review procurement files, particularly legal notices and solicitation documents, to determine whether responses to procurements are limited to pre-qualified firms. If a recipient requires prospective bidders to prequalify, determine if it has documented that it has ensured that all prequalification lists include enough sources to ensure full and open competition. Determine if the recipient permitted potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date).
- Review the list of revenue contracts awarded. On site, discuss with the recipient, and evaluate procurement files to determine if a competitive process was used when the recipient provided access to public transportation assets for the primary purpose of either producing revenue in connection with an activity related to public transportation, or creating business opportunities with the use of FTA-assisted property when there were several potential competitors for a limited opportunity.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it has conducted a procurement without providing for full and open competition. Examples of failure to provide for full and open competition include impermissible or unnecessary restrictive requirements in specifications or on prospective bidders in any of the procurement files reviewed.

DEFICIENCY CODE P7-1: Lacking full and open competition for one or more methods of procurement

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office procurement procedures that ensure full and open competition in all procurement transactions.

The recipient is deficient if it has improperly included unreasonable qualifications in its procurements.

DEFICIENCY CODE P7-2: Improper use of unreasonable qualifications

SUGGESTED CORRECTIVE ACTION: The recipient must cease using unreasonable qualifications in FTA-funded procurements and submit to the FTA regional office documentation of a revised procurement process. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it has improperly included unnecessary experience or excessive bonding in its procurements.

DEFICIENCY CODE P7-3: Improper use of unnecessary experience or excessive bonding

Commented [DB2]: Suggested by Hope to eliminate this from the PSR, as we get into detail below on what the actual restrictions on full and open were.

SUGGESTED CORRECTIVE ACTION: The recipient must cease using unnecessary experience or excessive bonding in FTA-funded procurements and submit to the FTA regional office documentation of a revised procurement process. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it has used “brand name” only specifications in its procurements.

DEFICIENCY CODE P7-4: Improper use of “brand name” only specifications

SUGGESTED CORRECTIVE ACTION: The recipient must use performance specifications or “brand name” or approved equal specifications that include the salient characteristics of the item specified and submit to the FTA regional office documentation of a revised procurement process. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if an organizational conflict of interest was present in its procurements.

DEFICIENCY CODE P7-5: Organizational conflict of interest not properly mitigated

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office documentation of a revised procurement process for identifying and mitigating organizational conflicts of interest. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if an arbitrary action was taken in connection with the award of its procurements.

DEFICIENCY CODE P7-6: Improper arbitrary action

SUGGESTED CORRECTIVE ACTION: The recipient shall submit to the FTA regional office documentation of a revised procurement process that will insure no arbitrary actions are taken in connection with the award of FTA funded procurements. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it has improperly included geographic preferences in its procurements.

DEFICIENCY CODE P7-7: Improper use of geographic preferences

SUGGESTED CORRECTIVE ACTION: The recipient must cease using inappropriate geographic preferences in FTA-funded procurements and submit to the FTA regional office documentation of a revised procurement process that prohibits the improper use of geographic preferences. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if its prequalification lists do not include enough qualified sources to ensure maximum full and open competition or it has precluded potential bidders from qualifying during the solicitation process.

DEFICIENCY CODE P7-8: Inadequate prequalification criteria

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation demonstrating that deficiencies identified in its prequalification process have been corrected. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

Commented [DB3]: As pointed out by Hope, TSO may want to revise this language, as it is not technically the criteria but the process

The recipient is deficient if it provided access to public transportation assets for the primary purpose of either producing revenue in connection with an activity related to public transportation, or creating business opportunities with the use of FTA-assisted property and there were several potential competitors for a limited opportunity, but it did not conduct a competitive process.

DEFICIENCY CODE P7-9: Lacking full and open competition for revenue contracts

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office with evidence that it has updated its procurement process to include procedures for competing revenue contracts when applicable. The recipient must obtain prior FTA regional office approval before entering into the next revenue contract.

GOVERNING DIRECTIVES

49 U.S.C. 5325(a). Contract requirements

“(a) Competition. Recipients of assistance under this chapter shall conduct all procurement transactions in a manner that provides full and open competition as determined by the Secretary.”

49 U.S.C. 5325(h). Contract requirements

“(h) Grant prohibition. A grant awarded under this chapter or the Federal Public Transportation Act of 2015 may not be used to support a procurement that uses an exclusionary or discriminatory specification.”

2 CFR 200.319 (a)

“All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section. In order to ensure objective contractor performance and eliminate unfair competitive advantage, contractors that develop or draft specifications, requirements, statements of work, or invitations for bids or requests for proposals must be excluded from competing for such procurements. Some of the situations considered to be restrictive of competition include but are not limited to: (1) Placing unreasonable requirements on firms in order for them to qualify to do business; (2) Requiring unnecessary experience and excessive bonding; (3) Noncompetitive pricing practices between firms or between affiliated companies; (4) Noncompetitive contracts to consultants that are on retainer contracts; (5) Organizational conflicts of interest; (6) Specifying only a “brand name” product instead of allowing “an equal” product to be offered and describing the performance or other relevant requirements of the procurement; and (7) Any arbitrary action in the procurement process.”

2 CFR 200.319 (c)(1)

“When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equivalent” description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offeror must be clearly stated.”

2 CFR 200.319 (b)

“The non-Federal entity must conduct procurements in a manner that prohibits the use of statutorily or administratively imposed state, local, or tribal geographic preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts state licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criterion provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.”

2 CFR 200.319 (d)

"The non-Federal entity must ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, the non-Federal entity must not preclude potential bidders from qualifying during the solicitation period."

Master Agreement (23), Section 16

FTA Circular 4220.1F Chapter VI 2. (g)

FTA Circular 4220.1F Chapter 2. b. (4) Revenue Contracts

P8. Did the recipient appropriately use each method of procurement as described in its policies and procedures and in compliance with 2 CFR Part 200?

BASIC REQUIREMENT

The non-Federal entity must appropriately use one of the following methods of procurement: micro-purchase, small purchase, sealed bid, competitive proposals or non-competitive proposals.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Micro-purchases may be made without obtaining competitive quotations if the recipient determines that the price to be paid is fair and reasonable. These purchases should be distributed equitably among qualified suppliers in the local area, and should not be split to avoid the requirements for competition above the micro-purchase threshold.

Small purchase procedures require that price or rate quotations be obtained from an adequate number of qualified sources (at least two). The solicitations and quotations may be either oral or written. There should not be any splitting of purchases to avoid requirements for competition above the small purchase threshold.

For procurements exceeding the Federal simplified acquisition threshold (currently \$250,000), sealed bids or competitive proposals are generally required. All solicitations must incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured.

- Sealed Bids/IFB – Bids are publicly solicited and solicited from an adequate number of known suppliers; sufficient response time is provided; the solicitation defines the items or services requested; there must be two or more responsible bidders; bids are to be opened publicly at a prescribed time and place; a firm fixed-price award is made to the lowest (best price), responsive (meets all specifications), and responsible (is qualified to perform the work) bidder; and any bids may be rejected for sound documented reason.
- Competitive Proposals/RFP – Proposals are publicly solicited and solicited from an adequate number of sources and the award is made to the responsive and responsible proposer whose offer is most advantageous to the recipient, with price and other factors considered. Recipients must identify their evaluation factors and indicate the relative importance that each has towards the award.

Non-competitive proposals: 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. In the case of a sole-source award, the recipient should prepare a written cost analysis and justification. The property or services are available from one source if one of the conditions described below is present:

- Unique or Innovative Concept. 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 in the past, has not been available from another source.
- Patents or Restricted Data Rights. Patent or data rights restrictions preclude competition.
- Substantial Duplication Costs. In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components, 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.

- Unacceptable Delay. In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components, when it is likely that award to another contractor would result in unacceptable delays in fulfilling the recipient's needs.

While professional services can be procured on a sole-source basis if justified, in general, a competitive environment does exist for professional services and the recipient needs to follow federal requirements when FTA funds are used to pay for these services.

With a single bid, the documentation should include a cost analysis, as well as an explanation as to why a single bid was obtained. 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 should include a survey of potential sources that chose not to submit a bid or proposal.

Time-and-materials contracts are listed as a restricted type of procurement. They are contracts in which the contractor charges a single rate that includes overhead and profit for labor, and materials are billed at cost. Generally, the total value of a time and materials type contract is an indeterminate amount. As such, recipients are not permitted to use FTA funds for time-and-materials type contracts unless it determines that no other type of contract is suitable for the procurement. If time-and-materials type contracts are used, recipients must specify a ceiling price that the contractor shall not exceed, except at its own risk.

INDICATORS OF COMPLIANCE

- If the recipient used micro-purchase procedures, was it done in accordance with requirements?*
- If the recipient used small purchase procedures, was it done in accordance with requirements?*
- If the recipient used sealed bid procedures, was it done in accordance with requirements?*
- If the recipient used competitive proposal procedures, was it done in accordance with requirements?*
- Did the recipient include written justification of any non-competitive or sole source procurements in the procurement file?*
- If the recipient had awarded a contract to a single bidder, did it appropriately determine that the item was available only from a single source?*
- If the recipient awarded any time and materials type contracts during the review period, did it determine that it was the only method suitable and was a ceiling price identified? Did the recipient have a monitoring process in place to verify actual time and materials used?*

INSTRUCTIONS FOR REVIEWER

Review the recipient's policies and procedures for dollar thresholds and procedures for micro-purchase, small purchase, sealed bid, competitive proposals or non-competitive proposals/sole source procurements, as applicable.

Review the list of FTA-funded procurements to determine which types of procurements were used.

Micro-purchase: Review selected procurements to determine if:

- this method was only used for procurements \$3,500 or less awarded prior to June 20, 2018, or \$10,000 or less for contracts awarded after June 20, 2018,
- the procurements were distributed equitably if there was more than one qualified supplier in the local area,

- the recipient documented its determination that the price was reasonable with a description of how that determination was made *Fair and Reasonable Price Determination [Micro-purchase] (PSR – 21)*, and

Review the full listing of procurements to determine if there were repetitive types or amounts of procurements that were below the micro-purchase threshold. Review any instances of these, along with interviewing procurement staff, to verify that there was no evidence that procurements were split to avoid procurement requirements for purchases above the micro-purchase threshold (such as repeated purchases of the same item(s)) *No Splitting [Micro-purchase] (PSR – 20)*.

Note to reviewers: State or local law or recipient policies/procedures may set a micro-purchase threshold lower than the federal threshold. In such cases, recipients must follow state or local law. However, if the state or local micro-purchase threshold is higher than the federal threshold, the recipient is constrained by the federal threshold for FTA-funded contracts.

Small purchase: Review selected procurements to determine if:

- this method was only used for procurements of \$150,000 awarded prior to June 20, 2018, or less, or \$250,000 or less for procurements awarded after June 20, 2018. Procurements funded by awards issued on or before December 25, 2014, are subject to the previous simplified acquisition threshold of \$100,000. (per 49 CFR 18.36(d)),
- price or rate quotations *Price Quotations [Small Purchase] (PSR – 23)* were obtained from an adequate (at least two) number of qualified sources *Adequate Competition – Two or More Competitors (PSR – 25)*, and

Review the full listing of procurements to determine if there were repetitive types or amounts of procurements that were below the small purchase threshold. Review any instances of these, along with interviewing procurement staff, to verify that there was no evidence that procurements were split to avoid procurement requirements for purchases above the small purchase threshold (such as repeated purchases of the same item(s)).

Note to reviewers: State or local law or recipient policies/procedures may set a small purchase threshold lower than the federal threshold. In such cases, recipients must follow state or local law. However, if the state or local small purchase threshold is higher than the federal simplified acquisition threshold, the recipient is constrained by the federal threshold for FTA-funded contracts.

Sealed bid: Review selected procurements to determine if:

- bids were solicited from an adequate number of known suppliers *Adequate Competition – Two or More Competitors (PSR – 25) Adequate Solicitation (PSR-30)*, and there were at least two or more responsible bidders able to compete for the business,
- solicitation documents contained a clear and accurate specification or scope of work *Clear, Accurate, and Complete Specification (PSR – 24)*,
- bids were publicly advertised in accordance with State and local laws *Advertised/Publicized (PSR-29)*,
- adequate time was allowed for potential vendors to prepare bids *Sufficient Bid Time [Sealed Bid] (PSR – 31)*,
- the invitation for bids defined the items or services in order for the bidder to properly respond,

- bids were publicly opened at the time and place prescribed in the invitation for bids *Bid Opening [Sealed Bid] (PSR – 32)*,
- a responsiveness determination was made *Responsiveness [Sealed Bid] (PSR – 33)*,
- responsiveness was determined from the bid documents themselves, and, with very few exceptions, it was determined with no discussions or further input from the bidder *Discussions Unnecessary [Sealed Bid] (PSR – 28)*,
- a firm fixed price contract *Firm Fixed Price [Sealed Bid] (PSR – 26)* (lump sum or unit price) was awarded to the lowest *Selection on Price [Sealed Bid] (PSR – 27)* responsive and responsible bidder *Lowest Price [Sealed Bid] (PSR – 34)*, and
- any or all bids were rejected only if there was a sound, documented reason *Rejecting Bids [Sealed Bid] (PSR – 35)*.

Competitive proposal: Review selected procurements to determine if:

- requests for proposals were publicly advertised in accordance with State and local laws *Advertised/Publicized (PSR-29)*,
- solicitation documents contained a clear and accurate specification or scope of work *Clear, Accurate, and Complete Specification (PSR – 24)*,
- evaluation criteria and their relative importance were identified *Evaluation [RFP] (PSR – 36)*,
- proposals were solicited from an adequate number of qualified sources, *Adequate Competition – Two or More Competitors (PSR – 25)*, *Adequate Solicitation (PSR – 30)*
- there was a written method for conducting technical evaluations of the proposals received and for selecting recipients, and *Written Procurement Selection Procedures (PSR – 16)*
- contracts were awarded to the responsive and responsible firm whose proposal is most advantageous, with price and other factors considered *Price and Other Factors [RFP] (PSR – 37)*.

For Architectural & Engineering (A&E) procurements, price should not be a factor in the selection criteria. A&E procurements are reviewed in a following question.

Non-competitive (sole source) procurement *Sole Source if Other Award is Infeasible (PSR – 38)*:

Review selected procurements to determine if one of the following conditions was met:

- The recipient appropriately determined that the item was available from only a single source. Property or services are available from one source when one of the conditions described below is present:
 - *Unique or Innovative Concept.* 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 in the past, has not been available from another source.
 - *Patents or Restricted Data Rights.* Patent or data rights restrictions preclude competition.

- *Substantial Duplication Costs.* In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components, 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.
- *Unacceptable Delay.* In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components, when it is likely that award to another contractor would result in unacceptable delays in fulfilling the recipient's needs.
- There was a public exigency or emergency for the requirement which would not permit a delay resulting from competitive solicitation. When relying on this provision, recipients may use a non-competitive procurement method only for its reasonable needs to address the exigency or emergency. For example, a recipient's facility receives an unprecedented 24-inches of snow in 24 hours in October and it does not have a snow removal contract in place. The recipient may enter into a non-competitive snow removal contract to clear the snow. However, the recipient may not use this emergency to justify entering into a non-competitive snow removal contract for the entire winter season.
- FTA expressly authorized noncompetitive proposals in response to a written request from the recipient.

Determine if the recipient included a written sole source justification in its procurement file that meets one of the criteria above.

Single bidder *Single Bid (PSR – 62):* Ask the recipient to provide information on state or local requirements for advertisement/dissemination of solicitation. Review any advertisement/dissemination procedures in the recipient's procurement policies. Review selected procurements to determine if the procurement files include an explanation as to why a single bid was obtained and if the recipient's determination of adequate competition included a review of the specifications for undue restrictiveness, a survey of potential sources that chose not to submit a bid or proposal, and the recipient's policies and procedures for advertising solicitations (i.e., was the solicitation widely disseminated using means beyond those required by State or local law, was the solicitation open for a sufficient period of time given the complexity of the project).

Time and materials *Time and Materials Contracts (PSR – 47):* Prior to the site visit, examine the procurement listing provided by the recipient to determine if any time-and-materials type contracts were awarded during the review period. If so, during the site visit, examine at least one time and materials procurement file to determine if there was information noting that this was the only suitable type of procurement and that a ceiling price was included. Also review the procurement file to determine if the recipient had a monitoring system to verify actual time and materials used.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it made procurements using micro-purchase procedures but used this method for procurements over \$3,500 for contracts awarded prior to June 20, 2018, or \$10,000 for contracts awarded after June 20, 2018, did not make reasonable price determinations, did not distribute purchases equitably if applicable.

DEFICIENCY CODE P8-1: Improper micro-purchase procedures used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to correctly implement micro-purchase procedures. For the next micro-purchase, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it made procurements using micro-purchase procedures and there was evidence of splitting procurements to be within the micro-purchase threshold.

DEFICIENCY CODE P8-2: Improper splitting of micro-purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure improper splitting will not occur with micro-purchase procurements. For the next micro-purchase, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it made procurements using small purchase procedures and there was evidence of splitting procurements to be within the small purchase threshold.

DEFICIENCY CODE P8-3: Improper splitting of small purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure improper splitting will not occur with small purchase procurements. For the next small purchase, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it made procurements using small purchase procedures for procurements over \$150,000 for contracts awarded prior to June 20, 2018, or \$250,000 for contracts awarded after June 20, 2018, and price or rate quotations were not obtained.

DEFICIENCY CODE P8-4: Lack of price or rate quotations for small purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure price or rate quotations are documented for small purchases. For the next small purchase, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it made procurements using small purchase procedures and price or rate quotations were not obtained from an adequate number of qualified sources.

DEFICIENCY CODE P8-5: Price or rate quotations not obtained from an adequate number of suppliers for small purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure price or rate quotations will be obtained from at least two suppliers for small purchases. For the next small purchase, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it made procurements using sealed bid procedures, or competitive proposal procedures and the procurement documents did not contain a clear accurate and complete specification or scope of work.

DEFICIENCY CODE P8-6: Lack of clear, accurate, or complete specification

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure clear, accurate, and complete specifications or scope of work for small purchases, sealed bids, and competitive proposals. For the next applicable procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it made procurements using sealed bid procedures and the procurement documents did not document that two or more competitors submitted bids.

DEFICIENCY CODE P8-7: Inadequate competition [two or more competitors]

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure adequate competition is achieved for sealed bids. For the next applicable procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it made procurements using sealed bid procedures and did not utilize a firm fixed price contract or justify the use of an alternate type of contract.

DEFICIENCY CODE P8-8: Firm fixed price contract [sealed bid]

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure that a firm fixed price contract is used for sealed bid awards or a written justification is made for use of an alternate type of contract. For the next applicable procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it used sealed bid procedures that did not contain a selection process based on the lowest price provided by a responsive and responsible bidder.

