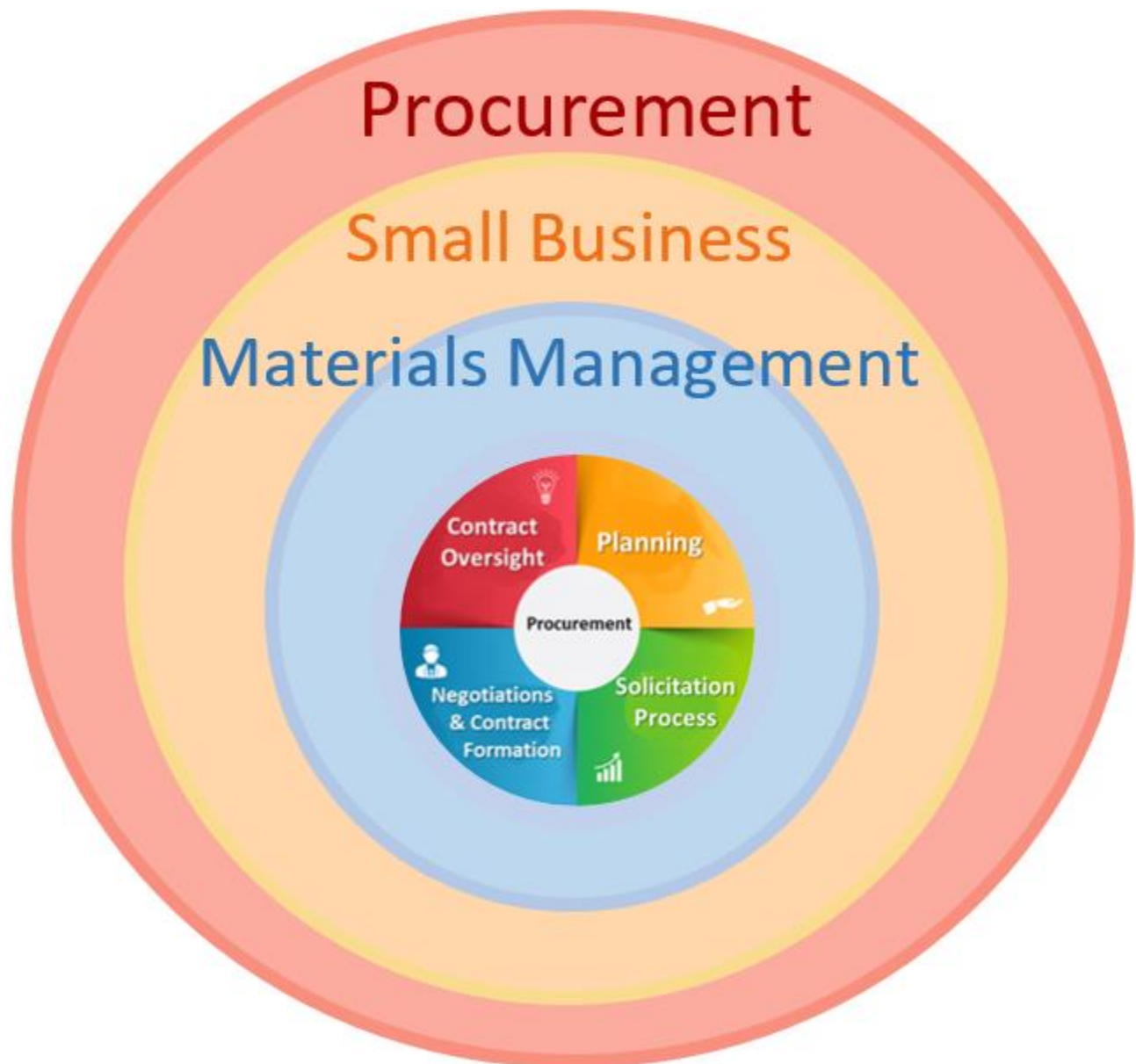



METROPOLITAN TRANSIT AUTHORITY OF HARRIS COUNTY, TEXAS

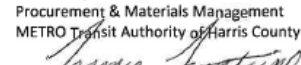
PROCUREMENT MANUAL

Version 8.0 5-1-2023



Approvals:


Michael Kyme, Vice President
Procurement & Materials Management
METRO Transit Authority of Harris County


Terence Fontaine, Chief Administrative Officer
METRO Transit Authority of Harris County


(Date)

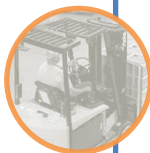

(Date)

• Materials Management

Plan Stocking Needs and Fulfill Demand for Inventory items

Manage Inventories at Bus & Rail Facilities

Distribute Inventory Stock Items from Central Warehouse to Operating Facilities & Storerooms



• Procurement

Facilitate Acquisition Planning

Implement Solicitation Processes

Conduct Negotiation & Contract Formation

Provide Contract Management Oversight



• Small Business

Set & Monitor Small Business Contract Goals

Conduct Outreach and Training for Small Business Community

Manage Small Business Compliance with Local & Federal Regulations



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Revision History

Note:

Major administrative changes (technical, process, etc.), will result in an incremental update to the Revision number (e.g., 1.0 to 2.0 to 3.0, etc.). Significant policy changes require approval by the Board of Directors.

Minor administrative changes (cosmetic, editorial) will result in an incremental update to the Version number (e.g., v1.1 to v1.2; v2.1 to v2.2, etc.)

Revision Number	Version Number	Effective Date	Revisions By:	Approved By:	Sections Impacted: Description of Revisions Made
1	0	7/23/14	Heather Monahan Nancy Christopherson	Michael Kyme	All Sections: This Board-approved, baseline revision supersedes all previous versions of the Manual.
2	0	4/22/15	Nancy Christopherson	Michael Kyme	1.3 Updated title changes in Delegation of Authority table 1.5: Updated Board Resolution references Chapter 2 and throughout: Title changes: Chief Procurement Officer (CPO); Deputy Chief Executive Officer (CEO); Executive Vice President Chapter 9: Changed title; added 'Safety' 9.8: NEW Safety section added 11.1F. Added Provision Overhead Rates
	1	12/7/15	Nancy Christopherson	Michael Kyme	9.8: Revised language and added reference to Safety Department's Rail System Safety Program Plan (RSSPP)
	2	¼/16 5/19/16	Nancy Christopherson	Michael Kyme	3.2.1: Added Contract Administrator duties concerning receipt of bids and proposals 3.2.2 Clarified existing and added new items to Contracting Officer Responsibilities 5.16: Reinforcement of adherence by METRO representatives and vendors to prohibited behavior of communication with anyone other than the Contract Administrator during the communications blackout period (from issuance of solicitation through contract award.)
3	0	6/6/16	Nancy Christopherson	Michael Kyme	Throughout: Removed 'Exhibits' and replaced with file locations noted in footnotes 1.10: Clarified responsibilities for completion of Conflict of Interest forms by METRO Board Members, employees, and vendors 1.10: Added information about Texas Ethics Commission Form 1295 requirements in paragraph D 3.2.1: Clarified Contract Administrator duties concerning receipt of bids and proposals 3.2.2: Added information on language to be used in a Work Authorization Contract Article 3.6: Inserted new information in this section concerning compliance with Texas Government Code Chapter 2258 on locally funded construction projects of ≥ \$2,000; Renumbered all subsequent sections in chapter 3.9.1: Updated METRO Procurement website URL 3.11: Relocated information about amending solicitations (was formerly Chapter 4, section 3) and clarified that amendments pertain to IFBs, RFPs and RFQs 3.12(C14): Clarified information to be included in the Memorandum of Negotiation 3.12(C9-10) and 4.2: Clarified customary and minimum bidding period requirements and procedures 3.13: Added information about establishing retainage and documenting retainage reductions 3.14: Removed 'Amendments' from title; added references to Change Order forms and procedures, and RE Manual; Renumbered all subsequent sections in chapter 4.5: Added instructions for Procurement staff concerning receipt of bids and proposals 4.10: Clarified federal websites to be used when evaluating bids 5.5: Clarified evaluation methods