DEFICIENCY CODE P8-9: Selection on price [sealed bid]

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure that sealed bid selection processes are based on the lowest responsive and responsible bid. For the next applicable procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if, when using sealed bid procedures, responsiveness was not determined from the bid documents themselves, and, with very few exceptions, discussions or further input was sought from the bidder(s),

DEFICIENCY CODE P8-10: Discussions unnecessary [sealed bid]

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure that when using the sealed bid method of procurement, the solicitation and procurement process is designed so that discussions are not necessary with potential bidders. For the next applicable procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it made procurements using sealed bid procedures or competitive proposal procedures but bids or proposals were not publicly advertised.

DEFICIENCY CODE P8-11: Procurement not advertised or publicized

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure competitive procurements above the Simplified Acquisition Threshold are advertised or publicized. For the next sealed bid or competitive proposal, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made procurements using sealed bid procedures or competitive proposal procedures but cannot document that an adequate number of potential sources were solicited.

DEFICIENCY CODE P8-12: Adequate solicitation

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure the procurement file contains documentation of the potential vendors solicited for competitive procurements above the Simplified Acquisition Threshold. For the next sealed bid or competitive proposal, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made procurements using sealed bid procedures and did not allow adequate time for a bidder to prepare bids.

DEFICIENCY CODE P8-13: Sufficient bid time

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure potential bidders will have sufficient time to prepare bids. For the next sealed bid, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made procurements using sealed bid procedures but did not have a public bid opening or did not advertise the date, place and time of the bid opening.

DEFICIENCY CODE P8-14: Bid opening deficient

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure public bid openings are held when using the sealed bid method of procurement and that the date, location and time of the bid opening are made public. For the next sealed bid, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made procurements using sealed bid procedures and did not document a determination of responsiveness for the bid that was awarded.

DEFICIENCY CODE P8-15: Responsiveness determination deficient

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure a written determination of responsiveness is made prior to awarding a low bid contract. For the next sealed bid, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made procurements using sealed bid procedures and the contract was awarded to other than the lowest responsive and responsible bidder.

DEFICIENCY CODE P8-16: Lowest price [sealed bid]

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure sealed bid procurements are awarded to the responsible bidder submitting the lowest responsive bid. For the next sealed bid, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it used sealed bid procedures and rejected any or all bids without documenting a sound business reason

DEFICIENCY CODE P8-17: Rejecting bids

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure that a sound business reason is documented in the procurement file if any or all bids are rejected. For the next sealed bid, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made procurements using the competitive proposal procedures but the RFP did not include a description of the process to be used to evaluate proposals and/or the relative importance of the evaluation factors.

DEFICIENCY CODE P8-18: Evaluation deficiencies [RFP]

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure competitive proposal procurement documents contain a description of the evaluation process, the evaluation factors and the relative importance of the evaluation factors. For the next sealed bid, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made an award using competitive proposal procedures but the procurement file does not contain documentation of how the award was based on price and other factors.

DEFICIENCY CODE P8-19: Price and other factors [RFP]

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to ensure competitive proposal procurement files contain documentation that demonstrates the recipient awarded the contract based on price and other factors. For the next competitive proposal, submit to the FTA regional office documentation that the required procedures were followed.

The recipient is deficient if it made sole source procurements but does not have a sole-source justification in its procurement files, and/or if its justification does not include at least one of the conditions permitting the use of a sole source procurement.

DEFICIENCY CODE P8-20: Lacking required justification(s) and documentation for sole-source award(s)

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence of an implemented policy to ensure that future sole source procurements are properly conducted and documented. Where contracts are ongoing, confer with the FTA regional office to determine if the recipient should be directed not to exercise any options, or possibly terminate the existing contract for convenience, and rebid for the required goods and services in accordance with Federal requirements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it does not have the appropriate justification for single-bid awards.

DEFICIENCY CODE P8-21: Lacking required justification(s) and documentation for single-bid award(s)

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence of an implemented policy to ensure that future single bid procurements are properly documented. For the next applicable procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if FTA funds were used for a time-and-materials contract and the files do not support the recipient's decision or the contract does not specify a ceiling price.

DEFICIENCY CODE P8-22: Improper time and materials contract

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office evidence that it has updated its procurement process to include procedures for the proper use of FTA-assisted time and materials contracts. The recipient must obtain prior FTA regional office approval before entering into the next time and materials contract.

GOVERNING DIRECTIVES

2 CFR 200.320 (a) Procurement by micro-purchases

"Procurement by micro-purchase is the acquisition of supplies or services, the aggregate dollar amount of which does not exceed the micro-purchase threshold (§200.67 Micro-purchase) (\$3,000 or less prior to October 1, 2015; \$3,500 or less effective October 1, 2015). To the extent practicable, the non-Federal entity must distribute micro-purchases equitably among qualified suppliers. Micro-purchases may be awarded without soliciting competitive quotations if the non-Federal entity considers the price to be reasonable."

Note: Threshold increased to \$10,000 effective June 20, 2018.

FTA 4220.1F Chapter VI 3. a. (2) (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 4220.1F Chapter VI 3. a. (2) (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."

2 CFR 200.319 (c)(1) Clear accurate and complete specification

(c) The non-Federal entity must have written procedures for procurement transactions. These procedures must ensure that all solicitations:

(1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description must not, in competitive procurements, contain features which 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, must 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 equivalent" description may be used as a means to define the performance or other salient requirements of procurement. The specific features of the named brand which must be met by offers must be clearly stated; and (2) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

2 CFR 200.320 (b) Procurement by small purchase procedures

"Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than the Simplified Acquisition Threshold. If

small purchase procedures are used, price or rate quotations must be obtained from an adequate number of qualified sources.”

2 CFR 200.320 (c) Procurement by sealed bids (formal advertising)

“Bids are publicly solicited and a firm fixed price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in paragraph (c)(1) of this section apply. (1) In order for sealed bidding to be feasible, the following conditions should be present: (i) A complete, adequate, and realistic specification or purchase description is available; (ii) Two or more responsible bidders are willing and able to compete effectively for the business; and (iii) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price. (2) If sealed bids are used, the following requirements apply: (i) Bids must be solicited from an adequate number of known suppliers, providing them sufficient response time prior to the date set for opening the bids, for local, and tribal governments, the invitation for bids must be publicly advertised; (ii) The invitation for bids, which will include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond; (iii) All bids will be opened at the time and place prescribed in the invitation for bids, and for local and tribal governments, the bids must be opened publicly; (iv) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs must be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and (v) Any or all bids may be rejected if there is a sound documented reason.”

2 CFR 200.320 (d) Procurement by competitive proposals

“The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply: (1) Requests for proposals must be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals must be considered to the maximum extent practical; (2) Proposals must be solicited from an adequate number of qualified sources; (3) The non-Federal entity must have a written method for conducting technical evaluations of the proposals received and for selecting recipients; (4) Contracts must be awarded to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered.”

2 CFR 200.320 (f) Procurement by noncompetitive proposals

“Procurement by noncompetitive proposals is procurement through solicitation of a proposal from only one source and may be used only when one or more of the following circumstances apply: (1) The item is available only from a single source; (2) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation; (3) The Federal awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-Federal entity; or (4) After solicitation of a number of sources, competition is determined inadequate.”

FTA Circular 4220.1F Chapter VI 3. i. (1) (b) 2. Single Bid or Single Proposal

“Upon receiving a single bid or single 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 competitive award. 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."

2 CFR 200.318 (j)(1)

"The non-Federal entity may use a time and materials type contract only after a determination that no other contract is suitable and if the contract includes a ceiling price that the contractor exceeds at its own risk. Time-and-materials type contract means a contract whose cost to a non-Federal entity is the sum of: (i) The actual cost of materials; and (ii) Direct labor hours charged at fixed hourly rates that reflect wages, general and administrative expenses, and profit. (2) Since this formula generates an open-ended contract price, a time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, each contract must set a ceiling price that the contractor exceeds at its own risk. Further, the non-Federal entity awarding such a contract must assert a high degree of oversight in order to obtain reasonable assurance that the contractor is using efficient methods and effective cost controls."

P9. Does the recipient procure Architectural Engineering (A&E) Services in accordance with 49 U.S.C. 5325(b)?

BASIC REQUIREMENT

If the recipient procures services for program management, architectural, engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services (collectively referred to as "A&E services") for an FTA-funded project, it must use a qualifications-based method. This method is not to be used for procuring services other than A&E.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Qualifications Exclude Price [A&E] (PSR – 51) and Serial Price Negotiations [A&E] (PSR – 52) A&E services include program management, architectural, engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services. FTA interprets 49 U.S.C. Section 5325(b) to authorize the use of qualifications-based procurement procedures only for those services that directly support or are directly connected or related to construction, alteration, or repair of real property. Unless FTA determines otherwise in writing, neither a recipient nor its subrecipients may use qualifications-based procurement procedures to acquire other types of services if those services are not directly in support of, directly connected to, directly related to, or do not lead to construction, alteration, or repair of real property. For design/build procurements, FTA expects recipients and their subrecipients to use the procurement method appropriate for the services having the greater cost, even though the other necessary services would not typically be procured by that method.

When using FTA assistance to contract for A&E services, recipients, including states, are required to use competitive proposal procedures based on the Brooks Act or an equivalent qualifications-based requirement of a State adopted before August 10, 2005.

For qualifications-based procurements under the Brooks Act, (unlike other two-step procurement procedures in which price is an evaluation factor), an offeror's qualifications are evaluated to determine the most qualified offeror. Price must not be considered during the selection phase of the most qualified offeror. Price is then negotiated with the most qualified firm. If an agreement cannot be reached, then the recipient may negotiate with the next most qualified firm and so on until an agreement is reached on a price that the State or recipient determines is fair and reasonable.

Recipients may make multiple awards to cover needs for various disciplines under an "on-call" type of contract. Under this type of contract, the recipient must select the most qualified firm for each discipline (e.g., architect, seismic engineer, etc.). When the recipient has a project that needs an A&E firm, the recipient negotiates price with the most qualified firm only. On-call contracts may be suited for smaller jobs that would be too expensive (administratively) to compete individually. The Brooks Act does not permit a recipient to enter into a contract with multiple "qualified" A&E firms with work assignments to be distributed among the various firms based on price or some other selection method. An on-call A&E contract means that the recipient has identified the most qualified firm and has entered into a contract with that firm for future A&E work, as needed.

Solicitations for on-call awards must describe how the work will be assigned, and not leave the process undefined. For example, if company A is initially evaluated as being the best for geothermal work, then all such work should be given to that company as tasks are defined, assuming the company can perform within the timeframes required for the task. The procurement officials should not leave it to someone's judgment later to withhold work from company A and give it to company B based on a subjective judgment that B would be better than A for this job even though A was evaluated first initially. The selected companies also should not be allowed to update their qualifications during the term of the

contract and so be rated higher than they were initially. There should be a finite period for these contract awards, after which a new round of qualifications-based awards would be made.

INDICATORS OF COMPLIANCE

- a. *Does the recipient have and follow a State statute prescribing a formal procedure for the procurement of A&E services, adopted prior to August 10, 2005 that it is an equivalent qualifications-based requirement of the Brooks Act?*
- b. *If the recipient does not have an applicable State statute, does it use competitive proposals based on the Brooks Act when procuring A&E services?*
- c. *Were price negotiations only carried out with the most qualified firm?*
- d. *Did on-call solicitations describe how on-call work will be assigned?*
- e. *If on-call contracting was used, were the on-call task orders only negotiated and awarded to the most qualified firm?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, review State statutes, the state management plan, and other documentation of procurement procedures for contracting A&E services through qualifications-based requirements. Review the list of procurements provided in advance of the review to identify procurements that would likely require Brooks method procedures. Procurements requiring the Brooks method must include both A&E and procurements directly in support of, directly connected to, directly related to, or leading to construction, alteration, or repair of real property.

On site, discuss with the recipient, and evaluate procurement files to determine if A&E services were procured using a qualifications-based process in accordance with the Brooks Act, where firms are ranked based only on their qualifications and price is then negotiated with the most qualified firm. The instructions to proposers and the evaluation criteria of the solicitation document should be reviewed to ensure price was not to be used to evaluate proposals. The description of how the contract will be awarded should also be reviewed to ensure proposed pricing information will only be evaluated for the firm that is identified as most qualified and that other pricing will only be evaluated if a fair and reasonable price cannot be negotiated with the most qualified firm and negotiations are terminated. Review the scoring completed by each member of the evaluation committee and the justifications for scores selected. Review documentation of the price negotiations to verify that only the most qualified firm was involved in price negotiations.

Review all "on-call" contracts for A&E services to determine if they comply with the Brooks Act. The recipient should be specifically asked if they utilize on-call A&E contracting where multiple firms are selected and eligible for assignments. These types of contracts may also be identified by recipients as "delivery order", "open-end", "job-order", or "pool" contracts. Review solicitations and contracts to determine if the method of assignments from these types of contracts would be selected and awarded. If on-call contracting is used, review the recipient's on-call contracting procedures to determine if assignments under these contracts are negotiated with the most qualified firm identified during the on-call contractor selection process. Review a sample of assignment authorizations to document the actual process used to authorize assignments of work.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient, including states, is deficient if it is in a state with a policy for A&E procurements adopted prior to August 10, 2005 but it is not following it or it is not following the Brooks Act, when procuring applicable services. The recipient also is deficient if it is using a qualifications-based method for procuring non-A&E services.

DEFICIENCY CODE P9-1: Recipient has A&E procurement deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office a list of all active A&E contracts procured with a method other than the qualifications-based method. The FTA regional office will advise the recipient as to whether those contracts must be terminated and resolicited. The recipient must provide the FTA regional office procedures for following qualifications-based procedures when using FTA assistance to contract for A&E services. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it carried out price negotiations with more than one proposer simultaneously.

DEFICIENCY CODE P9-2: A&E price negotiation deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office a list of all active A&E contracts procured where price negotiations were conducted with more than one proposer simultaneously. The FTA regional office will advise the recipient as to whether those contracts must be terminated and resolicited. The recipient must provide the FTA regional office procedures for following qualifications-based procedures when using FTA assistance to contract for A&E services. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient, including states, is deficient if solicitations for multi-consultant on-call services did not describe how work will be assigned or on-call A&E services were not negotiated and awarded to the most qualified firm identified in a multi-consultant on-call services procurement.

DEFICIENCY CODE P9-3: A&E on-call service deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office a list of all active A&E on-call contracts and associated task orders. The FTA regional office will advise the recipient as to whether those contracts must be terminated and resolicited. The recipient must provide the FTA regional office procedures for following qualifications-based procedures when using FTA assistance to contract for on-call A&E services. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES

49 U.S.C. 5325 (b) Architectural, Engineering, and Design Contracts

“(1) Procedures for awarding contract. A contract or requirement for program management, architectural engineering, construction management, a feasibility study, and preliminary engineering, design, architectural, engineering, surveying, mapping, or related services for a project for which Federal assistance is provided under this chapter shall be awarded in the same way as a contract for architectural and engineering services is negotiated under chapter 11 of title 40 [aka “Brooks Act”] or an equivalent qualifications-based requirement of a State adopted before August 10, 2005.”

40 U.S.C. 1101- 1104 (“Brooks Act”)

§1101: “The policy of the Federal Government is to publicly announce all requirements for architectural and engineering services and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices.”

§1104(b): “Order of Negotiation. The agency head shall attempt to negotiate a contract, as provided in subsection (a), with the most highly qualified firm selected under section 1103 of this title. If the agency head is unable to negotiate a satisfactory contract with the firm, the agency head shall formally terminate negotiations and then undertake negotiations with the next most qualified of the selected firms, continuing

the process until an agreement is reached. If the agency head is unable to negotiate a satisfactory contract with any of the selected firms, the agency head shall select additional firms in order of their competence and qualification and continue negotiations in accordance with this section until an agreement is reached.”

2 CFR 200.320(d)(5)

“The non-Federal entity may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.”

FTA Circular 4220.1F Chapter IV 2. h. (2) (a)

“FTA has long administered the requirement for using qualifications-based procurement procedures for selection of contractors that perform A&E services, generally associated with the construction, alteration, or repair of real property. FTA interprets 49 U.S.C. Section 5325(b) to authorize the use of qualifications-based procurement procedures only for those services that directly support or are directly connected or related to construction, alteration, or repair of real property. FTA's interpretation of 49 U.S.C. Section 5325(b) is consistent with typical Federal policies implementing the “Brooks Act,” 40 U.S.C. Section 1102, which limits qualifications-based procurement procedures to research, planning, development, design, construction, alteration, or repair of real property. Thus, if services, such as program management, feasibility studies, or mapping, are not directly in support of, directly connected to, or directly related to, or lead to construction, alteration, or repair of real property, then the recipient may not use qualifications-based procurement procedures to select the contractor that will perform those services.”

P10. Does the recipient develop independent cost estimates and conduct cost and/or price analysis as described in its policies and procedures and for each procurement action above the Simplified Acquisition Threshold?

BASIC REQUIREMENT

Recipients must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold. As a starting point, the recipient must make independent estimates before receiving bids or proposals.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Independent Cost Estimate (PSR-7)

The independent cost estimate (ICE) is a tool to assist in determining the reasonableness of the bid or proposal being evaluated; that is, to assist in performing the cost or price analysis. An ICE is the starting point for conducting a cost or price analysis. It is required for all procurements actions exceeding the simplified acquisition threshold. An ICE is completed prior to receipt of bids or proposals. An ICE is required for procurement actions such as contract modifications and change orders. It can range from a simple budgetary estimate to a complex estimate based on inspection of the product itself and review of items like drawings, specifications, and prior data. The word "independent" does not imply that it is performed by someone other than the recipient. This could be the case, however, if the recipient does not have the expertise for a large complex procurement.

The ICE is especially critical whenever there is no price competition (e.g., for architect-engineer procurements during price negotiations, sole source procurements, or single bid procurements), or where offerors are submitting price proposals for goods or services that are not exactly comparable (e.g., for procurements of high-technology items or professional services). It is also useful in competitive procurements to alert the recipient when all competitors are submitting unreasonably high or low-cost proposals.

Cost Analysis Required (Sole Source) (PSR- 39), Cost or Price Analysis (PSR- 41)

Recipients must perform cost or price analyses in connection with every procurement action exceeding the applicable Simplified Acquisition Threshold after receiving bids, but before awarding a contract. Note that effective June 20, 2018, the Simplified Acquisition Threshold increased from \$150,000 to \$250,000. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation.

A cost analysis must be performed for: (1) procurements which require that offerors submit detailed elements of direct and indirect costs; (2) procurements where adequate price competition is lacking; and/or (3) sole-source procurements, unless price reasonableness can be established based on market prices. Obtaining cost elements for sole source pricing of manufactured items can be difficult or impossible since many vendors may feel this information is proprietary. In these cases, recipients should prepare a price analysis to determine if the price is fair and reasonable.

Price analysis (i.e., using catalog, market prices, or comparison of bidders) may be performed for all other procurements. A price analysis is a more simplified process and is normally used when two or more responsive and responsible bids or proposals have been received.

For each contract in which there is no price competition and in all cases where a cost analysis is performed, the recipient must negotiate profit as a separate element of the price. To establish a fair and reasonable profit, consideration must 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. A bidder's profit should be separately negotiated and not based on a flat percentage of estimated contract costs.

INDICATORS OF COMPLIANCE

- a. *Did the recipient develop an ICE prior to the receipt of bids and proposals for procurements above the Simplified Acquisition Threshold?*
- b. *Did the recipient develop an ICE for change orders and sole source procurements over the Simplified Acquisition Threshold?*
- c. *Was the independent cost estimate prepared prior to receipt of bids or proposals and did it contain the basis for the estimated cost?*
- d. *Did the recipient conduct a cost analysis or price analysis for every procurement action above the Simplified Acquisition Threshold?*
- e. Did the recipient develop a cost analysis for change orders or sole source procurements?
- f. Did the recipient negotiate profit for sole source procurements and for every instance where a cost analysis was performed?

INSTRUCTIONS FOR REVIEWER

Independent Cost Estimate

Prior to the site visit, examine the recipient's policies and procedures. Onsite, review selected procurements to determine if the recipient developed an independent estimate prior to receipt of bids or proposals for procurement actions (including change orders and sole source procurements) above the Simplified Acquisition Threshold. The independent cost estimate (ICE) should be contained in the procurement file and be in writing. Determine if the ICE is dated to verify that it was completed prior to the receipt of bids or proposals. Determine if the ICE contains documentation of how the recipient arrived at the estimate. If the recipient required a breakdown of estimated costs, determine if the in-house independent cost estimate was broken down into similar cost elements.

Cost or Price Analysis

Review procurements over the Simplified Acquisition Threshold to determine if each cost or price analysis includes a written narrative of how the recipient determined the cost or price was fair and reasonable prior to a contract award. Determine if the analysis compared the prices or costs received to the ICE. In certain circumstances, the ICE may be much higher or lower than the costs or prices received. If this is the case for procurements reviewed, obtain documentation from the recipient on how it determined to move forward with the award.

Determine if the recipient adequately documented a price analysis when a cost analysis was not required.

Determine if a cost analysis was performed in accordance with the recipient's policies and procedures and 2 CFR Part 200.323 for: (1) procurements which require that offerors submit detailed elements of direct and indirect costs; (2) procurements where adequate price competition is lacking; (3) change orders; and/or (4) sole-source procurements. Determine if the cost analysis documented how a fair and reasonable profit was determined and if the extent of the analysis appears to be adequate to the size and complexity of the procurement. For sole source awards and in any other instance where cost analysis was used, determine if profit was negotiated as a separate element of the price, taking into account aspects such as 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.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it has not conducted independent cost estimates for procurements above the Simplified Acquisition Threshold.

DEFICIENCY CODE P10-1: Lacking independent cost estimate

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation that it has updated its procurement process to include development of independent cost estimates prior to receipt of bids or proposals. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it has not conducted independent cost estimates for change orders or sole source procurements above the Simplified Acquisition Threshold.

DEFICIENCY CODE P10-2: Lacking independent cost estimate for change orders or sole source procurements.

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation that it has updated its procurement process to include development of independent cost estimates prior to receipt of sole source bids or proposals and change orders. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if the independent cost estimate is not dated, was dated after receipt of the bid or proposal, or there was no basis for how the estimate was derived.

DEFICIENCY CODE P10-3: Inadequate independent cost estimate

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation that it has updated its procurement process to ensure the independent cost estimate is dated, was prepared prior to receipt of bids or proposals, and contains the basis for how the estimate was derived. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it did not conduct a cost analysis or price analysis, as applicable, for procurements above the Simplified Acquisition Threshold or if the extent of the analysis was not sufficient based on the size and complexity of the procurement.

DEFICIENCY CODE P10-4: Lacking required cost/price analysis

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation that it has updated its procurement process to include performing applicable cost or price analysis for procurements above the Simplified Acquisition Threshold. For the next applicable procurement, submit to FTA documentation that the required analysis was implemented.

The recipient is deficient if a cost analysis was not prepared or was inadequate for change orders or sole source procurements over the Simplified Acquisition Threshold.

DEFICIENCY CODE P10-5: Cost analysis lacking for change orders or sole source procurements

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation that it has updated its procurement process to include performing a cost

analysis for change orders and sole source procurements. For the next change order, submit to the FTA regional office documentation that the required cost analysis was completed.

The recipient is deficient if, for noncompetitive awards or any other instance where a cost analysis was used, profit was not negotiated as a separate element.

DEFICIENCY CODE P10-6: Profit not negotiated when cost analysis required

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office documentation that it has updated its procurement process to include negotiating profit as a separate element for procurements requiring a cost analysis. For the next sole source procurement, submit to the FTA regional office documentation that the required cost analysis was completed.

GOVERNING DIRECTIVES

2 CFR § 200.323

“(a) The non-Federal entity must perform a cost or price analysis in connection with every procurement action in excess of the Simplified Acquisition Threshold including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, the non-Federal entity must make independent estimates before receiving bids or proposals.

(b) The non-Federal entity must negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where a cost analysis is performed. To establish a fair and reasonable profit, consideration must 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.

(c) Costs or prices based on estimated costs for contracts under the Federal award are allowable only to the extent that costs incurred or cost estimates included in negotiated prices would be allowable for the non-Federal entity under Subpart E—Cost Principles of this part. The non-Federal entity may reference its own cost principles that comply with the Federal cost principles.

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.”

FTA Circular 4220.1F Chapter VI 6. a. Cost Analysis

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

FTA Circular 4220.1F Chapter VI 6. b. Price Analysis

“If the recipient determines that competition was adequate, a price analysis, rather than a cost analysis, is required to determine the reasonableness of the proposed contract price. As discussed previously in subsection 3.a of this Chapter, the price analysis for micro-purchases may be limited. Similarly, the

recipient may use an abbreviated price analysis for small purchases in most cases. One method to record this price analysis is through the use of a preprinted form on which a contracting officer (or other responsible person) can annotate a finding of fair and reasonable pricing and check off the most common reasons why this would be so, such as catalog or market prices offered in substantial quantities to the general public, regulated prices (for example many utilities purchases), or a comparison with recent prices for similar goods and services.”

P11. Did the recipient include applicable federal clauses in FTA-funded procurements exceeding the micro-purchase limit and construction contracts over \$2,000?

APPLICABILITY

All recipients

BASIC REQUIREMENT

Recipients must include and implement required clauses in its procurements.

EXPLANATION FOR RECIPIENT

Sound and Complete Agreement (PSR-19), Micro-purchase Davis-Bacon (PSR – 22), Bid Security (PSR – 53), Performance Security (PSR – 54), Payment Security (PSR – 55), and Clauses (PSR – 56)

Recipients are required to include specific required clauses in FTA-funded procurements, intergovernmental agreements (e.g., those involving states and other public entities), and subrecipient agreements. FTA Master Agreement identifies certain clauses that apply to third party contracts. 2 CFR 200.326 and Appendix II to 2 CFR Part 200 identify contract provisions for non-Federal contracts under a Federal award. FTA C. 4220.1F discusses Federal requirements that affect a recipient's acquisitions.

Additional guidance is provided through FTA's Third Party Procurement Frequently Asked Questions website. Through the National Rural Transportation Assistance Program (RTAP), FTA developed ProcurementPRO, an on-line procurement tool that assists recipients in developing procurement packages. Using ProcurementPRO, can assist a recipient in developing a procurement package that includes federally required clauses.

Recipients may not modify their own contracts after award to include Federal clauses and so make them eligible for procuring goods and services with Federal funds. Recipients may, however, modify its state's General Services Administration (GSA)-type contracts to add Federal clauses when they issue orders against those state contracts.

Not all clauses apply to every contract. The applicability of clauses depends on the size and type of contract as is described in the exhibit at the end of this section. Procurement contracts or purchase orders should be tailored and only the clauses applicable to the specific procurement should be included in the contract document. Including clauses not applicable to the procurement may restrict competition or result in higher contract pricing than necessary. Procurements above the micro-purchase threshold must include all applicable FTA clauses as part of the solicitation, purchase order, or contract. A general reference to FTA guidelines is not sufficient to meet this requirement. A matrix of required clauses is provided at the end of this section. The checklist provides a citation from the FTA Master Agreement for each required clause. Certifications, reports, and forms that are required for DBE, Buy America, debarment and suspension and lobbying are also included as are other required items to assist in determining whether the recipient's policies and procedures are actually being followed. The applicability of FTA clauses to different types of procurements is shown in the exhibit. Note that the construction of ferry vessels using Federal funds is considered a public works project and therefore, the clauses related to construction contracts are applicable.

INDICATOR OF COMPLIANCE

- a. *Did the recipient include applicable required clauses in FTA-funded procurements?*
- b. *Did the recipient add clauses to a non-state type GSA contract after contract award?*
- c. *Did the recipient obtain bid security, performance security, and payment security for applicable construction projects?*
- d. *Did the recipient include Davis Bacon wage determinations in applicable construction projects?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, examine the recipient’s policies and procedures. During the site visit, examine procurement files for inclusion of required clauses as detailed in the exhibit at the end of this section. Suggested language for some of these clauses may be found in the FTA “Best Practices Procurement Manual.”

Review construction project files to verify that the recipient obtained bid security, performance security and payment security.

Review construction project files to ensure bid documents contain the wage determinations to be paid to workers under the provisions of the Davis-Bacon Act. As a general rule, the wage determination incorporated into a bid solicitation and related contract award establishes the minimum wage rates and fringe benefits which must be paid for the entire term of the contract. Where the proper wage determination is incorporated into a contract prior to award of the contract, wage determination modifications issued after bid opening are not applicable to the contract except in the case of a general wage determination in a contract that has not been awarded within 90 days after the bid opening and an extension of the 90-day limit has not been granted.

The reviewer should point out any instances where the recipient has included clauses or certifications not applicable to the procurements reviewed and discuss with the recipient the need to tailor clauses and certifications to the size and type of procurement.

Clause	Threshold	Citation
<p>Bonding</p> <p>(a) A bid guarantee from each bidder equivalent to five percent of the 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 as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.</p> <p>(b) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor’s obligations under such contract.</p> <p>(c) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying</p>	<p>For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass-through entity has made a determination that the Federal interest is adequately protected.</p>	<p>2 CFR 200.325</p>

Clause	Threshold	Citation
labor and material in the execution of the work provided for in the contract.		
Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate	All contracts exceeding the simplified acquisition level	Appendix II to Part 200
Termination for cause and for convenience including the manner by which it will be effected and the basis for settlement	For procurements over \$10,000	Appendix II to Part 200
Equal Employment Opportunity	All contracts that meet the definition of "federally assisted construction contract" in 41 CFR Part 60-1.3	Appendix II to Part 200
Davis-Bacon Act	All prime construction contracts in excess of \$2,000	Appendix II to Part 200
Contract Work Hours and Safety Standards Act	All contracts in excess of \$100,000 that involve the employment of mechanics or laborers	Appendix II to Part 200
Rights to Inventions Made Under a Contract or Agreement	Contracts that meet the definition of "funding agreement" under 37 CFR §401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that "funding agreement," the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements."	Appendix II to Part 200

Clause	Threshold	Citation
Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act	Contracts in excess of \$150,000	Appendix II to Part 200 42 U.S.C. §§ 7401 – 7671q 33 U.S.C. §§ 1251 – 1388
6002 of the Solid Waste Disposal Act When procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR Part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition Procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines	For a non-Federal entity that is a state agency or agency of a political subdivision of a state, contracts with a purchase price of the item exceeds \$10,000 or the value of the quantity acquired during the preceding fiscal year exceeded \$10,000	2 CFR 200.322
Access to Records	All contracts	FTA Master Agreement (25), Sec. 9(c)(1)
DBE Assurance Clause	All contracts	49 CFR part 26.13(b)
Federal Changes	All contracts	FTA Master Agreement (25), Sec. (3)(i)(6)
Incorporation of Federal Terms	All contracts	FTA Master Agreement (25), Sec. (3)(i)(5)
Cargo Preference	When acquiring property possible for shipment by ocean vessel	46 CFR part 381.7
Copeland Anti-Kickback Act Section 1 and Section 2	All construction contracts above \$2,000	29 CFR 3.1 and 3.11 18 USC § 874 40 USC § 3145
Seismic Safety	Design and construction of new building and addition to existing buildings financed in whole or in part through Federal grants	49 CFR § 41.117

Clause	Threshold	Citation
Charter Service Operations	Transit operations funded with 5307, 5309, 5311 and 5316 funds	49 USC § 5323(d)
Drug and Alcohol Testing	All transit operations contracts	49 CFR part 40.11(c)
School Bus Operations	All transit operations contracts	49 USC § 5323(f)
Transit Employee Protective Arrangements	Transit operations funded with 5307-5312, and 5316	49 USC § 5333(b)
Non-construction Employee Protection (Contract Work Hours and Safety Standards Act)	All turnkey, rolling stock and operational contracts (excluding contracts for transportation services) exceeding the simplified acquisition level	40 U.S.C. §3702(b)
Prompt Payment	All non-TVM contracts with subcontractors if threshold for a DBE program met	49 CFR part 26.29(a)
Return of Retainage	All non-TVM contracts with subcontractors if threshold for a DBE program met	49 CFR part 26.29(b)
Veterans Preference	Contracts for capital projects	49 USC § 5325(k)
Seat Belt Use	Each third party contract	Master Agreement Section 34 (a)
Distracted Driving	Each third party agreement	Master Agreement Section 34 (b)

Commented [DB4]: Two new ones from master agreement...do not see a dollar or procurement type threshold

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if did not include all applicable required clauses in FTA-funded procurements reviewed.

DEFICIENCY CODE P11-1: Missing FTA clauses

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office revised procurement procedures that address inclusion of all FTA-required third party contract clauses through use of a clause checklist or other mechanism. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if required clauses were added to a FTA-funded procurement contract after contract award.

DEFICIENCY CODE P11-2: FTA clauses added after contract award

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office revised procurement procedures that address inclusion of all FTA-required third party contract clauses before award of a contract. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if required security bonds were not obtained for an applicable FTA-funded construction procurement.

DEFICIENCY CODE P11-3: Bid security, performance security, or payment security not obtained

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office revised procurement procedures that addresses inclusion of all required bonding and security for FTA funded construction procurements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if required Davis-Bacon rates were not included in an applicable construction procurement.

DEFICIENCY CODE P11-4: Davis-Bacon rates not used

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office revised procurement procedures that addresses inclusion of Davis-Bacon rates in all required FTA funded construction procurements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES

2 C.F.R. 200.325

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the Federal awarding agency or pass-through entity may accept the bonding policy and requirements of the non-Federal entity provided that the Federal awarding agency or pass through entity has made a determination that the Federal interest is adequately protected. If such a determination has not been made, the minimum requirements must be as follows: (a) A bid guarantee from each bidder equivalent to five percent of the 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 as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified. (b) A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor’s obligations under such contract. (c) A payment bond on the part of the contractor for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

Appendix II to Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards and FTA Master Agreement (25), section 16.e

“In addition to other provisions required by the Federal agency or non-Federal entity, all contracts made by the non-Federal entity under the Federal award must contain provisions covering the following, as applicable.

(A) Contracts for more than the simplified acquisition threshold currently set at \$150,000, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

(B) All contracts in excess of \$10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.

(C) Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of "federally assisted construction contract" in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and implementing regulations at 41 CFR part 60, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor."

(D) Davis-Bacon Act, as amended (40 U.S.C. 3141-3148). When required by Federal program legislation, all prime construction contracts in excess of \$2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, "Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction"). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland "Anti-Kickback" Act (40 U.S.C. 3145), as supplemented by Department of Labor regulations (29 CFR Part 3, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States"). The Act provides that each contractor or subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.

(E) Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708). Where applicable, all contracts awarded by the non-Federal entity in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

(F) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of "funding agreement" under 37 CFR §401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that "funding agreement," the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements," and any implementing regulations issued by the awarding agency.

(G) Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended—Contracts and subgrants of amounts in excess of \$150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

(H) Debarment and Suspension (Executive Orders 12549 and 12689)—A contract award (see 2 CFR 180.220) must not be made to parties listed on the government-wide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), "Debarment and Suspension." SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.

(I) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)—Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

(J) See §200.322 Procurement of recovered materials—A non-Federal entity that is a state agency or agency of a political subdivision of a state and its contractors must comply with section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. The requirements of Section 6002 include procuring only items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered materials practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired by the preceding fiscal year exceeded \$10,000; procuring solid waste management services in a manner that maximizes energy and resource recovery; and establishing an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines."

FTA Master Agreement (25), section 9(c)

Access to Recipient and Third Party Participant Records. The Recipient agrees, and assures that each Subrecipient, if any, will agree to: (1) Provide, and require its Third Party Participants at each tier to provide, sufficient access to inspect and audit records and information related to its Award, the accompanying Underlying Agreement, and any Amendments thereto to the U.S. Secretary of Transportation or the Secretary's duly authorized representatives, to the Comptroller General of the United States, and the Comptroller General's duly authorized representatives, and to the Recipient and each of its Subrecipients; (2) Permit those individuals listed above to inspect all work and materials related to its Award, and to audit any information related to its Award under the control of the Recipient or Third Party Participant within books, records, accounts, or other locations; and (3) Otherwise comply with 49 U.S.C. § 5325(g), and federal access to records requirements as set forth in the applicable U.S. DOT Common Rules.

49 CFR 26.13 (b) What assurances must recipients and contractors make?

Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance: The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate, which may include, but is not limited to:

- (1) Withholding monthly progress payments;
- (2) Assessing sanctions;
- (3) Liquidated damages; and/or
- (4) Disqualifying the contractor from future bidding as non-responsible.

FTA Master Agreement (25), Sec. (3)(i)(6) Notice to Third Party Participants.

The Recipient agrees to include notice in each Third Party Agreement that: (i) Federal requirements that apply to the Recipient or the Award, the accompanying Underlying Agreement, and any Amendments thereto may change due to changes in federal law, regulation, other requirements, or guidance, or changes in the Recipient's Underlying Agreement including any information incorporated by reference and made part of that Underlying Agreement; and (ii) Applicable changes to those federal requirements will apply to each Third Party Agreement and parties thereto at any tier.