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					<p>5.13: Clarified and added instructions for Procurement Staff concerning receipt of proposals and qualifications</p> <p>5.19: Added new subsection D to clarify instructions on the methods to be used by OPC members to score/rank Oral Presentations.</p> <p>5.19: Clarified that a Contract Administrator must preserve the proceedings of oral presentations either by audiotaping or, if that is not possible, including written notes in the contract file.</p> <p>5.25: Clarified requirements for documenting negotiations and pre-negotiation position</p> <p>9.4: Updated language and noted new website regarding surety company verification procedures.</p> <p>14: Renumbered chapter sections and expanded information about Davis-Bacon General Wage Determinations in section D.</p>
3	1	11-9-17	Nancy Christopherson	Michael Kyme	<p>1.9 and 1.10: Replaced in entirety with updated version of the Code of Ethics, provided by Legal, as approved by the Board at the July meeting. 1.9 is the COE/METRO Employees; 1.10 has changed from Conflicts of Interest to the COE/Board of Directors.</p> <p>1.11: Added new section for Conflicts of Interest (includes information about the TEC Form 1295).</p>
4	0	2-5-18	Nancy Christopherson	Michael Kyme	<p>1.5: Updated Board Resolution references to include TCPN and U.S. Communities.</p> <p>3.10.I: Added new section concerning potential conflicts of interest with former METRO employees.</p> <p>5.15C: Corrected updating of anticipated projects reports by Procurement, not Board of Directors, and updated image of 'Solicitation Evaluation Committees' form to current version.</p> <p>5.18.c: Removed requirement to conduct minimum of three oral reviews because not applicable to METRO (Brooks Act. Sec. 903).</p> <p>5.19e: Clarified the consensus approach to be by Oral Presentation Committees.</p> <p>6.3: Clarified procedures to be followed for emergency or urgent procurements.</p> <p>8.5: Clarified process of establishing inventory requirements contracts.</p> <p>8.6: Removed need for CA to sign PO before sending to awarded vendor.</p> <p>13: Modified to add 15-day payment terms for SB contracts.</p> <p>14: Expanded to include five subchapters; added 14.2 and 14.3 regarding the Super Circular and FTA FAST Act/Buy America.</p> <p>Throughout: Updated name of department to include Small Business. Removed obsolete definitions and references and added current ones reflecting implementation of SAP.</p>
4	1	11-15-18	Nancy Christopherson	Michael Kyme	<p>1.5.C: Updated Board Resolution references to include 2018-85, authorization to participate in TIPS (The Interlocal Purchasing System) established by the Texas Education Code, Region VIII Education Service Center.</p> <p>5.18.C (4): Updated language regarding removal of a submitter to a solicitation for further consideration by an Office of Economic Business Opportunity representative.</p> <p>8.4A: Increased threshold of quotes required for micro purchases from \$3,000 to \$10,000, per Board approval.</p> <p>13A: Updated title of VP Small Business to Deputy Chief Procurement Officer.</p>
4	2	1-15-19	Nancy Christopherson	Michael Kyme	<p>5.20A: Added permission to appoint external consultants and community members as non-voting members of an Executive Selection Committee.</p> <p>8.2D: Clarified that small purchase procurements are not to be made through use of Purchase Orders; only the methods listed in 8.3 are approved for use.</p>
4	3	1-17-19	Nancy Christopherson	Michael Kyme	<p>5.20A: Slight revision to wording of paragraph.</p>