FTA Master Agreement (25), Sec. (3)(i)(5) Third Party Agreements.

To comply with federal requirements, the Recipient agrees to enter into a written Third Party Agreement with each Third Party Participant in its Underlying Agreement and must include all appropriate provisions stating the Third Party Participant's responsibilities to assure the Recipient's capability to comply with applicable federal requirements and guidance and specifying the responsibilities that the Third Party Participant will fulfill on the Recipient's behalf.

§381.7 Federal Grant, Guaranty, Loan and Advance of Funds Agreements

In order to insure a fair and reasonable participation by privately owned United States-flag commercial vessels in transporting cargoes which are subject to the Cargo Preference Act of 1954 and which are generated by U.S. Government Grant, Guaranty, Loan and/or Advance of Funds Programs, the head of each affected department or agency shall require appropriate clauses to be inserted in those Grant, Guaranty, Loan and/or Advance of Funds Agreements and all third party contracts executed between the borrower/grantee and other parties, where the possibility exists for ocean transportation of items procured, contracted for or otherwise obtained by or on behalf of the grantee, borrower, or any of their contractors or subcontractors. The clauses required by this part shall provide that at least 50 percent of the freight revenue and tonnage of cargo generated by the U.S. Government Grant, Guaranty, Loan or Advance of Funds be transported on privately owned United States-flag commercial vessels. These clauses shall also require that all parties provide to the Maritime Administration the necessary shipment information as set forth in §381.3. A copy of the appropriate clauses required by this part shall be submitted by each affected agency or department to the Secretary, Maritime Administration, for approval no later than 30 days after the effective date of this part. The following are suggested acceptable clauses with respect to the use of United States-flag vessels to be incorporated in the Grant, Guaranty, Loan and/or Advance of Funds Agreements as well as contracts and subcontracts resulting therefrom:

(a) *Agreement Clauses.* "Use of United States-flag vessels:

- (1) Pursuant to Pub. L. 664 (43 U.S.C. 1241(b)) at least 50 percent of any equipment, materials or commodities procured, contracted for or otherwise obtained with funds granted, guaranteed, loaned, or advanced by the U.S. Government under this agreement, and which may be transported by ocean vessel, shall be transported on privately owned United States-flag commercial vessels, if available.

“(2) Within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, ‘on-board’ commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (a)(1) of this section shall be furnished to both the Contracting Officer (through the prime contractor in the case of subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590.”

(b) *Contractor and Subcontractor Clauses.* “Use of United States-flag vessels: The contractor agrees—

“(1) To utilize privately owned United States-flag commercial vessels to ship at least 50 percent of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to this contract, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels.

“(2) To furnish within 20 days following the date of loading for shipments originating within the United States or within 30 working days following the date of loading for shipments originating outside the United States, a legible copy of a rated, ‘on-board’ commercial ocean bill-of-lading in English for each shipment of cargo described in paragraph (b) (1) of this section to both the Contracting Officer (through the prime contractor in the case of subcontractor bills-of-lading) and to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590.

“(3) To insert the substance of the provisions of this clause in all subcontracts issued pursuant to this contract.”

29 CFR 3.1 Purpose and scope.

This part prescribes “anti-kickback” regulations under section 2 of the Act of June 13, 1934, as amended (40 U.S.C. 276c), popularly known as the Copeland Act. This part applies to any contract which is subject to Federal wage standards and which is for the construction, prosecution, completion, or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States. 29 CFR 3.11 Regulations part of contract. All contracts made with respect to the construction, prosecution, completion, or repair of any public building or public work or building or work financed in whole or in part by loans or grants from the United States covered by the regulations in this part shall expressly bind the contractor or subcontractor to comply with such of the regulations in this part as may be applicable. In this regard, see §5.5(a) of this subtitle.

§ 41.117 Buildings built with Federal assistance.

(a) Each DOT Operating Administration assisting in the financing, through Federal grants or loans, or guaranteeing the financing, through loan or mortgage insurance programs, of newly constructed buildings will ensure that any building constructed with such assistance is constructed in accord with seismic standards set out in § 41.120 of this part.

(b) This section applies to new buildings and additions to existing buildings financed in whole or in part through Federal grants or loans administered by DOT Operating Administrations, or through guaranteed financing through loan or mortgage insurance programs administered by DOT Operating Administrations.

(c) Any building constructed with Federal financial assistance, after July 14, 1993 must be designed and constructed in accord with seismic standards approved by the DOT operating Administration under § 41.120 of this part in order to be eligible for Federal financial assistance.

(d) For buildings built with Federal financial assistance, a certification of compliance with the seismic design and construction requirements of this part is required prior to the furnishing of such assistance. Such statements of compliance may include the engineer’s and architect’s authenticated verifications of seismic design codes, standards, and practices used in the design and construction of the building,

construction observation reports, local or state building department plan review documents, or other documents deemed appropriate by the DOT Operating.

49 USC 5323 (d) Condition on Charter Bus Transportation Service.—(1) Agreements.

Financial assistance under this chapter may be used to buy or operate a bus only if the applicant, governmental authority, or publicly owned operator that receives the assistance agrees that, except as provided in the agreement, the governmental authority or an operator of public transportation for the governmental authority will not provide charter bus transportation service outside the urban area in which it provides regularly scheduled public transportation service. An agreement shall provide for a fair arrangement the Secretary of Transportation considers appropriate to ensure that the assistance will not enable a governmental authority or an operator for a governmental authority to foreclose a private operator from providing intercity charter bus service if the private operator can provide the service.

49 CFR 40.11 What are the general responsibilities of employers under this regulation?

(a) As an employer, you are responsible for meeting all applicable requirements and procedures of this part. (b) You are responsible for all actions of your officials, representatives, and agents (including service agents) in carrying out the requirements of the DOT agency regulations. (c) All agreements and arrangements, written or unwritten, between and among employers and service agents concerning the implementation of DOT drug and alcohol testing requirements are deemed, as a matter of law, to require compliance with all applicable provisions of this part and DOT agency drug and alcohol testing regulations. Compliance with these provisions is a material term of all such agreements and arrangements.

49 USC 5323 (f) School bus Transportation.- (1) AGREEMENTS.

Financial assistance under this chapter may be used for a capital project, or to operate public transportation equipment or a public transportation facility, only if the applicant agrees not to provide schoolbus transportation that exclusively transports students and school personnel in competition with a private schoolbus operator. This subsection does not apply—

(A) to an applicant that operates a school system in the area to be served and a separate and exclusive schoolbus program for the school system; and (B) unless a private school bus operator can provide adequate transportation that complies with applicable safety standards at reasonable rates.

49 USC 5333 (b) Employee Protective Arrangements.

(1) As a condition of financial assistance under sections 5307–5312, 5316,^[1]5318, 5323(a)(1), 5323(b), 5323(d), 5328,^[1] 5337, and 5338(b) of this title, the interests of employees affected by the assistance shall be protected under arrangements the Secretary of Labor concludes are fair and equitable. The agreement granting the assistance under sections 5307–5312, 5316,^[1] 5318, 5323(a)(1), 5323(b), 5323(d), 5328,^[1] 5337, and 5338(b) shall specify the arrangements.

40 USC 3702(b) Contract Requirements

A contract described in section 3701 of this title, and any obligation of the Federal Government, a territory of the United States, or the District of Columbia in connection with that contract, must provide that—

(1) a contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall not require or permit any laborer or mechanic, in any workweek in which the laborer or mechanic is employed on that work, to work more than 40 hours in that workweek, except as provided in this chapter; and (2) when a violation of clause (1) occurs, the contractor and any subcontractor responsible for the violation are liable—(A) to the affected employee for the employee's unpaid wages; and (B) to the Government, the District of Columbia, or a territory for liquidated damages as provided in the contract.

49 CFR 26.29 What prompt payment mechanisms must recipients have?

(a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment you make to the prime contractor.

(b) You must ensure prompt and full payment of retainage from the prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. You must use one of the

following methods to comply with this requirement: (1) You may decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors. (2) You may decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. (3) You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days after your payment to the prime contractor.

49 USC 5325(k) 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.

(3)The term "capital project" means a project for— (A)acquiring, constructing, supervising, or inspecting equipment or a facility for use in public transportation, expenses incidental to the acquisition or construction (including designing, engineering, location surveying, mapping, and acquiring rights-of-way), payments for the capital portions of rail trackage rights agreements, transit-related intelligent transportation systems, relocation assistance, acquiring replacement housing sites, and acquiring, constructing, relocating, and rehabilitating replacement housing; (B)rehabilitating a bus; (C)remanufacturing a bus; (D)overhauling rail rolling stock; (E)preventive maintenance; (F)leasing equipment or a facility for use in public transportation; (G)a joint development improvement that— (i)enhances economic development or incorporates private investment, such as commercial and residential development; (ii)provides a fair share of revenue that will be used for public transportation; (iv)provides that a person making an agreement to occupy space in a facility constructed under this paragraph shall pay a fair share of the costs of the facility through rental payments and other means; and (v)may include— (I)property acquisition; (II)demolition of existing structures; (III)site preparation; (IV)utilities; (V)building foundations; (VI)walkways; (VII)pedestrian and bicycle access to a public transportation facility; (VIII)construction, renovation, and improvement of intercity bus and intercity rail stations and terminals; (IX)renovation and improvement of historic transportation facilities; (X)open space; (XI)safety and security equipment and facilities (including lighting, surveillance, and related intelligent transportation system applications); (XII)facilities that incorporate community services such as daycare or health care; (XIII)a capital project for, and improving, equipment or a facility for an intermodal transfer facility or transportation mall; and (XIV)construction of space for commercial uses; (H)the introduction of new technology, through innovative and improved products, into public transportation; (I)the provision of nonfixed route paratransit transportation services in accordance with section 223 of the Americans with Disabilities Act of 1990 (j), but only for grant recipients that are in compliance with applicable requirements of that Act, including both fixed route and demand responsive service, and only for amounts— (i)not to exceed 10 percent of such recipient's annual formula apportionment under sections 5307 and 5311; or (ii)not to exceed 20 percent of such recipient's annual formula apportionment under sections 5307 and 5311, if, consistent with guidance issued by the Secretary, the recipient demonstrates that the recipient meets at least 2 of the following requirements: (I)Provides an active fixed route travel training program that is available for riders with disabilities. (II)Provides that all fixed route and paratransit operators participate in a passenger safety, disability awareness, and sensitivity training class on at least a biennial basis. (III)Has memoranda of understanding in place with employers and the American Job Center to increase access to employment opportunities for people with disabilities. (J)establishing a debt service reserve, made up of deposits with a bondholder's trustee, to ensure the timely payment of principal and interest on bonds issued by a grant recipient to finance an eligible project under this chapter; (K)mobility management— (i)consisting of short-range planning and management activities and projects for improving coordination among public transportation and other transportation service providers carried out by a recipient or subrecipient through an agreement entered into with a person, including a governmental

entity, under this chapter (other than section 5309); but (ii)excluding operating public transportation services; (L)associated capital maintenance, including— (i)equipment, tires, tubes, and material, each costing at least .5 percent of the current fair market value of rolling stock comparable to the rolling stock for which the equipment, tires, tubes, and material are to be used; and (ii)reconstruction of equipment and material, each of which after reconstruction will have a fair market value of at least .5 percent of the current fair market value of rolling stock comparable to the rolling stock for which the equipment and material will be used; (M)associated transit improvements; or (N)technological changes or innovations to modify low or no emission vehicles (as defined in section 5339(c)) or facilities.

FTA Master Agreement (25) Section 34. Safe Operation of Motor Vehicles. (a) Seat Belt Use. The Recipient agrees to implement Executive Order No. 13043, "Increasing Seat Belt Use in the United States," April 16, 1997, 23 U.S.C. § 402 note, (62 Fed. Reg. 19217), by: 90 (1) Adopting and promoting on-the-job seat belt use policies and programs for its employees and other personnel that operate company-owned vehicles, company-rented vehicles, or personally operated vehicles; and (2) **Including a "Seat Belt Use" provision in each third party agreement related to the Award.**

FTA Master Agreement (25) Section 34. Safe Operation of Motor Vehicles. (b) Distracted Driving. Including Text Messaging While Driving. The Recipient agrees to comply with: (1) Executive Order No. 13513, "Federal Leadership on Reducing Text Messaging While Driving," October 1, 2009, 23 U.S.C. § 402 note, (74 Fed. Reg. 51225); (2) U.S. DOT Order 3902.10, "Text Messaging While Driving," December 30, 2009; and (3) The following U.S. DOT Special Provision pertaining to Distracted Driving: (i) Safety. The Recipient agrees to adopt and enforce workplace safety policies to decrease crashes caused by distracted drivers, including policies to ban text messaging while using an electronic device supplied by an employer, and driving a vehicle the driver owns or rents, a vehicle Recipient owns, leases, or rents, or a privately-owned vehicle when on official business in connection with the Award, or when performing any work for or on behalf of the Award; (ii) Recipient Size. The Recipient agrees to conduct workplace safety initiatives in a manner commensurate with its size, such as establishing new rules and programs to prohibit text messaging while driving, re-evaluating the existing programs to prohibit text messaging while driving, and providing education, awareness, and other outreach to employees about the safety risks associated with texting while driving; and (iii) Extension of Provision. The Recipient agrees to **include the preceding Special Provision of section 34(b)(3)(i) – (ii) of this Master Agreement in its third party agreements, and encourage its Third Party Participants to comply with this Special Provision, and include this Special Provision in each third party subagreement at each tier supported with federal assistance.**

P12. Did the recipient include required certifications in solicitations and receive signed certifications from bidders as part of their bid or proposal, as applicable?

BASIC REQUIREMENT

Recipients must include required certifications in its procurements and receive signed certifications from bidders.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Certifications (TVM, Lobbying, Buy America) (PSR – 63)

Transit Vehicle Manufacturer (TVM) Certification: As part of their DBE program, all recipients must require that each TVM, as a condition of being authorized to bid on transit vehicle procurements funded by FTA, certify that it has complied with the requirements of 49 CFR 26.49. Only those TVMs listed on FTA's certified list or that have submitted a goal methodology to FTA that has been approved or has not been disapproved at the time of solicitation are eligible to bid. The recipient is required to include a provision in its bid specifications requiring the TVM certification as a condition of permission to bid. The certification should reference 49 CFR Part 26 (not Part 23).

A list of certified TVMs that have submitted required DBE information to FTA is available at the FTA website: <https://www.transit.dot.gov/regulations-and-guidance/civil-rights-ada/eligible-tvms-list>. However, this list is not exclusive and recipients should consult with FTA to verify the status of TVMs not currently on the website. Prior to award, evidence that this website has been checked or evidence of communication with FTA's Office of Civil Rights to validate TVM certification, should be included in applicable procurement files. FTA has instructed TVMs to submit to recipients a copy of their FTA approval letters along with the TVM certifications.

The TVM definition is codified at 49 CFR 26.5. Note that producers of vehicles that receive post-production alterations or retrofitting to be used for public transportation purposes (e.g., so-called cutaway vehicles, vans customized for service to people with disabilities) are also considered to be TVMs. Further, to the extent to which a vehicle remanufacturer is responding to a solicitation for new or remanufactured vehicles with a vehicle to which the remanufacturer has provided post-production alterations or retro-fitting, that remanufacturer is considered a TVM. Again, only certified TVMs are eligible to bid on FTA-assisted procurements. Businesses that manufacture, mass-produce, or distribute vehicles solely for personal use and for sale "off the lot" are not considered TVMs.

Lobbying Certification: Recipients are required to include a lobbying certification in agreements, contracts, and subcontracts exceeding \$100,000. Signed certifications regarding lobbying must be obtained by the recipient from subrecipients and contractors. Subrecipients retain their contractors' certifications and contractors retain subcontractors' certifications. The recipient is responsible for ensuring that they fulfill the requirements in applicable direct procurements exceeding \$100,000.

Buy America Certification: Buy America regulations require that all steel, iron, and manufactured products used in the project are produced in the United States. Solicitations for steel, iron, and manufactured products must contain a Buy America certification, unless the procurement is subject to a general waiver or the small purchase waiver. Buy America requirements also apply to capital leases for rolling stock and related equipment. Buy America requirements applicable to rolling stock procurements are discussed in more detail in Part D, Revenue Rolling Stock Procurements.

The small purchase waiver is now included in 49 U.S.C 5323(j)(13) and provides that the term "small purchase" means a purchase of not more than \$150,000. On September 16, 2016, the FTA Chief Counsel issued a Dear Colleague Letter regarding the small purchase waiver. The statutory language is clear that the small purchase waiver applies to purchases of \$150,000 or less, regardless of the size of the project. Therefore, purchases made with FTA financial assistance, including capital, planning, or

operating assistance, are subject to the waiver. The waiver applies both to purchases made directly by recipients or subrecipients and to purchases made by third-party contractors on behalf of the recipient or subrecipient. This provision of the FAST Act applies to all purchases made after October 1, 2015. The \$150,000 contract value is based on the total contract amount, including labor and options, and not just the value of the goods purchased. Also, recipients are not permitted to break up procurements in order to stay under the \$150,000 threshold. Finally, if a solicitation may result in bids near \$150,000, recipients should include the Buy America certifications in the solicitation, with a note clarifying that if the bid is more than \$150,000, the bidder must certify per the Buy America requirements, but if the bid is \$150,000 or less, no certification will be necessary.

Buy America statute applies to:

- All purchases of steel, iron, and manufactured products greater than \$150,000, regardless of whether they involve capital, operating, or planning funds,
- Contractors and subcontractors if the contract or subcontract is more than \$150,000, including labor and options,
- Purchases made using an intergovernmental agreement and jointly purchased manufactured products, and
- Purchases of used items.

For all procurements more than \$150,000, the recipient shall include in its bid or request for proposal an appropriate notice of the Buy America provision. Such specifications shall require, as a condition of responsiveness, that the bidder or offeror submit with the bid or offer a completed Buy America certificate in accordance with 49 CFR §§ 661.6 or 661.12 of this part, as appropriate. Recipients should include only the applicable Buy America certification. Inclusion of both certifications for both rolling stock and non-rolling stock procurements is discouraged and may result in confusion on the part of the contractor as to the applicable Buy America requirements.

Recipients may not obtain signed Buy America certifications after contract award for its own contracts or contracts of other recipients to make the contracts eligible for Federal funding. Recipients may, however, obtain signed Buy America certifications before buying off state GSA-type contracts to make them eligible for Federal funding. The recipient should consider the full GSA-type contract amount, not the amount of its purchase, when determining whether Buy America requirements apply to those purchases.

If a bidder or offeror cannot certify compliance with Buy America requirements, the recipient must seek a waiver of the Buy America statute before it may award the contract to the bidder or offeror. Buy America waivers are available on one of the following grounds: applying Buy America requirements would be inconsistent with the public interest; the materials produced in the United States are not produced in a sufficient and reasonably available quantity or are not of a satisfactory quality (i.e., non-availability waiver); or including domestic material will increase the cost of the overall project by more than 25 percent.

INDICATORS OF COMPLIANCE

- a. For FTA-funded vehicle procurements including procurements of remanufactured vehicles, did the recipient include the required DBE TVM certifications in solicitations and receive and verify signed certifications as part of bid responsiveness?*
- b. Did the recipient include required lobbying certifications in solicitations and receive signed certifications from contractors as part of bid responsiveness in procurements over \$100,000?*
- c. Did the recipient include required Buy America certifications in solicitations and receive signed certifications from contractors as part of bid responsiveness in applicable procurements over \$150,000 that included iron, steel or manufactured products?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, examine the recipient's policies and procedures. During the site visit, examine procurement files for inclusion of the following required certifications and receipt of signed certifications from bidders at the time of submitting bids or proposals:

- DBE TVM certifications;
- Lobbying certifications; and
- Buy America certifications.

For transit vehicle purchases, determine if, prior to award, the recipient documented that it verified TVM certifications received by either consulting FTA's Office of Civil Rights TVM website or contacting the Office of Civil Rights directly. If the bidder is not listed on the website, confirm that recipient contacted FTA's Office of Civil Rights to verify bidder's or proposer's eligibility to bid at the time the bid or proposal was submitted. TVM status cannot be cured after bid or proposal submittal, but before contract award.

Examine procurement files for inclusion of required Lobbying certifications in solicitations and receipt of signed certifications from bidders in agreements, contracts, and subcontracts exceeding \$100,000.

Examine procurement files for inclusion of required Buy America certifications in solicitations and receipt of signed certifications from bidders for:

- all purchases of steel, iron, and manufactured products greater than \$150,000, regardless of whether they involve capital, operating, or planning funds
- contractors and subcontractors if the contract or subcontract is more than \$150,000, including labor and options
- purchases made using an intergovernmental agreement and jointly purchased manufactured products
- purchases of used items

If a bidder or offeror did not certify compliance with Buy America requirements, document if the recipient received a waiver of the Buy America statute before it awarded the contract to the bidder or offeror. A Buy America Certification is non-compliant in circumstances where an offeror indicates both compliance and non-compliance within the certification document.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not include, where applicable, a provision in its bid specifications requiring TVM certifications, if the files do not contain TVM certifications from successful bidders, or if the TVM certification is out of date (references Part 23 instead of Part 26). The recipient is deficient if it cannot provide evidence that it ensured that the manufacturer was an eligible TVM at the time it submitted its bid or proposal.

DEFICIENCY CODE P12-1: No TVM certification

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA RCRO procedures for obtaining signed TVM certifications and for ensuring that manufacturers are eligible TVMs at the time of bid or proposal submission. The recipient must submit to the RCRO an updated TVM certification template to be used in future transit vehicle procurements. The recipient must submit to the FTA regional office a copy of the signed form with the next revenue rolling stock procurement.

The recipient is deficient if it has not included the lobbying certification in its procurement solicitations that exceed \$100,000 or if it has not obtained the proper certifications from contractors awarded contracts that exceed \$100,000.

DEFICIENCY CODE P12-2: Lobbying certifications not included in procurement solicitations or signed contractors or subcontractors

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office procedures for obtaining signed lobbying certifications. The recipient must submit to the FTA regional office a copy of the signed lobbying certification with the next applicable procurement.

The recipient is deficient if it did not include applicable Buy America provisions in its solicitation documents.

DEFICIENCY CODE P12-3: Buy America provisions not in solicitation and/or contract

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office revised procurement procedures that require the recipient to include Buy America provisions in solicitation documents and to obtain signed certifications from vendors when procuring steel, iron, or manufactured products not subject to a general waiver. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

For procurements for which a Buy America certification was not obtained, or if the offeror indicated both compliance and non-compliance within the certification, the recipient must provide the FTA regional office information documenting that the procurement complies with the Buy America provisions.

For procurements in progress for which bids have not been received, the recipient must submit to the FTA regional office documentation that it included, via an addendum, Buy America requirements in the solicitation.

The recipient must submit to the FTA regional office a copy of the signed Buy America certification before awarding the contract for the next procurement subject to Buy America requirements.

The recipient is deficient if it did not obtain signed Buy America certifications from vendors as part of the vendor's bid or proposal.

DEFICIENCY CODE P12-4: Contract files lacking signed Buy America certifications

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office revised procurement procedures that require the recipient to include Buy America provisions in solicitation documents and to obtain signed certifications from vendors when procuring steel, iron, or manufactured products not subject to a general waiver. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

For procurements for which a Buy America certification was not obtained, the recipient must provide the FTA regional office information documenting that the procurement complies with the Buy America provisions.

For procurements in progress for which bids have not been received, the recipient must submit to the FTA regional office documentation that it included, via an addendum, Buy America requirements in the solicitation.

The recipient must submit to the FTA regional office a copy of the signed Buy America certification before awarding the contract for the next procurement subject to Buy America requirements.

The recipient is deficient if it awarded the contract to a contractor who certified non-compliance with Buy America and did not obtain a waiver from FTA or it awarded the contract to a contractor who certified both compliance and non-compliance.

DEFICIENCY CODE P12-5: Contract awarded without Buy America waiver

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office revised procurement procedures that require the recipient to include Buy America provisions in solicitation documents and to obtain signed certifications from vendors when procuring steel, iron, or manufactured products not subject to a general waiver. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

For procurements for which a Buy America certification was not obtained, the recipient must provide the FTA regional office information documenting that the procurement complies with Buy America provisions.

For procurements in progress for which bids have not been received, the recipient must submit to the FTA regional office documentation that it included, via an addendum, Buy America requirements in the solicitation.

The recipient must submit to the FTA regional office a copy of the signed Buy America certification before awarding the contract for the next procurement subject to Buy America requirements.

GOVERNING DIRECTIVES

49 CFR 26.49 (a)

"If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section."

FTA Circular 9030.1E Chapter V 11.

h. "The recipient is obligated to determine, by checking the TVM listing on FTA's website or by checking with FTA's Office of Civil Rights at the time of bid opening, that the manufacturer likely to receive the contract is in compliance with 49 CFR Part 26."

APPENDIX II TO PART 200—CONTRACT PROVISIONS FOR NON-FEDERAL ENTITY CONTRACTS UNDER FEDERAL AWARDS. (I) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)

"Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award."

49 CFR 661.6

"Certification requirements for procurement of steel or manufactured products. If steel, iron, or manufactured products (as defined in §§661.3 and 661.5 of this part) are being procured, the appropriate

certificate as set forth below shall be completed and submitted by each bidder or offeror in accordance with the requirement contained in §661.13(b) of this part.”

49 CFR 661.12

“Certification requirement for procurement of buses, other rolling stock and associated equipment. If buses or other rolling stock (including train control, communication, and traction power equipment) are being procured, the appropriate certificate as set forth below shall be completed and submitted by each bidder in accordance with the requirement contained in §661.13(b) of this part.”

P13. If the recipient included liquidated damages in its procurements, did it do so appropriately?

BASIC REQUIREMENT

If recipients include liquidated damages in procurements, the rate must be stated and it must be based on a calculation. Any recovered damages should be credited back to the project account.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Liquidated Damages Provisions (PSR – 49)

Recipients are allowed to use liquidated damage clauses when there is a reasonable expectation of damages (increased costs on the project involved) from late completion or if weight requirements are exceeded and the extent or amount of such damages would be difficult or impossible to determine. Liquidated damage clauses may not be punitive. They may not be used to impose a penalty or limit or restrict competition, or used in situations where delayed performance will not affect the recipient adversely. The rate and measurement of liquidated damages must be specified in the solicitation and contract. The procurement file should include a record of the calculation and rationale for the amount of the damages assessed.

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. Any liquidated damages recovered should be credited to the project account involved unless FTA permits otherwise.

Liquidated damages should not be utilized as a substitute for other contract performance requirements. Recipients are required to maintain a contract administration system to ensure that they and their third party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders. There are methods that may be more appropriate than liquidated damages to incentivize or enforce contractor performance.

INDICATORS OF COMPLIANCE

- a. If the recipient included liquidated damages in its procurements, did it specify the rate in the contract, based on a calculation and rationale?*

- b. If the recipient recovered liquidated damages in its FTA-funded procurements, did it appropriately account for those damages with FTA?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient determines if it will use liquidated damages in contracts.

During the site visit, examine selected contract files, in accordance with records sampling procedures, for liquidated damage clause(s). Determine if the rationale for and calculation of the dollar value of liquidated damages was documented in the procurement file and presented in the solicitation documents as a specific rate. Examine selected contract files and correspondence in TrAMS to determine if any liquidated damages recovered were credited to the project account involved or if FTA allowed the recipient to handle the recovered damages in a different manner.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if a liquidated damages rate is not specified in the solicitation documents but is included in a resulting contract. The recipient is deficient if it cannot provide a reasonable explanation

regarding expected damages as a result of late completion and an appropriate mathematical basis for the dollar value of the liquidated damages.

DEFICIENCY CODE P13-1: Improper use of liquidated damage clause

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office written procedures for the correct use of liquidated damages clauses. If clauses are in existing contracts improperly, direct the recipient to modify the contract to eliminate the clause or provide a justification for the use and level of liquidated damages. Direct the recipient to obtain prior FTA regional office approval before awarding the next contract with a liquidated damage clause.

The recipient is deficient if it assessed liquidated damages, but did not credit these funds back to the project account or account for them as directed by FTA.

DEFICIENCY CODE P13-2: Improper accounting for recovered liquidated damages

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office procedures for appropriately accounting for recovered liquidated damages. For liquidated damages collected, submit to the FTA regional office with an accounting of those funds retained/collected so that FTA can provide appropriate instructions.

GOVERNING DIRECTIVES

Master Agreement, section 39(c)

"Federal Interest in Recovery. The Federal Government retains the right to a proportionate share of any proceeds recovered from any third party, based on the percentage of the federal share for the Underlying Agreement. Notwithstanding the preceding sentence, the Recipient may return all liquidated damages it receives to its Award Budget for its Underlying Agreement rather than return the federal share of those liquidated damages to the Federal Government, provided that the Recipient receives FTA's prior written concurrence."

FTA Circular 4220.1F Chapter IV 2. b. (6) (b)1

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

P14. Did the recipient approve, evaluate, and document change orders to procurements as described in its policies and procedures?

BASIC REQUIREMENT

The recipient is responsible for issuing, evaluating, and making necessary decisions involving any change to its third party contracts, and any change orders, or modifications it may issue.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Out of Scope Changes (PSR - 44) and Change Orders (PSR – New 59)

Recipients use their own procurement procedures that reflect applicable state and local laws and regulations, provided that the process ensures competitive procurement and the procedures conform to applicable Federal law, including 2 CFR Part 200, and FTA Circular 4220.1F, "Third Party Contracting Guidance."

A change order is an order authorized by the recipient directing the contractor to make changes, pursuant to contract provisions for such changes, with or without the consent of the contractor. Change orders must be approved by authorized recipient officials. Change orders are, in effect, sole source procurements. If project managers can approve change orders with minimal or no oversight, outside of normal procurement channels, potential problems may arise.

Competitors sometimes protest the issuance of changes when they believe that a new competitive procurement process should have been used for the changed work. The criterion is whether the change was within the scope of the original competition, i.e., what the competitors should have anticipated to be within the scope of the competition. An important factor to be considered is whether the original solicitation adequately advised offerors of the potential for the type of changes during the course of the contract that in fact occurred, or whether the modification is of a nature which potential offerors would reasonably have anticipated under the changes clause.

Recipients must develop an ICE and perform a cost or price analysis in connection with every contract modification or change order over \$150,000. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation.

To be eligible for FTA assistance under the recipient's award or cooperative agreement, the cost of the change, modification, change order, or constructive change must be allowable, allocable, within the scope of its award or cooperative agreement, and reasonable for the completion of project scope.

INDICATORS OF COMPLIANCE

- a. *Did the recipient evaluate and document change orders?*
- b. *Did the recipient ensure that executed change orders were within the scope of the original contract and its grant award?*
- c. *Did the recipient ensure that executed change orders were reasonable for completion of the project scope?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, receive and review the recipient's policies and procedures to determine how the recipient describes:

1. Management of change orders;
2. Evaluations of change orders; and

3. Thresholds and responsibilities for change order approvals.

During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that had significant change orders issued.

Determine if selected change orders were within the scope of the recipient's award and reasonable for the completion of project's scope. A change to a contract that is beyond the scope of that contract, is a new non-competitive or sole source award that must be justified under the provisions for non-competitive procurements.

Determine if documentation for selected change orders included:

- Cost justification; and
- Approval by an authorized official.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if it executed change orders to contracts that were not within the scope of the contract or were not reasonable for complete of the project scope, and/or did not document authorized official approval in accordance with its procurement procedures.

DEFICIENCY CODE P14-1: Insufficient documentation to support change orders

SUGGESTED CORRECTIVE ACTION: The recipient must submit compliant change order procedures to the FTA regional office. For the next change order, submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES

FTA Circular 4220.1F Chapter VII 2. a. The Recipient's Role and Responsibilities

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

FTA Circular 4220.1F Chapter VI 3. i. (1) (b)

"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."

P15. If the recipient included options in an FTA-funded procurement, did it base the number of options on its reasonably foreseeable need and evaluate the option price prior to awarding the contract?

BASIC REQUIREMENT

Recipients that include options in FTA-funded contracts must ensure that options reflect their reasonably foreseeable need, were evaluated prior to contract award, and that only previously-evaluated options were exercised.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Evaluation of Options (PSR – 40) and Exercise of Options (PSR – 43)

Recipients' contracts may include options to ensure the future availability of property or services, so long as the recipient is able to justify those options 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.

Recipients may include options in contracts that reflect reasonably foreseeable needs. If a recipient chooses to use options, the option quantities or periods in the bid must be evaluated in order to determine contract award. If the option quantities on a rolling stock or replacement parts purchase appear to exceed the recipient's reasonably foreseeable needs, the recipient may not assign those options to other recipients.

The price associated with exercising the option needs to be defined at the outset, either as a specific price or as a percentage increase of the base price. The evaluation of options should be documented in writing and should be part of the cost or price analysis undertaken by the recipient for the overall procurement. Documentation awarding the contract should indicate that the award is for the base contract as well as identified options.

INDICATORS OF COMPLIANCE

- a. *Did the recipient base the quantity or amount of options on its reasonably foreseeable need?*
- b. *Did the recipient evaluate option prices included in solicitations prior to contract award?*
- c. *Did the recipient exercise any options that it had not evaluated prior to contract award?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, examine the recipient's policies and procedures to determine if the recipient describes the use of options. During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that included options. Determine if the recipient documented that the inclusion of options in the solicitation represented its foreseeable need. If the documentation does not appear to be sufficient, provide this information to the FTA regional office for their further review and action. If options in the contract have been assigned to other recipients through a "piggybacking" process, the recipient should have documentation of why the quantities were no longer needed.

During the site visit, examine selected contract files, in accordance with records sampling procedures, for contracts that included options. Determine if the recipient documented its evaluation of the option prices prior to contract award if it intended to exercise the option(s) at a later date.

Prior to the site visit, request a list of options that the recipient exercised during the review period; this includes options for additional property or equipment, or options extending the term of a contract. Verify

that the recipient documented the evaluation of these options prior to award of the base contract and that the option prices conformed to the evaluated price.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if the contract quantities were not based on the recipient's foreseeable needs.

DEFICIENCY CODE P15-1: Contract quantities not based on need

SUGGESTED CORRECTIVE ACTION: The recipient must develop procedures for complying with FTA requirements when including options in solicitations.

The recipient is deficient if it exercised options that were not evaluated with the initial bid.

DEFICIENCY CODE P15-2: Options exercised not evaluated

SUGGESTED CORRECTIVE ACTION: The recipient must develop procedures for complying with FTA requirements when evaluating contracts which included options and for exercising options. For the next applicable procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient must provide to the FTA regional office a written assurance that it will not exercise the options unless FTA approval is granted for instances where the options that may violate the requirements have not been exercised. The recipient may not assign the options to any other FTA recipients.

The recipient is deficient if it exercised an option at a different price than noted in the award.

DEFICIENCY CODE P15-3: Exercised option differed from awarded option

SUGGESTED CORRECTIVE ACTION: The recipient must develop procedures for complying with FTA requirements when exercising options.

GOVERNING DIRECTIVES

2 CFR 200.318(d)

"The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach."

FTA Circular 4220.1F Chapter IV. 1.b. Necessity

"... requires the recipient to establish procedures to avoid the purchase of unnecessary property and services (including duplicative items and quantities or options it does not intend to use or whose use is unlikely)."

FTA Circular 4220.1F Chapter VI 7. b. (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."

P16. If the recipient procured bus or rail rolling stock or replacement parts with FTA funds, did it adhere to the time limitations on placing orders against the contracts?

BASIC REQUIREMENT

Options for the procurement of buses or replacement parts must not extend for more than 5 years after the date of the original contract or 7 years for rail rolling stock. For cooperative procurement contracts, the contract duration can be for no more than a two-year initial term, with no more than three optional extensions of not more than one year each.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Contract Period of Performance Limitation (PSR-15)

Recipients must not enter into contracts for revenue rolling stock and replacement parts with a period of performance exceeding five years for bus procurements inclusive of options, extensions, or renewals, and seven years for rail procurements. The five- and seven-year rules do not mean the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. The recipient, may not exercise the option to acquire buses or replacement parts later than five years (bus) or seven years (rail) after the date of its original contract. However, the maximum quantity specified in such multi-year contracts must represent the recipient's reasonably foreseeable need.

The FAST Act allows recipients to purchase rolling stock and related equipment from cooperative procurement contracts. A "cooperative procurement contract" means a contract entered into between a State government or eligible nonprofit entities and 1 or more vendors under which the vendors agree to provide an option to purchase rolling stock and related equipment to multiple participants. The contract term for a cooperative procurement contract may be for an initial term of not more than two years and may include three optional extensions of one year each.

Other than revenue rolling stock and replacement parts, recipients' 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 based on sound business judgment and should contain contract terms no longer than necessary to accomplish the purpose of the contract. Contracts exceeding a total of five years may or may not be reasonable. The recipient should have a justification that reflects sound business judgment for longer term contracts that exceed five years in length.

INDICATOR OF COMPLIANCE

a. If the recipient procured bus or rail rolling stock or replacement parts did it ensure that the contracts met the contract term restriction?

b. Are the periods of performance for the recipient's non-rolling stock contracts reasonable?