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4	4	12-20-19	Nancy Christopherson	Michael Kyme	3.1.D: Clarified required documentation of vendors' debarment and suspension status for contract file. 3.12.C13 Added required documentation of vendors' debarment and suspension status for contract file. 3.17: Changed ban on vendors exhibiting behavior not in compliance with procurement processes or contractual requirements from prohibition in bidding to ineligibility for award for set time frames based on severity and number of offenses. 3.7.2G: Removed previous requirement to complete an ICE form for locally funded procurements of less than \$50,000. 9.1-9.2: Clarified requirements for bid, payment and performance bonds. 12.8-12.9: Removed paragraphs that described the discontinued option of two forms of contract dispute resolution. Remaining paragraphs renumbered accordingly.
4	5	11-11-20	Nancy Christopherson	Michael Kyme	1.5C: Added resolution 2019-49 that authorized the use of Choice Partners; added Buy Board to list of named authorized interlocal agreements 3.10.I: Added authorized use of teleconference or electronic meetings in lieu of in-person meetings conducted during the procurement process in times of natural disasters, pandemics, etc. 4.1D; 4.4J; 4.5B; 5.5C; 5.6E: Authorized use of electronic submission of bids and proposals/submissions to METRO during times of natural disasters, pandemics, etc.
5	0	1-29-21	Nancy Christopherson/ Katelyn Tran	Michael Kyme	Chapter 2: Revised or added definitions of actions under 'Construction Methods of Procurement' 4.10M: Added instruction on how to resolve a bid award in the event of a tie bid situation. 6.1E; 6.1F: Adjusted requirement for authorization of sole source procurements by CEO and issue of public notice of such procurements from those exceeding \$25,000 to \$50,000.
6	0	8-27-2021	Ana Silva/ Katelyn Tran	Michael Kyme	1.8.3 Added Innovation Proposal Policy (IPP) 1.5.C: Added Resolution 2021-55 that authorized the use of Purchasing Cooperative of America (PCA). Chapter 4:14: Added section 4.14 Construction Methods of Procurement Procedure. 5:15A: Revised section. Excludes all invitation for bids and routine requests for proposals for various services. 5.6D: Revised section "Prior to Board Approval" Chapter 15: Added Innovative Proposal Program.
6	1	11-17-2021	Ana Silva/ Katelyn Tran	Michael Kyme	11.3A Changed sixty percent to seventy percent 11.3B2 Changed sixty percent to seventy percent
7	0	5-10-2022	Ana Silva/ Katelyn Tran	Michael Kyme	1.3 Table 1 Removed from table "10% of contract value NTE \$100,000" 1.5F Amended Board Resolution 1999-34 1.5G Added G Authorizes the President & CEO to negotiate & execute change orders to existing contracts as described in Section 3.14(F) 3.14F Added F Authorizes the President & CEO to negotiate & execute change orders to existing contracts 6.3.1A Removed the word "Small Purchases" 14.3.1 Added Revised Buy America Guidelines – Executive Order 14005
7	1	6/28/2022	Ana Silva/ Katelyn Tran	Michael Kyme	1.5.C Updated list of partners that merged under one organization with Omnia Partners 1.5.G Changed Board Resolution number from TBD to 2022-46 that authorizes to negotiate & execute change orders 1.5.H Added Resolution 2022-63 Cooperative Purchasing Agreement with Equalis Group LLC
7	2	10/31/2022	Ana Silva/ Katelyn Tran	Michael Kyme	4.14A Added Alternative Construction Delivery Method Verification Form 1.5C Added Sourcwell as one of METRO's approved Cooperative Vendors

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Revision Number	Version Number	Effective Date	Revisions By:	Approved By:	Sections Impacted: Description of Revisions Made
					Updated department name from “Office of Small Business” to “Office of Economic Business Opportunity” in all areas.
8	0	5/1/2023	Ana Silva/ Katelyn Tran	Michael Kyme	<p>1.3 Table 1 Delegation of Authority – updated table approval limits: Board approves over \$250K & Procurement under \$250K. Added #5 to general comments regarding providing quarterly reports on contracts</p> <p>1.5 Added Section I – Board Resolution 2023-42 amends the Board approval level to \$250K on all contracts excluding Sole Source & Cooperatives.</p> <p>4.13 B Changed Board Approval amount from \$100K to \$250K</p> <p>5.1 C Changed Board Authorization amount from \$100K to \$250K</p> <p>5.6 C Changed the QBS process approval amount from \$100K to \$250K</p> <p>5.15 A Removed sentence excluding various services. Added parentheses sentence regarding Chapter 14.4 Alternative methods of construction.</p> <p>5.24 A Changed the Solicitations approval amount from \$100K to \$250K</p> <p>6.1 E Changed Profess/Personal Svcs approval amount \$100K to \$250K</p>