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, examine the recipient's policies and procedures to determine if the recipient describes management of options for rolling stock purchases. During the site visit, examine selected rolling stock and replacement part contracts to ensure that these met the contract term restriction. The five- and seven-year rules do not mean the recipient must obtain delivery, acceptance, or even fabrication in five or seven years. The recipient may not exercise the option to acquire buses or replacement parts later than five years (bus) or seven years (rail) after the date of its original contract.

If the recipient procured rolling stock through a cooperative purchase agreement, verify that the recipient obtained the agreement and verified that the terms of the contract were for an initial two-year period and no more than three one-year extensions for options.

For any non-rolling stock procurement reviewed that exceeds five years, determine if the recipient has justification to demonstrate that the contract term is reasonable.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if it exercised rolling stock options outside of the five- or seven-year period.

DEFICIENCY CODE P16-1: Contract(s) period of performance exceeds limitation

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office revised procurement procedures that include appropriate contract term restrictions on the period of performance for rolling stock and replacement part contracts supported with FTA funds. The recipient must provide the FTA regional office with an assurance that unexecuted options will not be executed on an existing contract that exceeds contract term restrictions. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if a non-rolling stock contract period of performance is unreasonable.

DEFICIENCY CODE P16-2: Contract(s) period of performance is unreasonable.

SUGGESTED CORRECTIVE ACTION: The recipient must provide the FTA regional office revised procurement procedures that include how it will establish reasonable contract terms for non-rolling stock items. The recipient must provide the FTA regional office with an assurance that unexecuted options will not be executed on an existing contract where the contract term is unreasonable. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES

49 USC § 5325(e) Multiyear rolling stock

"(1) Contracts. A recipient procuring rolling stock with Government financial assistance under this chapter may make a multiyear contract to buy the rolling stock and replacement parts under which the recipient has an option to buy additional rolling stock or replacement parts for:

(A) not more than 5 years after the date of the original contract for bus procurements; and

(B) not more than 7 years after the date of the original contract for rail procurements, provided that such option does not allow for significant changes or alterations to the rolling stock."

FTA Circular 4220.1F Chapter 2. b.3.b

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.

FTA Circular 4220.1F Chapter IV 2. e. (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: 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."

FAST Act, Section 3019 (b)(1)(B)(i)

PROCUREMENT NOT LIMITED TO INTRASTATE PARTICIPANTS. A grantee may participate in a cooperative procurement contract without regard to whether the grantee is located in the same State as the parties to the contract. (ii) VOLUNTARY PARTICIPATION. Participation by recipient in a cooperative procurement contract shall be voluntary. (iii) CONTRACT TERMS. The lead procurement agency or lead nonprofit entity for a cooperative procurement contract shall develop the terms of the contract. (iv) DURATION.—A cooperative procurement contract— (I) subject to subclauses (II) and (III), may be for an initial term of not more than 2 years; (II) may include not more than 3 optional extensions for terms of not more than 1 year each; and (III) may be in effect for a total period of not more than 5 years, including each extension authorized under subclause (II).

P17. If the recipient purchased FTA-funded assets through an assignment of options (a/k/a “piggyback”), did the underlying contract comply with applicable federal requirements regarding excessive options, inclusion of Federal requirements, assignability, and price, and no cardinal changes?

BASIC REQUIREMENT

Recipients may use another recipient’s contract rights if the original contract was procured in compliance with Federal requirements, contained required Federal provisions, included an assignability provision, does not contain excessive options, the optioned vehicles do not include cardinal changes to the original vehicles, and the contract price is fair and reasonable.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Piggybacking (PSR – 50, PSR - 43)

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

Intentionally procuring excessive quantities using Federal money is a violation of Federal regulations. Furthermore, to the extent that an improper assignment of contract rights enables an assignee to avoid otherwise required procurement procedures, it also undermines the requirement for full and open competition in federally assisted procurements.

While it has become increasingly popular for recipients to acquire vehicles through this method of procurement, piggybacking can also occur for purchases of services and property. A recipient that obtains contractual rights through assignment may use them after first determining that 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. 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.

FTA expects 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. Otherwise, the purchase is a “tag-on” and is considered an improper sole source procurement.

Any changes in the vehicle when assigned must be within the original scope (i.e., no major changes in configuration or design). FTA has not developed a finite list of acceptable contract changes. In the case of rolling stock, a major change in quantity or a substitution of major end items not contemplated when competition for the original award took place would generally be a cardinal change. Another cardinal change includes a change from a high-floor to a low-floor vehicle. Changing an engine might result in a cardinal change depending on the circumstances surrounding the project and whether a compatible replacement could be obtained through competition. FTA, however, considers changes to seating, fabrics, colors, exterior paint schemes, signage, floor covering, and other similar items to be permissible changes.

For purposes of Buy America, the domestic content of the option vehicles is determined based on the delivery date of the first production option vehicle. If the assignment results in a higher domestic content than applicable to the original contract, the options may not be assigned to another recipient. A

manufacturer may not agree to amend the contract to provide for a higher domestic content in order to permit a recipient to piggyback on an existing contract. Such an amendment is considered a cardinal change to the original contract.

Vehicles added to the base or option amounts originally specified are called “tag-ons.” Tag-ons are not permitted. A tag-on is defined as the adding on to the contracted quantities (base and option) as originally advertised, competed, and awarded, whether for the use of the buyer or for others, and then treating the add-on portion as though it met the requirements of competition.

If a recipient is using another recipient’s procurement contract for purchasing revenue vehicles (i.e., “piggybacking”), the purchaser may rely on the pre-award audit completed prior to the original contract. However, the recipient must review the audit and prepare its own signed certifications.

INDICATORS OF COMPLIANCE

- a. For “piggyback” procurements, did the recipient ensure that the underlying contract was solicited and awarded in accordance with Federal and FTA requirements?
- b. For “piggyback” procurements, did the recipient ensure that the original contract contained an assignability clause and that the quantities it used were available?
- c. For “piggyback” procurements, did the recipient document that the price of assignments acquired was fair and reasonable?
- d. For “piggyback” procurements, did the recipient make cardinal changes to the vehicle ordered under the option (e.g., ordered a different size vehicle, fuel option, etc.)?
- e. Did the recipient exercise an assigned option for delivery of vehicles on a contract that was entered into before December 4, 2015? If yes:
 1. If the assigned option is exercised for delivery of vehicles in FY2018 or FY2019, did the original contract include a provision for domestic content of more than 65 percent?
 2. If the assigned option is exercised for delivery of vehicles in FY2020 and beyond, did the original contract include a provision for domestic content of more than 70 percent?

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, examine the recipient’s policies and procedures to determine how the recipient describes compliance with “piggyback” purchases. Examine the recipient’s listing of procurements to identify any piggyback procurements.

During the site visit, examine selected “piggyback” procurement files to:

- Ensure that the recipient files include sufficient documentation that the underlying contract was solicited and awarded in compliance with Federal and FTA requirements and included required contract provisions. The recipient should be able to provide a complete procurement file for the procurement undertaken by the assigning agency.
- Determine if the recipient verified that:
 - the original contract contained an assignability provision, and
 - the quantities acquired, coupled with the quantities already assigned, did not exceed the amounts available under the assigning recipient’s contract

- Ensure that the recipient files include sufficient documentation that the original contract price remained fair and reasonable. Review the price analysis that was prepared by the assigning agency. Verify that the recipient determined that the option price was better than prices available in the market.
- Ensure that the recipient files include sufficient documentation that the vehicle ordered under the option is substantially the same as the original vehicle in the contract. Review any correspondence between the recipient and the vendor to identify any changes made to the specifications. Ensure that these changes were not cardinal changes to the original procurement.

Identify any piggyback procurements entered into after December 4, 2015. Onsite, review the date of the underlying contract on which the recipient is piggybacking and confirm that the exercised option conforms with FTA's September 1, 2016 policy guidance on the implementation of the phased increase in domestic content for rolling stock.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it cannot document that the:

- original award met Federal requirements,
- contract contained an assignability clause, and that assigned quantities did not exceed contract allowable amounts,
- price was determined to be fair and reasonable,
- the option price was better than prices available in the current market, and
- option vehicle did not contain a cardinal change to the original vehicle.

DEFICIENCY CODE P17-1: Improper piggyback purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office piggyback procedures that comply with FTA requirements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient may be required by FTA to terminate the agreement for convenience if an improper piggyback procurement is in process.

The recipient is deficient if, subsequent to December 4, 2015, it acquired options through piggybacking and the base contract did not have the correct FY2018, FY2019 or FY2020 domestic content requirement.

DEFICIENCY CODE P17-2: Domestic content requirements not met in piggyback purchase

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office piggybacking procedures that comply with FTA requirements. For the next procurement, submit to the FTA regional office documentation that the required process was implemented.

The recipient may be required by FTA to terminate the agreement for convenience if an improper piggyback procurement is in process.

GOVERNING DIRECTIVES

FTA Circular 4220.1F Chapter V (7)(2) Assignment of Contract Rights

"...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 recipient that obtains contractual rights through assignment may use them after first determining that the original contract price remains fair and reasonable, and the original 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.”

FTA Circular 4220.1F Chapter V 7. a. (1) (b). Exercise of Options

“A recipient may use contract options held by another recipient with the following limitations: ... 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.”

FTA Circular 4220.1F Chapter V, Section 7. b. (2) (d)

“In the case of rolling stock, a major change in quantity or a substitution of major end items not contemplated when competition for the original award took place would generally be a cardinal change. Another cardinal change would, at this time, include a change from a high-floor to a low-floor vehicle. Changing an engine might result in a cardinal change depending on the circumstances surrounding the project and whether a compatible replacement could be obtained through competition. FTA, however, considers changes to seating, fabrics, and colors, exterior paint schemes, signage, and floor covering, and other similar changes to be permissible changes.”

Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances IV, 81 Federal Register 60278 (September 1, 2016)

“The right to exercise an option does not create a contractual obligation until that contract is actually signed. Thus, assigning contract options to a third party will result in a new contract between that third party and the transit vehicle manufacturer, negating commenters' concerns that an increase in domestic content might be viewed as a “cardinal change.” Third parties seeking the assignment of procurement options (a/k/a “piggybacking”) have no contractual or statutory right to that option, and FTA considers that procurement to be a “new” contract and therefore subject to the applicable FAST Act standard based upon the scheduled delivery date of the first production vehicle under the new contract

P18. Did the recipient ensure that appropriate FTA approval was acquired for advance payments and that adequate protection was exercised for progress payments?

BASIC REQUIREMENT

The recipient must receive FTA approval for advance payments and protect FTA's interest on progress payments.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Advance Payments (PSR – 45) and Progress Payments (PSR – 46)

FTA does not authorize and will not participate in funding advance payments to a contractor without prior, written approval from the FTA regional office administering the project. A recipient may use its local funds for advance payments. However, advance payments made with local funds before federal funds have been awarded or before the issuance of a letter of no prejudice or other pre-award authority are ineligible for reimbursement.

There are some items for which it is customary to pay prior to receipt of products or services. Advance payments falling into this category would include such things as utility services, insurance premiums, and subscriptions to newspapers and magazines. FTA concurrence is required only when advance payment or payments *customarily required* in the marketplace exceed \$100,000.

FTA will allow progress payments if the payments are made to the contractor only for costs incurred in the performance of the contract. 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. Adequate security for progress payments may include taking title, performance and payment bonding, or obtaining a letter of credit or taking equivalent measures to protect the recipient's financial interest in the progress payment.

Payments should not be based on project milestones unless the contractor and recipient can substantiate the actual costs incurred in connection with each milestone.

INDICATORS OF COMPLIANCE

a. If the recipient used FTA funds for advance payments to contractors, is prior FTA approval documented in procurement files?

b. If the recipient used FTA funds for progress payments to contractors, did it adequately protect FTA's interest and substantiate the work for which payment was made based on actual costs incurred?

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes management of payments to contractors and administration and management of progress payments.

Close attention should be paid if the recipient used a vendor-supplied agreement for a procurement. Many vendor agreements contain payment provisions that would be categorized as advance payments, such as a provision requiring a payment upon contract execution. Use of vendor agreements are common for technology-based projects.

During the site visit, examine selected contract files, in accordance with records sampling procedures, for payments that may be categorized as payment to a contractor before the contractor incurred contract costs. Progress payments that do not reflect contractor incurred costs could be determined to be

advance payments. If such payments are evident, determine if the recipient documented that it received prior FTA approval in advance of the payments.

Examine selected contract files for description of how and when progress payments will be made. Determine if the recipient documented appropriate measures it took to protect FTA's interest before making any progress payments and that it has written documentation to substantiate the work for which payment was made. Include in selection of files reviewed those projects that appear to be paid based on milestones to determine if there is documentation to support costs incurred for each milestone.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it has used advance payments without prior FTA approval.

DEFICIENCY CODE P18-1: No FTA approval for advance payments

SUGGESTED CORRECTIVE ACTION: The recipient must report immediately to the FTA regional office any improper advance payments with an explanation of the circumstances surrounding the payments and await further instructions. The recipient must submit to the FTA regional office procedures for obtaining prior FTA approval for advance payments. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if it has made progress payments but has not obtained adequate security for those payments and does not have written documentation to substantiate the work for which payment was made.

DEFICIENCY CODE P18-2: Federal interest not protected in advance/progress payments

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office procedures for obtaining adequate security and or sufficient written documentation to substantiate the work for progress payments. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

GOVERNING DIRECTIVES

FTA C. 5010.1E, page IV-15

"Provisions in 2 CFR §200.305 and 31 CFR Part 205 govern payments to recipients for financing operations under federal assistance and other programs. These regulations require that advance payment to a recipient be limited to the minimum amounts needed and timed to be in accord with only the actual, immediate cash requirements of the recipient in carrying out the purpose of the Award. The timing and amount of advance payments must be as close as is administratively feasible to the actual disbursements by the recipient for direct program or costs of the Award and the proportionate share of any allowable indirect costs. The recipient must make timely payment to third-party contractors in accordance with the third-party contract provisions."

FTA C. 4220.1F, Ch. IV, Sections 2. b. (5)(b) Advance Payments

"Advance payments are payments made to a contractor before the contractor incurs contract costs. The recipient may use its local share funds for advance payments. However, if there is no automatic preaward authority for its project, then advance payments made with local share funds before FTA assistance has been awarded, or before a letter of no prejudice has been issued or other preaward authority has been provided, or before FTA approval for the specific advance payment has been obtained, are ineligible for reimbursement. The following principles and restrictions apply: 1 Use of FTA Assistance Prohibited. The recipient may not use FTA assistance to make payments to a third party contractor before the contractor has incurred the costs for which the payments would be attributable. 2 Exceptions for Sound Business Reasons. Apart from advance payments that are customary, as discussed further, FTA does occasionally make exceptions to its advance payment prohibitions, if the

recipient can provide sound business reasons for doing so and has obtained FTA's advance written concurrence. A recipient that seeks to use FTA assistance to support advance payments should contact the regional office administering its project to obtain FTA concurrence.

a Adequate Security for Advance Payments. FTA recognizes that advance payments may be needed for certain costs supported by sound business judgment. Adequate security for the advance payment is an essential pre-condition to FTA's concurrence in the use of FTA or local share funds.

b Customary Advance Payments. FTA recognizes that advance payments are typically required for, but are not limited to, public utility connections and services, rent, tuition, insurance premiums, subscriptions to publications, software licenses, construction mobilization costs, transportation, hotel reservations, and conference and convention registrations. Accordingly, the recipient may use FTA assistance to support or reimburse the costs of such acquisitions. FTA concurrence is required only when such advance payment or payments customarily required in the marketplace exceed \$100,000."

FTA C. 4220.1F, Ch. IV, Sections 2. b. (5)(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."

P19. If the recipient procured buses with FTA funds, did it comply with requirements for bus testing reports?

BASIC REQUIREMENT

For bus procurements, the recipient must have in its possession a copy of the Altoona Bus Testing Report before final acceptance of the first vehicle.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Bus Testing (PSR – New 64)

The recipient must have in its possession a copy of the Altoona Bus Testing Report before final acceptance of the first vehicle. Testing applies to buses and modified vans used in transit service, including, but not limited to, new bus and van models using alternative fuels such as methanol, ethanol, compressed natural gas (CNG), hydrogen, and electricity (if stored and/or generated on-board the vehicle).

FTA does not require a vehicle manufacturer to test its model before bidding. However, recipients of FTA funds acquiring any bus model must certify that an example of that model will have been tested and the recipient will have received a copy of the resulting test report prepared on the bus model before the final acceptance of the first vehicle. Effective October 31, 2016, the effective date of the revision to 49 CFR part 665, recipients must certify that the bus models submitted to Altoona following the effective date received a passing score before FTA funds can be spent on that vehicle.

Bus testing is not required for unmodified mass-produced vans (provided they are only offered to FTA recipients in the 4-year/100,000-mile service life category). Unmodified mass-produced vans are vehicles manufactured as complete, fully assembled vehicles as provided by the original equipment manufacturer (OEM). This category includes vans with raised roofs or wheelchair lifts or ramps that are installed by the OEM or by someone other than the OEM, provided that the installation of these components is completed in strict conformance with the OEM modification guidelines.

INDICATORS OF COMPLIANCE

- a. *Were the bus models that the recipient purchased during the review period tested?*
- b. *Did the recipient obtain the bus testing report showing the bus model met FTA's bus testing requirements prior to acceptance of the first vehicle?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, examine the make and models of all buses procured since the last Comprehensive Review. Review the Altoona Bus Research and Testing Center Database at <http://altoonabustest.psu.edu/> to determine if a bus report has been issued for that model. For bus models tested subsequent to October 31, 2016, determine if the bus model received a passing score.

During the site visit, examine selected bus procurement files to ensure that the recipient had in its possession a copy of the Altoona Bus Testing Report before final acceptance of the first vehicle and that, subsequent to October 31, 2016, any new bus model tested received a passing score.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if the bus model purchased with FTA funds was not tested or, for new bus models tested after October 31, 2016, the bus model did not receive a passing score.

DEFICIENCY CODE P19-1: Deficiency with bus model testing requirements

SUGGESTED CORRECTIVE ACTION: If any vehicles have not been tested and the recipient has accepted the vehicles, the recipient must submit to the FTA regional office information relating to the procurement. The recipient must provide procedures for only accepting vehicles that were tested and received a passing score for future bus purchases to the FTA regional office. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if a copy of the Altoona Bus Test Report is not in the recipient's procurement files.

DEFICIENCY CODE P19-2: Missing documentation of bus model testing

SUGGESTED CORRECTIVE ACTION: The recipient must obtain the Altoona Bus Test Report for the specific make/model purchased and provide a copy of it and procedures for obtaining the report for future bus purchases to the FTA regional office.

GOVERNING DIRECTIVE

49 CFR 665.7 Certification of compliance

"(a) In each application to FTA for the purchase or lease of any new bus model, or any bus model with a major change in configuration or components to be acquired or leased with funds obligated by the FTA, the recipient shall certify that the bus was tested at the Bus Testing Facility and that the bus received a passing test score as required in this part. The recipient shall receive the appropriate full Bus Testing Report and any applicable partial testing report(s) before final acceptance of the first vehicle."

P20. If the recipient procured rolling stock with FTA funds, did it comply with the requirements of 49 CFR Part 663, including pre-award and post-delivery Buy America audit requirements, resident inspector requirements, and purchaser's certifications?

BASIC REQUIREMENT

A recipient purchasing revenue service rolling stock with Federal funds must conduct pre-award and post-delivery audits verifying compliance with Buy America provisions, purchaser's requirements, resident inspector requirements, and Federal Motor Vehicle Safety Standards (FMVSS).

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Vehicle Pre-Award Review (PSR – 57) and Vehicle Post-Delivery Review (PSR – 58)

A recipient purchasing revenue service rolling stock with Federal funds must conduct pre-award and post-delivery audits verifying compliance with Buy America provisions, purchaser's requirements, resident inspector requirements, and FMVSS. The recipient is required to keep records, including pre-award and post-delivery certifications, which show that the regulations have been followed. The audits require the recipient to complete two certifications (Buy America and Purchaser's Requirements) at the pre-award stage and three certifications (Buy America, Purchaser's Requirements, and FMVSS) at the post-delivery stage.

Although procurements of rolling stock of \$150,000 or less are not subject to Buy America requirements, these contracts still must comply with the pre-award and post-delivery purchaser's requirements and FMVSS audits required by 49 CFR Part 663.

Pre-Award Audits and Certifications

Recipients may purchase vehicles in several groups over several years using either vehicle procurement contracts with options or multi-year vehicle procurement contracts. FTA requires that each group of vehicles purchased, i.e., each "order" of vehicles, have a pre-award audit before the order is placed. One pre-award audit may suffice, provided that there is no change in vehicle configuration, i.e., no change that is expected to have a significant impact on vehicle handling and stability or structural integrity, between successive deliveries of vehicles.

If a recipient is using another recipient's procurement contract for purchasing revenue vehicles (i.e., "piggybacking"), the purchaser may rely on the pre-award audit completed prior to the original contract. However, the recipient must review the audit and prepare its own signed certification.

Compliance with purchaser's specifications: The recipient must complete a pre-award purchaser's requirements certification verifying that the manufacturer's bid specifications comply with the recipient's solicitation requirements and that the proposed manufacturer is responsible and capable of building the bus to the solicitation specifications. The pre-award certification may be based on the recipient's determination that the vendor is responsive and responsible. The requirement to conduct an audit for compliance with purchaser's requirements and sign a certification applies to all purchases of revenue rolling stock, even those below the Federal simplified acquisition threshold or Buy America threshold. The pre-award audit is required before a recipient enters into a formal contract with a supplier.

Compliance with Buy America: If the procurement is more than \$150,000, at the pre-award stage, the recipient must complete:

- A compliance certification verifying that the rolling stock will contain the required minimum percent domestic components, by cost, and that final assembly will take place in the United States; or
- An exemption certification indicating that the recipient has a letter from FTA granting a waiver from the Buy America requirement.

The recipient or an independent third party must conduct the Buy America audit. The audit may be based on information provided by the manufacturer; however, certification by the manufacturer is not adequate.

For rolling stock contracts entered into before October 1, 2015, the domestic content must exceed 60 percent. For rolling stock contracts entered into on or after October 1, 2015, the applicable domestic content percentage under 49 U.S.C. § 5323(j)(2)(C) will be based on the scheduled delivery date of the first production vehicle (i.e., the first vehicle intended to carry passengers in revenue service), final acceptance notwithstanding. Thus, if a recipient or group of recipients as part of a joint procurement enter into a contract for rolling stock on or after October 1, 2015, then the new FAST Act provisions applicable for the date of delivery of the first production vehicle shall apply. Accordingly, if the first production vehicle is delivered in FY2018 or FY2019, the domestic content must be more than 65 percent, and if the first production vehicle is delivered in FY2020 or beyond, the domestic content must be more than 70 percent. If the scheduled delivery date is delayed such that the domestic content requirement is increased, recipients must comply with FTA's September 1, 2016 policy guidance on the implementation of the phased increase in domestic content.

Compliance with FMVSS: The recipient must receive a certification from the vehicle manufacturer at the pre-award stage that the vehicles being procured comply with FMVSS issued by the National Highway Traffic Safety Administration (49 CFR Part 571).

Post Delivery Audits and Certifications

Compliance with purchaser's specifications: The recipient must complete a post-delivery purchaser's requirements certification verifying that the buses delivered meet the contract specifications. This must be completed before a bus title is transferred to the recipient or before a bus is placed into revenue service, whichever is first. The post-delivery certification is based on the recipient's visual inspections and road tests and, if required, the resident inspector's monitoring of the final assembly process and final report of manufacturing activities. The requirement to conduct an audit for compliance with purchaser's requirements and sign a certification applies to all purchases of revenue rolling stock, even those below the Federal simplified acquisition threshold or Buy America threshold.

Recipients are required to have a resident inspector during final assembly process if they meet the following criteria:

- Recipient is purchasing any number of rail vehicles.
- Recipient is in an urbanized area with a population of more than 200,000 and is purchasing more than 10 buses.
- Recipient is in an area with a population of 200,000 or less and is purchasing more than 20 buses.

FTA does not require in-plant inspectors for unmodified vans manufactured by the automobile companies. FTA requires only a visual inspection and road test after delivery for such procurements.

In the case of consolidated procurements on behalf of multiple subrecipients, the in-plant inspection requirement is triggered only if any single subrecipient will receive more than 10 or more than 20 vehicles, depending on area size. One in-plant inspector can meet the requirement for multiple recipients. The inspector may not be an agent or employee of the manufacturer. The inspector must prepare a report providing accurate records of all vehicle construction activities and summarizing how the construction and operational characteristics of the vehicles met (or did not meet) the contract specifications.

Compliance with Buy America: Required post-delivery certification includes disclosure by the manufacturer of the final assembly location; a listing of the component and subcomponent parts, the cost (actual or percent of total) of such components and subcomponents and the country of origin; a description of final assembly activities; and the cost of final assembly. Final assembly costs are not to be included when calculating the percent of domestic content of the vehicle.

The recipient or an independent third party must conduct the Buy America audits. The audit may be based on information provided by the manufacturer; however, certification by the manufacturer is not adequate.

Compliance with FMVSS: The recipient must complete, at the post-delivery stage, a certification that the recipient has received from the vehicle manufacturer at both the pre-award and post-delivery stages a certification that the vehicles comply with the FMVSS issued by the National Highway Traffic Safety Administration (49 CFR Part 571). The requirement to conduct an audit for compliance with FMVSS and sign a certification applies to all purchases of revenue rolling stock, even those below the Federal simplified acquisition threshold or Buy America threshold.

INDICATORS OF COMPLIANCE

- a. *For rolling stock procurements, did the recipient include the appropriate Buy America domestic content requirements in its solicitation?*
- b. *For rolling stock purchases, did the recipient conduct pre-award and post-delivery audits to ensure the manufacturer(s) complied with contract specifications, Buy America?*
- c. *Did the recipient document its pre-award and post-delivery audits by completing and maintaining written certifications?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, review the recipient's list of rolling stock procurements to determine which Buy America domestic content percentage is required. Onsite, review contract documents to ensure that the appropriate domestic content requirements are included.

- For contracts entered into before October 1, 2015, all vehicles delivered under the original contract base order and any properly exercised options by recipients who are direct parties to the contract must contain a domestic content of 60 percent or more.
- The FAST Act amendments regarding increasing domestic content do not apply to contracts entered into before October 1, 2015, even if the contract provides for the delivery of the first production vehicle after FY2017.
- For rolling stock contracts entered into on or after October 1, 2015, the applicable domestic content percentage is based on the scheduled delivery date of the first production vehicle (i.e., the first vehicle intended to carry passengers in revenue service), final acceptance notwithstanding.
- If the first production vehicle is delivered in FY2018 or FY2019, the domestic content must be more than 65 percent, and if the first production vehicle is delivered in FY2020 or beyond, the domestic content must be more than 70 percent.
- If the delivery date of the first production vehicle is delayed such that it will be delivered in a year with a higher domestic content, FTA will address those situations on a case-by-case basis.

Prior to the site visit, examine the recipient's policies and procedures to determine how the recipient describes compliance with pre-award and post-delivery audits and audit certifications for rolling stock purchases. During the site visit, examine selected rolling stock procurement files to ensure that, for each group of vehicles purchased, the recipient conducted the following audits and included in their files the following certifications:

- Pre-award Buy America.
- Pre-award Purchaser's Requirements (required even if procurement is below \$150,000).

- Post-delivery Buy America.
- Post-delivery Purchaser's Requirements (required even if procurement is below \$150,000).
- Post-delivery FMVSS (required even if procurement is below \$150,000).

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it did not include the appropriate Buy America domestic content requirements in its rolling stock procurements.

DEFICIENCY CODE: P20-1 Buy America domestic content deficiencies

SUGGESTED CORRECTIVE ACTION: The recipient must stop work on the contract until FTA determines the appropriate corrective action for non-compliant vehicles already delivered and paid for under the contract and for future orders of non-compliant vehicles.

The recipient is deficient if it did not conduct all of the required audits for revenue rolling stock procurements. The recipient is deficient if it ordered a group of vehicles from a multi-year procurement before the pre-award audit was conducted.

DEFICIENCY CODE P20-2: Pre-award and/or post-delivery audits not performed

SUGGESTED CORRECTIVE ACTION: If no vehicles have been delivered under the contract, the recipient must conduct within 30 days the equivalent of a Buy America pre-award audit. If the vehicles are in the process of being delivered or have been delivered, the recipient must conduct a Buy America post-delivery audit within 30 days. The recipient must submit to the FTA regional office procedures for pre-award and post-delivery review and inspection. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient must submit to the FTA regional office procedures for conducting pre-award audits for options and/or multi-year contracts so that future procurements will comply with this requirement. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

The recipient is deficient if its pre-award and/or post-delivery certifications for applicable rolling stock procurements is not complete or in compliance with 49 CFR Part 663.

DEFICIENCY CODE P20-3: Pre-award and/or post-delivery certifications lacking

SUGGESTED CORRECTIVE ACTION: If no vehicles have been delivered under the contract, the recipient must submit a compliant pre-award audit within 30 days. If the vehicles are in the process of being delivered or have been delivered, the recipient must submit a compliant pre-award audit and/or post-delivery audit within 30 days. The recipient must submit to the FTA regional office the certifications for the procurement reviewed and procedures for completing the applicable pre-award and post-delivery audits certifications for future revenue rolling stock procurements. If the recipient cannot certify compliance, it must confer with the FTA regional office for the appropriate corrective action. For the next procurement, the recipient must submit to the FTA regional office documentation that the required process was implemented.

For the next revenue rolling stock procurement, the recipient must submit to the FTA regional office pre-award audit information and certifications before awarding the contract and the post-delivery audit information and certifications before drawing FTA funds.

GOVERNING DIRECTIVES

49 U.S.C. 5323(j)

49 CFR 663 Pre-award and Post-delivery Audits of Rolling Stock Purchases “Subpart B—Pre-Award Audits

49 CFR 663.21 Pre-award audit requirements

“A recipient purchasing revenue service rolling stock with FTA funds must ensure that a pre-award audit under this part is complete before the recipient enters into a formal contract for the purchase of such rolling stock.”

49 CFR 663.23 Description of pre-award audit

“A pre-award audit under this part includes—(a) A Buy America certification as described in §663.25 of this part; (b) A purchaser's requirements certification as described in §663.27 of this part; and (c) Where appropriate, a manufacturer's Federal Motor Vehicle Safety Standards certification information as described in §663.41 or §663.43 of this part.”

49 CFR 663.25 Pre-award Buy America certification

“For purposes of this part, a pre-award Buy America certification is a certification that the recipient keeps on file that—(a) There is a letter from FTA which grants a waiver to the rolling stock to be purchased from the Buy America requirements under section 165(b)(1), (b)(2), or (b)(4) of the Surface Transportation Assistance Act of 1982, as amended; or (b) The recipient is satisfied that the rolling stock to be purchased meets the requirements of section 165(a) or (b)(3) of the Surface Transportation Assistance Act of 1982, as amended, after having reviewed itself or through an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer which lists—(1) Component and subcomponent parts of the rolling stock to be purchased identified by manufacturer of the parts, their country of origin and costs; and (2) The location of the final assembly point for the rolling stock, including a description of the activities that will take place at the final assembly point and the cost of final assembly.”

49 CFR 663.27 Pre-award purchaser's requirements certification

“For purposes of this part, a pre-award purchaser's requirements certification is a certification a recipient keeps on file that— (a) The rolling stock the recipient is contracting for is the same product described in the purchaser's solicitation specification; and (b) The proposed manufacturer is a responsible manufacturer with the capability to produce a vehicle that meets the recipient's specification set forth in the recipient's solicitation. Subpart C—Post-Delivery Audits”

49 CFR 663.31 Post-delivery audit requirements

“A recipient purchasing revenue service rolling stock with FTA funds must ensure that a post-delivery audit under this part is complete before title to the rolling stock is transferred to the recipient.”

49 CFR 663.33 Description of post-delivery audit

“A post-delivery audit under this part includes—(a) A post-delivery Buy America certification as described in §663.35 of this part; (b) A post-delivery purchaser's requirements certification as described in §663.37 of this part; and (c) When appropriate, a manufacturer's Federal Motor Vehicle Safety Standards self-certification information as described in §663.41 or §663.43 of this part.”

49 CFR 663.35 Post-delivery Buy America certification

"For purposes of this part, a post-delivery Buy America certification is a certification that the recipient keeps on file that—(a) There is a letter from FTA which grants a waiver to the rolling stock received from the Buy America requirements under sections 165 (b)(1), or (b)(4) of the Surface Transportation Assistance Act of 1982, as amended; or (b) The recipient is satisfied that the rolling stock received meets the requirements of section 165 (a) or (b)(3) of the Surface Transportation Assistance Act of 1982, as amended, after having reviewed itself or by means of an audit prepared by someone other than the manufacturer or its agent documentation provided by the manufacturer which lists—(1) Components and subcomponent parts of the rolling stock identified by manufacturer of the parts, their country of origin and costs; and (2) The actual location of the final assembly point for the rolling stock including a description of the activities which took place at the final assembly point and the cost of the final assembly."

49 CFR 663.37 Post-delivery purchaser's requirements certification

"For purposes of this part, a post-delivery purchaser's requirements certification is a certification that the recipient keeps on file that—(a) Except for procurements covered under paragraph (c) in this section, a resident inspector (other than an agent or employee of the manufacturer) was at the manufacturing site throughout the period of manufacture of the rolling stock to be purchased and monitored and completed a report on the manufacture of such rolling stock. Such a report, at a minimum, shall—(1) Provide accurate records of all vehicle construction activities; and (2) Address how the construction and operation of the vehicles fulfills the contract specifications. (b) After reviewing the report required under paragraph (a) of this section, and visually inspecting and road testing the delivered vehicles, the vehicles meet the contract specifications. (c) For procurements of: (1) Ten or fewer buses; or (2) Procurements of twenty vehicles or fewer serving rural (other than urbanized) areas, or urbanized areas of 200,000 people or fewer; or (3) Any number of primary manufacturer standard production and unmodified vans, after visually inspecting and road testing the vehicles, the vehicles meet the contract specifications."

49 CFR 663.39 Post-delivery audit review

"(a) If a recipient cannot complete a post-delivery audit because the recipient or its agent cannot certify Buy America compliance or that the rolling stock meets the purchaser's requirements specified in the contract, the rolling stock may be rejected and final acceptance by the recipient will not be required. The recipient may exercise any legal rights it has under the contract or at law. (b) This provision does not preclude the recipient and manufacturer from agreeing to a conditional acceptance of rolling stock pending manufacturer's correction of deviations within a reasonable period. Subpart D—Certification of Compliance With or Inapplicability of Federal Motor Vehicle Safety Standards"

49 CFR 663.41 Certification of compliance with Federal motor vehicle safety standards

"If a vehicle purchased under this part is subject to the Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in part 571 of this title, a recipient shall keep on file its certification that it received, both at the pre-award and post-delivery stage, a copy of the manufacturer's self-certification information that the vehicle complies with relevant Federal Motor Vehicle Safety Standards."

49 CFR 663.43 Certification that Federal motor vehicle standards do not apply

"(a) Except for rolling stock subject to paragraph (b) of this section, if a vehicle purchased under this part is not subject to the Federal Motor Vehicle Safety Standards issued by the National Highway Traffic Safety Administration in part 571 of this title, the recipient shall keep on file its certification that it received a statement to that effect from the manufacturer. (b) This subpart shall not apply to rolling stock that is not a motor vehicle."

Notice of Policy on the Implementation of the Phased Increase in Domestic Content Under the Buy America Waiver for Rolling Stock and Notice of Public Interest Waiver of Buy America Domestic Content Requirements for Rolling Stock Procurement in Limited Circumstances IV, 81 Federal Register 60278 (September 1, 2016)

“For rolling stock contracts entered into on or after October 1, 2015, i.e., the effective date of the FAST Act, the applicable domestic content percentage under section 5323(j)(2)(C) will be based on the scheduled delivery date of the first production vehicle (i.e., the first vehicle intended to carry passengers in revenue service), final acceptance notwithstanding. Thus, if a recipient or group of recipients as part of a joint procurement entered into a contract for rolling stock on or after October 1, 2015, then the new FAST Act provisions applicable for the date of delivery of the first production vehicle shall apply. Accordingly, if the first production vehicle is delivered in FY2018 or FY2019, the domestic content must be more than 65 percent, and if the first production vehicle is delivered in FY2020 or beyond, the domestic content must be more than 70 percent. These delivery provisions apply to contracts entered into on or after October 1, 2015, unless a waiver is granted. If the delivery date of the first production vehicle is delayed such that it will be delivered in a year with a higher domestic content, FTA will address those situations on a case-by-case basis. The FAST Act amendments do not apply to contracts entered into before October 1, 2015, even if the contract provides for the delivery of the first production vehicle after FY2017. For contracts entered into before October 1, 2015, all vehicles delivered under the original contract base order and any properly exercised options by recipients who are direct parties to the contract may contain a domestic content of more than 60 percent, per the pre-FAST Act requirements.”