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This Manual shall provide the policies and procedures related to the procurement of goods and services, contract management, and disposal of property. The mission of the Procurement, Materials Management & Small Business Department is to provide increased efficiency and effectiveness in the procurement process by exercising good stewardship of public funds, and maximizing to the greatest extent possible the purchasing value of those public funds. The department shall also:

1. Provide for public confidence in the integrity, fairness and accountability of the Authority's procurement process;
2. Foster full and open competition;
3. Promote contracting opportunities for small and disadvantaged businesses, both as prime contractors and sub-contractors;
4. Promote positive relationships through courtesy and impartiality in all phases of the procurement process;
5. Meet internal and external customers' needs in terms of cost, quality and timeliness of the delivered product or service;
6. Handle confidential information or proprietary information with proper consideration of the ethical and legal ramifications of disclosure;
7. Provide for timely and impartial resolution of procurement issues.

This Manual is an ongoing and expanding document and METRO will make every effort to ensure current and accurate information at all times. Revisions, additions and deletions are coordinated as required before incorporating any updates into the Manual. The Procurement, Materials Management & Small Business Department will immediately forward notification of any changes made to this Manual to applicable personnel.

This Procurement Manual is for the benefit of METRO and does not confer any rights to actual or potential bidders, vendors, or contractors.

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INTRODUCTION

The Metropolitan Transit Authority of Harris County, Texas (METRO) is a transportation authority existing under Chapter 451 of the Texas Transportation Code. The FTA publication, 'Third Party Contracting Guideline 4220.1F,' sets forth the applicable federal laws, regulations and requirements affecting the procurement practices of METRO. In the absence of other guidance, the Federal Acquisition Regulation (FAR) may prove useful if the application is suitable.

This statute empowers METRO to enter into contracts for various purposes, provides for the Board of Directors to prescribe policies and authorizes the Board of Directors to adopt rules governing the taking of bids and the awarding of contracts. All METRO personnel must follow this statutory requirement, commonly referred to as METRO's enabling legislation. METRO personnel must also follow all policies and procedures; however, deviations are permissible when authorized by the Board of Directors.

As caretakers of the public trust and guardians of taxpayer dollars, all METRO departments hold particular responsibility for conducting procurements in a deliberate, fair, open and ethical manner.

This Manual establishes standards and guidelines relating to the procurement of goods, services and construction, with funding from the Federal Transit Administration (FTA), other federal appropriations, the State of Texas and/or local funding sources. These guidelines ensure that METRO obtains goods and services in accord with federal, state and METRO Board requirements. Any contract or purchase order not in compliance with federal, state or local law may be void or voidable. At all times, particular attention to the standards and limitations of federal, state and local law is necessary.

In the event that this Manual does not address a particular subject or conflicts with U.S. Department of Transportation (DOT) Orders, FTA Master Agreement, FTA Circulars or other policies or directives provided by DOT, FTA or by an agency of the state of Texas having jurisdiction over METRO, the following order of precedence will prevail for federally funded procurements:

1. U.S. DOT Orders;
2. FTA Master Agreement;
3. FTA Circulars and Other Directives or Notices issued by FTA;
4. Policies and Directives issued by the state of Texas;
5. METRO Board of Directors' Resolutions and Policies;
6. METRO Procedures and the FTA Best Practices Procurement Manual.

If federal funds are not involved, the order of precedence will be as follows:

1. Chapter 451 of the Texas Transportation Code;
2. Any and all other state laws and regulations;
3. METRO Board of Directors' Resolutions and Policies.

The METRO Board of Directors, through Resolution 2014-35, adopted the revised METRO Procurement Manual in March 2014. Chapter 1 of this Manual identifies the active Board resolutions.

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• Materials Management

Plan Stocking Needs and Fulfill Demand for Inventory items

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1. PROCUREMENT POLICIES AND STANDARDS

1.1. PROCUREMENT AUTHORITY AND RESPONSIBILITY

- A. It is the responsibility of the Chief Procurement Officer or designee to procure equipment, supplies, materials, services, and construction through receipt of an approved purchase following the appropriate process for solicitation, contract award, execution of modifications, contract administration, and contract close out.
- B. Organizational charts posted on METRO Intranet website under the link for the Procurement, Materials Management & Small Business Department depict the management span of control for the procurement function.

1.2. CONTRACTING APPROVAL AND EXECUTION REQUIREMENTS

- A. METRO will enter no contract, modification, change order, or commitment unless it is made in writing and executed by a representative of METRO acting within the scope of actual authority. METRO will neither authorize nor permit a person to commence work for METRO or on behalf of METRO in contemplation of a contract prior to the execution of a written contract.
- B. METRO will enter no contract, modification, change order, or contract price adjustment unless sufficient funds are authorized and available for expenditure for such purposes in METRO current budget. With respect to certain contracts exceeding \$100,000, and obligating funds of future fiscal year budgets, METRO will not execute the contract unless authorized by the Board of Directors. See Delegation of Authority Table 1 below.
- C. An individual to whom METRO has expressly delegated the authority to make such an obligation must sign or otherwise authorize each contract or procurement action that obligates METRO to pay a Contractor.

Unauthorized Procurements

Any employee, who initiates a contractual obligation (verbal or otherwise) without proper authorization, may be liable for that obligation and may be subject to disciplinary action, including suspension or termination of employment. An invoice shall not include purchase order or contract services rendered, or goods received 'after-the-fact.'

1.3. DELEGATION OF AUTHORITY

- A. The METRO Board of Directors has authorized the President & CEO and his designee, the Chief Procurement Officer, the authority to enter into contractual obligations for the Authority and to execute contracts on behalf of METRO for equipment, supplies, materials, services, or construction.
- B. Contract Administrators are required to conduct procurements in accordance with applicable local, state, and federal requirements, and METRO procurement policies and procedures, utilizing best business, purchasing and contracting practices and the highest standard of ethics.
- C. The authority delegated by the President & CEO is set forth in the table below, which specifies who may authorize and execute contracts.

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Table 1, Delegation of Authority

SIGNATORY AUTHORITY FOR CONTRACT EXECUTION BY TYPE OF PROCUREMENT				
Title	Competitive Solicitations - Invitation for Bids (IFB) - Request for Proposals (RFP) - Architect–Engineer Services (RFQ)	Sole Source Award, Contract Modifications, Change Orders, Authorization for Adjustment (AFA)	Emergency	General Comments
Board Approval	Over \$250,000	Over \$100,000	Reported to the Board at next regular scheduled meeting, if over \$100K	1. All contracts including modifications and Sole Source awards require an approved Shopping Cart prior to execution. 2. In addition to required approvals shown above, route all contracts and modifications through General Counsel and the Finance Office for approval. 3. The CPO shall provide Sole Source Report between \$50,000 - \$100,000 to Board on a quarterly basis. 4. The CPO, EVP/F&A, General Counsel, and Asst. Secretary shall execute all contracts. 5. The CPO shall provide quarterly reports on contracts executed \$100K - \$250K.
Pres & CEO, Deputy CEO, CPO	Under \$250,000	Sole Source Awards \$50,000 - \$100,000	Reported to the Board at the next regular scheduled meeting, if more than \$100K	
Procurement & Materials Staff				
Directors	Less than \$100,000	Sole Source Awards < \$100,000	N/A	
Managers	Less than \$50,000	Sole Source Awards < \$50,000	N/A	
Supervisor/ Specialist Sr. CA	Less than \$25,000	N/A	N/A	
CA	Less than \$5,000	N/A	N/A	