FTA is issuing two general public interest waivers to address two categories of recipients and manufacturers: (1) Recipients who entered into contracts or placed purchase orders against State schedules between October 1, 2015 and December 4, 2015; and (2) recipients who have entered into contracts after December 4, 2015, as a result of solicitations for bids or requests for proposals that were advertised before December 4, 2015. In addition, FTA is issuing a third public interest waiver for recipients who solicited contracts on or after December 4, 2015, provided they enter into a contract within 60 days of publication of this Notice.

P21. Does the recipient perform oversight of its subrecipients' FTA-funded procurement activities as described in its policies and procedures?

BASIC REQUIREMENT

The recipient is responsible for ensuring that subrecipients administer FTA-funded procurements in accordance with the requirements in 2 CFR Part 200 and FTA Circular 4220.1F.

APPLICABILITY

All recipients with subrecipients

EXPLANATION FOR RECIPIENT

Subrecipient Oversight (New PSR - 60)

When a recipient passes through funding to a subrecipient, competitive procurement requirements may apply to the subrecipient. Typically, this requirement would apply to any subrecipient which performs primary project activities normally performed by the recipient directly. In such circumstances, the procurement process of the subrecipient should meet Federal requirements contained in the FTA Master Agreement, including Buy America, debarment and suspension, and lobbying requirements. Furthermore, a recipient needs to have a mechanism to ensure subrecipient compliance.

Some recipients provide written guidelines or standard terms and conditions to subrecipients for direct procurements. Some recipients review subrecipients' direct procurements, particularly for vehicles, equipment, and construction. Such reviews, which generally focus on bid evaluation and selection, may be used to ensure that FTA (and state) requirements are met.

Monitoring of compliance with FTA third party contracting requirements will require a review of procurement procedures, either through site visits or a periodic review of written procurement manuals. The recipient is not required to review each subrecipient's procurement to ensure compliance with Federal requirements. The recipient may review selected procurements on a periodic basis in conjunction with a site visit or other general review of compliance with Federal requirements.

INDICATORS OF COMPLIANCE

- a. *Does the recipient implement oversight procedures of its subrecipients for FTA-funded procurements?*
- b. *Do subrecipient procurement files reviewed demonstrate adequate oversight by the recipient?*

INSTRUCTIONS FOR REVIEWER

Request and review a listing of subrecipients. Request and review the recipient's oversight procedures, State Management Plans (if the recipient is a State), and any procurement requirements that have been included in subrecipient agreements. Discuss with the recipient onsite and determine who monitors the subrecipients' procurement processes. Examine written reports or audit reports of the process to determine if the recipient is monitoring in accordance with its documented procedures.

For each subrecipient selected for a site visit, onsite:

- Confirm that the subrecipient has written procurement policies and procedures that comply with 2 CFR Part 200.
- Confirm the subrecipient has written standards of conduct for those involved in its procurement and contract administration actions.
- Confirm that the subrecipient makes protest procedures available to bidders and the public.
- Select one procurement that has been reviewed by the recipient.
 - Verify that a written responsibility determination was made for the successful bidder prior to award and that consideration was given to matters such as:
 - Contractor integrity
 - Compliance with public policy
 - Record of past performance
 - Financial and technical resources.
 - Verify that the subrecipient is determining that bidders were not excluded or disqualified before entering into any third-party contracts. Document that the subrecipient makes this verification by:
 - Checking System for Award Management (SAM) Exclusions (at SAM.gov); or
 - Collecting a certification; or
 - Adding a clause or condition to the covered transaction.
 - Confirm that the subrecipient maintains records sufficient to detail the history of procurement actions.
 - Confirm that there is a method to ensure the most efficient and economic purchase.
 - Confirm that contract administration and oversight procedures are being implemented as described in the subrecipient's procurement policies and procedures.
 - Confirm that the subrecipient is not using geographic preferences or misusing prequalification lists.
 - Verify that the subrecipient used the appropriate method of procurement as described in its policies and procedures and in compliance with 2 CFR Part 200.
 - Confirm that the subrecipient did not use the cost plus percentage of cost type of contracting.
 - If reviewing an A&E procurement, determine that A&E services were procured using a qualifications-based process in accordance with the Brooks Act, where firms are ranked based only on their qualifications and price is then negotiated with the most qualified firm.
 - Confirm the subrecipient developed an independent estimate prior to receipt of bids or proposals for procurements above the Simplified Acquisition Threshold.
 - Confirm that a cost analysis was performed in accordance with the recipient's policies and procedures for: (1) procurements which require that offerors submit detailed elements of direct and indirect costs; (2) procurements where adequate price competition is lacking; and/or (3) sole-source procurements. If a cost analysis was not required, confirm the subrecipient documented a price analysis.
 - Verify that the subrecipient included the applicable FTA clauses in its bid documents.
 - Confirm that, for applicable construction contracts, the subrecipient received bid, performance, and payment security documents in the correct amounts, and that Davis Bacon wage determinations were included in the contract documents.
 - Confirm the subrecipient included all applicable certifications in its bid documents and received signed certifications from the proposers. These certifications may include:
 - Transit Vehicle Manufacturer (TVM) certification
 - Lobby certification
 - Buy America certification
 - Determine that liquidated damages in contracts were administered correctly, if assessed.
 - Verify that any change orders over \$100,000 were executed correctly. Confirm that the subrecipient performed an independent cost estimate, a cost or price analysis, was within the scope of the project, and the change order was executed by an authorized individual.
 - If the reviewed procurement included options, confirm that the subrecipient based the number of options on its reasonably foreseeable need and evaluated the option price prior to awarding the contract.

Commented [M5]: FTA, should this be higher for a psr?

- If the subrecipient procured bus or rail rolling stock or replacement parts with FTA funds, verify that it adhered to the time limitations on placing orders against the contracts.
- If the subrecipient purchased FTA-funded assets through an assignment of options (a/k/a “piggyback”), confirm the underlying contract complied with applicable federal requirements regarding excessive options, inclusion of Federal requirements, assignability, and price; and no cardinal changes.
- Verify that no advance payments were made without prior FTA approval, and that there was adequate protection for progress payments.
- For bus procurements, ensure the subrecipient complied with bus testing report requirements.
- For rolling stock procurements, determine that the subrecipient complied with pre-award and post-delivery audits verifying compliance with Buy America provisions, purchaser’s requirements, resident inspector requirements, and Federal Motor Vehicle Safety Standards (FMVSS). Verify that all pre-award and post-delivery certifications were completed.

POTENTIAL DEFICIENCY DETERMINATION

The recipient is deficient if 1) it is not providing oversight of its subrecipients’ procurement processes as described in its written documents, 2) it does not monitor subrecipients making direct procurements with FTA assistance for compliance with the requirements, and/or 3) during a review of subrecipient procurements, deficiencies are found.

DEFICIENCY CODE P21-1: Insufficient oversight of subrecipient procurements

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office documentation that it has implemented a procurement monitoring program.

GOVERNING DIRECTIVE

2 CFR 200.331 “Requirement for pass-through entities:

All pass-through entities must: (d) Monitor the activities of the subrecipient as necessary to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward; and that subaward performance goals are achieved. Pass-through entity monitoring of the subrecipient must include: (1) Reviewing financial and performance reports required by the pass-through entity. (2) Following-up and ensuring that the subrecipient takes timely and appropriate action on all deficiencies pertaining to the Federal award provided to the subrecipient from the pass-through entity detected through audits, on-site reviews, and other means. (3) Issuing a management decision for audit findings pertaining to the Federal award provided to the subrecipient from the pass-through entity as required by §200.521 Management decision.”

P22. Did the recipient use a cost plus percentage of cost contract?

BASIC REQUIREMENT

Recipients are prohibited from using a cost plus percentage of cost contract.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

Cost Plus Percentage of Cost (PSR – 48)

2 C.F.R. 200 expressly prohibits the use of the cost plus a percentage of cost and percentage of construction cost methods of contracting.

The cost-plus-percentage of a cost is a type of contract that requires the buyer to reimburse all legitimate project costs towards the seller. Aside from reimbursing costs, the buyer also needs to pay a percentage cost as stipulated and agreed-upon in the contract. This type of contract raises the additional fee as the cost of the contract rises and does not provide any incentive to the contractor to control the project cost.

A percentage of construction cost contract is similar. This method of contracting may be requested by project/construction managers or A&E firms and would include a provision that ties their fixed fee or profit to a percentage of construction cost.

Change orders on construction projects are another type of procurement action where the request for a cost plus a percentage of cost arrangement may be made by a contractor. Recipients should exercise caution in change order negotiations to ensure that cost plus percentage of cost change orders are not used.

INDICATORS OF COMPLIANCE

- a. *Did the recipient use a cost plus percentage of cost or a cost plus percentage of construction cost method of contracting for any FTA funded procurement?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, review the procurement listing to identify project management/construction management contracts, construction contracts, and change orders to construction contracts for review during the site visit. Review procurement policies and procedures to determine if this method of contracting is described or prohibited.

During the site visit, ask the procurement representatives if this type of contracting is utilized. Examine selected procurement files to determine the type of contracting method used. Pay special attention to cost proposals, payment terms, and change order cost negotiations records for any provisions that tie a predetermined fee to actual contract costs.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if the cost plus percentage of cost or the cost plus percentage of construction cost method of contracting was used.

DEFICIENCY CODE **P22-1**: Cost plus percentage of cost contracting used

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office documentation that it has revised its procurement policies and procedures and has established a system to ensure that the cost plus percentage of cost method of contracting will not be used for FTA funded procurements.

GOVERNING DIRECTIVE

2 C.F.R. 200 § 200.323 Contract cost and price

(d) The cost plus a percentage of cost and percentage of construction cost methods of contracting must not be used.

P23. Does the recipient have a system in place to ensure the most efficient and economic purchases?

BASIC REQUIREMENT

Recipients must avoid acquisition of unnecessary or duplicative items and purchase items in the most economical manner.

APPLICABILITY

All recipients

EXPLANATION FOR RECIPIENT

System for Ensuring Most Efficient and Economic Purchase (PSR – 5)

2 C.F.R. 200 requires that recipients have procedures in place to avoid purchasing unnecessary or duplicative items and they should consider consolidating or breaking out procurements to obtain a more economical purchase.

Recipients who invest the time and resources to develop checks and balances in their procurement program, along with development of short and long range procurement plans, can avoid last minute, emergency, or unnecessary procurements, which are contrary to open, efficient, and effective procurements.

FTA recipients vary in size and organization, therefore the system that each develops and implements to avoid unnecessary or duplicative purchases should be tailored to their agency. Whether the procurement functions are centralized, decentralized, or a combination of both, it is essential that no employee undertakes any procurement function without delegated authority and guidelines. It is easier for an entity to effectively manage its procurement responsibilities if most of the decisions and contractual actions are concentrated in one or more experienced individuals who are familiar with the requirements that span the entire procurement cycle. Because initial identification of need is often initiated by a recipient's internal customers (i.e., program or technical personnel for whom goods or services are being procured), the procurement office should be in a position to facilitate the consolidation of procurements of different internal customers with the same need.

INDICATORS OF COMPLIANCE

- a. *Does the recipient have procedures in place to avoid unnecessary and duplicative purchases?*
- b. *Does the recipient have procedures in place to evaluate procurements to determine the most economical methods?*

INSTRUCTIONS FOR REVIEWER

Prior to the site visit, review the procurement policies and/or procedures to determine if there are written procedures in place to:

- avoid unnecessary and duplicative purchases,
- consolidate or break out purchases to make more economical purchases, or
- consider lease vs. purchase alternatives.

Review the list of procurements to identify any repetitive purchases for the same items or same amounts. Onsite, gain an understanding of how the procurement function operates, if there are decentralized procurement functions, and if procurements are reviewed to ensure that they are necessary and not duplicative. Determine if there is a process in place to determine the most efficient and economical methods of procurement. Determine if, for the procurements selected, any procedures regarding the necessity and economy of procurements were followed.

POTENTIAL DEFICIENCY DETERMINATIONS

The recipient is deficient if it does not have or does not implement procedures to avoid unnecessary and duplicative purchases or to make the most economical purchases.

DEFICIENCY CODE **P23-1**: No system for efficient and economic purchases

SUGGESTED CORRECTIVE ACTION: The recipient must submit to the FTA regional office documentation that it has revised its procurement policies and procedures to include procedures for efficient and economical purchases, or that it has implemented procedures it had previously developed.

GOVERNING DIRECTIVES

2 CFR 200.318(d)

"The non-Federal entity's procedures must avoid acquisition of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach."

FTA Circular 4220.1F Chapter IV. 1.b. Necessity

"... requires the recipient to establish procedures to avoid the purchase of unnecessary property and services (including duplicative items and quantities or options it does not intend to use or whose use is unlikely)."

P24. PSR Element and CORTAP Question Crosswalk

PSR No.	Element	CORTAP Question
1)	Written Standards of Conduct	2
2)	Contract Administration System	6
3)	Written Protest Procedures	3
4)	Prequalification System	7
5)	System for Ensuring Most Efficient and Economic Purchase	<u>23</u>
6)	Procurement Policies and Procedures	1
7)	Independent Cost Estimate	10
8)	A&E Geographic Preference	7
9)	Unreasonable Qualification Requirements	7
10)	Unnecessary Experience and Excessive Bonding	7
11)	Organizational Conflict of Interest	7
12)	Arbitrary Action	7
13)	Brand Name Restrictions	7
14)	Geographic Preferences	7
15)	Contract Period of Performance Limitation	16
16)	Written Procurement Selection Procedures	8
17)	Solicitation Prequalification Criteria	7
18)	Award to Responsible Contractors	4
19)	Sound and Complete Agreement	11
20)	No Splitting [Micro-purchase]	8
21)	Fair and Reasonable Price Determination [Micro-purchase]	8
22)	Micro-purchase Davis-Bacon	11
23)	Price Quotations [Small Purchase]	8
24)	Clear, Accurate, and Complete specification	8
25)	Adequate Competition – Two or More Competitors	8
26)	Firm Fixed Price [Sealed Bid]	8
27)	Selection on Price [Sealed Bid]	8
28)	Discussions Unnecessary [Sealed Bid]	8
29)	Advertised/Publicized	8
30)	Adequate Solicitation	8
31)	Sufficient Bid time [Sealed Bid]	8
32)	Bid Opening [Sealed Bid]	8
33)	Responsiveness [Sealed Bid]	8
34)	Lowest Price [Sealed Bid]	8
35)	Rejecting Bids [Sealed Bid]	8
36)	Evaluation [RFP]	8
37)	Price and Other Factors [RFP]	8
38)	Sole Source if Other Award is Infeasible	8

PSR No.	Element	CORTAP Question
39)	Cost Analysis Required [Sole Source]	10
40)	Evaluation of Options	15
41)	Cost or Price Analysis	10
42)	Written Record of Procurement History	5
43)	Exercise of Options	15, 17
44)	Out of Scope Changes	14
45)	Advance Payments	18
46)	Progress Payments	18
47)	Time and Materials Contracts	8
48)	Cost Plus Percentage of Cost	22
49)	Liquidated Damages Provisions	13
50)	Piggybacking	17
51)	Qualifications Exclude Price [A&E]	9
52)	Serial Price Negotiations [A&E]	9
53)	Bid Security [Construction over \$100,000]	11
54)	Performance Security [Construction over \$100,000]	11
55)	Payment Security [Construction over \$100,000]	11
56)	Clauses (includes Veterans Preference)	11
57)	<u>Vehicle Pre-Award Review</u>	20
58)	<u>Vehicle Post-Delivery Review</u>	20
59)	<u>Change Orders</u>	14
60)	<u>Subrecipient Oversight</u>	21
61)	<u>Revenue Contracts</u>	7
62)	<u>Single Bid</u>	8
63)	<u>Certifications (TVM, Lobbying, Buy America</u>	12
64)	<u>Bus Testing</u>	19

P25. CORTAP Question and PSR Element Crosswalk

CORTAP Question	Element	PSR No.
1	Procurement Policies and Procedures	6)
2	Written Standards of Conduct	1)
3	Written Protest Procedures	3)
4	Award to Responsible Contractors	18)
5	Written Record of Procurement History	42)
6	Contract Administration System	2)
7	Prequalification System	4)
7	A&E Geographic Preference	8)
7	Unreasonable Qualification Requirements	9)
7	Unnecessary Experience and Excessive Bonding	10)
7	Organizational Conflict of Interest	11)
7	Arbitrary Action	12)
7	Brand Name Restrictions	13)
7	Geographic Preferences	14)
7	Solicitation Prequalification Criteria	17)
7	<u>Revenue Contracts</u>	61)
8	Written Procurement Selection Procedures	16)
8	No Splitting [Micro-purchase]	20)
8	Fair and Reasonable Price Determination [Micro-purchase]	21)
8	Price Quotations [Small Purchase]	23)
8	Clear, Accurate, and Complete specification	24)
8	Adequate Competition – Two or More Competitors	25)
8	Firm Fixed Price [Sealed Bid]	26)
8	Selection on Price [Sealed Bid]	27)
8	Discussions Unnecessary [Sealed Bid]	28)
8	Advertised/Publicized	29)
8	Adequate Solicitation	30)
8	Sufficient Bid time [Sealed Bid]	31)
8	Bid Opening [Sealed Bid]	32)
8	Responsiveness [Sealed Bid]	33)
8	Lowest Price [Sealed Bid]	34)
8	Rejecting Bids [Sealed Bid]	35)
8	Evaluation [RFP]	36)
8	Price and Other Factors [RFP]	37)
8	Sole Source if Other Award is Infeasible	38)
8	Time and Materials Contracts	47)
8	<u>Single Bid</u>	62)

CORTAP Question	Element	PSR No.
9	Qualifications Exclude Price [A&E]	51)
9	Serial Price Negotiations [A&E]	52)
10	Independent Cost Estimate	7)
10	Cost Analysis Required [Sole Source]	39)
10	Cost or Price Analysis	41)
11	Sound and Complete Agreement	19)
11	Micro-purchase Davis-Bacon	22)
11	Bid Security [Construction over \$100,000]	53)
11	Performance Security [Construction over \$100,000]	54)
11	Payment Security [Construction over \$100,000]	55)
11	Clauses (includes Veterans Preference)	56)
12	<u>Certifications (TVM, Lobbying, Buy America)</u>	63)
13	Liquidated Damages Provisions	49)
14	Out of Scope Changes	44)
14	<u>Change Orders</u>	59)
15	Evaluation of Options	40)
15	Exercise of Options	43)
17		
16	Contract Period of Performance Limitation	15)
17	Piggybacking	50)
18	Advance Payments	45)
18	Progress Payments	46)
19	<u>Bus Testing</u>	64)
20	<u>Vehicle Pre-Award Review</u>	57)
20	<u>Vehicle Post-Delivery Review</u>	58)
21	<u>Subrecipient Oversight</u>	60)
<u>22</u>	Cost Plus Percentage of Cost	48)
<u>23</u>	System for Ensuring Most Efficient and Economic Purchase	5)