1.4. **AUTHORITY TO CONTRACT: STATUTORY REQUIREMENTS FOR FULL AND OPEN COMPETITION**

All procurement transactions, regardless of dollar value shall maximize open and free competition. METRO's enabling legislation, as amended, contains the following language from the Texas Transportation Code Chapter 451 regarding competitive bidding requirements:

Section 451.110 Purchases: Competitive Bidding

- (a) *“Except as provided by Subsection (c), a board may not contract for the construction of an improvement or the purchase of any property, except through competitive bidding after notice of the contract proposal. The notice must be published in a newspaper of general circulation in the area in which the authority is located at least once each week for two consecutive weeks before the date set for receiving the bids. The first notice must be published at least fifteen (15) days before the date set for receiving bids.*
- (b) *The board may adopt rules on:*
- (1) *the taking of bids;*
 - (2) *the awarding of contracts; and*
 - (3) *the waiver of the competitive bidding requirement:*
 - (A) *if there is an emergency;*
 - (B) *if there is only one source for the purchase; or*
 - (C) *except for a contract for construction of an improvement on real property, if:*

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- (i) *competitive bidding is inappropriate because the procurement requires design by the supplier and if competitive negotiation, with proposals solicited from an adequate number of qualified sources, will permit reasonable competition consistent with the procurement; or*
- (ii) *it is ascertained after solicitation that there will be only one Bidder.*

(c) *Subsection (a) does not apply to a contract for:*

- (1) *\$50,000 or less;*
- (2) *the purchase of real property;*
- (3) *personal or professional services; or*
- (4) *the acquisition of an existing transit system."*

Section 451.111 Purchases: Notice of Noncompetitive Bid Proposals

(a) *"Unless the posting requirements in subsection b) are satisfied, a board may not let a contract that is:*

- (1) *for more than \$50,000; and*
- (2) *for:*
 - (A) *the purchase of real property; or*
 - (B) *consulting or professional services*

(b) *An announcement that a contract to which this section applies is being considered must be posted in a prominent place in the principal office of the authority for at least two weeks before the date the contract is awarded.*

(c) *This section does not apply to a contract that must be awarded through competitive sealed bidding or for the purchase of an existing transit system."*

1.5. METRO BOARD OF DIRECTORS POLICY (BOARD RESOLUTIONS)

The METRO Board of Directors approved the following Board Resolutions, which permits the President & CEO or designee to perform the following actions:

- A. Board Resolution 2004-49 authorizes the execution of contracts less than \$100,000 for service-related procurements. This includes professional, personal and non-personal service contracts.
- B. Board Resolution 1989-9 authorizes the execution of contracts less than \$250,000 for standard off-the-shelf supplies, equipment, and repairs.
- C. Board Resolutions 1997-125, 1998-148, 2003-66, 2011-52, 2016-84, 2018-85, and 2019-49 authorize the execution of contracts utilizing inter-local agreements (TXMAS; DIR; Buy Board, HGAC, TCPN*, COH, U.S. Communities*, TIPS, Choice Partners, PCA, Sourcewell (formerly National Joint Powers Alliance), etc.)
*Merged with Omnia Partners
- D. Board Resolution 1996-46 authorizes incidental and non-warranty services to be performed during the repair of items under warranty.
- E. Board Resolutions 1996-140, 2013-117, and 2013-118 authorize the acquisition of off-the-shelf computer hardware/software and to enter into contracts with multiple vendors for IT-related licenses, maintenance, services and support.

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- F. Board Resolution 1999-34 authorizes the President & CEO to negotiate and execute all change orders, without regard to the maximum dollar value of the contract, not to exceed a cumulative increase in the original contract amount by 10% and authorizes staff to request the Board approve an additional owner-controlled contingency up to 10% of the contract award if necessary.
- G. Board Resolution 2022-46 authorizes the President & CEO to negotiate and execute change orders to existing contracts for which the delayed execution could impact the safety, schedules or services of the Authority, as described in Section 3.14(F) of the Procurement Manual and made certain other related clarifying changes to the Procurement Manual.
- H. Board Resolution 2022-63 authorizes the President & CEO to negotiate and execute a Master Intergovernmental Cooperative Purchasing Agreement with the Equalis Group LLC to participate in the Equalis Group Purchasing Program to procure certain goods and services, and making findings and provisions related to the foregoing subject.
- I. Board Resolution 2023-42 amends the Board approval level to \$250K on all contracts excluding Sole Source awards and Cooperative Agreements which shall remain at \$100K threshold.

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1.6. EXCEPTIONS TO COMPETITIVE BIDDING

METRO may elect to negotiate procurements when the material is available from only one source (Refer to Chapter 6, Non-Competitive Procurements, Sections 6.1 and 6.2) or if the need for the procurement is an emergency (Emergency and Urgent Purchases – Section 6.3).

1.7. FEDERALLY FUNDED CONTRACTS

When using FTA assistance to support acquisition, refer to the most updated version of the FTA Circular for Third Party Contracts for guidance. Federal Contracts shall include all the Third-Party Contract requirement clauses set forth in Appendix D of FTA Circular for Third Party Contracts. Chapter 14 provides the latest FTA Circular and describes the provisions, clauses and procedures followed by Contracting Officers specific to contracts associated with federal funding.

1.8. AUTHORITY TO CONTRACT: STATUTORY REQUIREMENTS FOR OTHER THAN FULL, OPEN COMPETITION

Chapter 2254.002 of Texas Government Code defines the Texas Professional Services Act as follows:

Chapter 2254.002 of Texas Government Code for Texas Professional Services Act

§2254.002 *Professional Services: Definition:*

"In this subchapter:

- (1) *Governmental entity means:*
 - (A) *A state agency or department;*
 - (B) *A district, authority, county, municipality, or other political subdivision of the state; or*
 - (C) *A publicly owned utility;*
- (2) *'Professional services' means services:*
 - (A) *within the scope of the practice, as defined by state law, of:*
 - (i) *accounting;*
 - (ii) *architecture;*
 - (iii) *landscape architecture*
 - (iv) *land surveying;*
 - (v) *medicine;*
 - (vi) *optometry;*
 - (vii) *professional engineering;*
 - (viii) *real estate appraising; or*
 - (ix) *professional nursing; or*
 - (B) *provided in connection with the professional employment or practice of a person who is licensed as:*
 - (i) *a certified public accountant;*
 - (ii) *an architect;*
 - (iii) *a landscape architect;*
 - (iv) *a land surveyor;*
 - (v) *a physician, including a surgeon;*
 - (vi) *an optometrist;*
 - (vii) *a professional engineer;*
 - (viii) *a state certified or state licensed real estate appraiser; or*

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(ix) *a registered nurse.”*

§2254.003 *Selection of Provider: Fees*

- (a) *“A Governmental entity may not select a provider of professional services or a group or association of providers or award a contract for the services on the basis of competitive bids submitted for the contract or for the services, but shall make the selection and award:*
- (1) on the basis of demonstrated competence and qualifications to perform the services; and*
 - (2) for a fair and reasonable price.*
- (b) *The professional fees under the contract:*
- (1) must be consistent with and not higher than the recommended practices and fees published by the applicable professional associations, and*
 - (2) may not exceed any maximum provided by law.”*

§2254.004 *Contract for Professional Services of Architect or Engineer*

- (a) *“In procuring architectural, engineering or land surveying services, a governmental entity shall:*
- (1) first select the most highly qualified provider of those services on the basis of demonstrated competence and qualifications, and*
 - (2) then attempt to negotiate with that provider a contract at a fair and reasonable price.*
- (b) *If a satisfactory contract cannot be negotiated with the most highly qualified provider of architectural, engineering or land surveying services, the entity shall:*
- (1) formally end negotiations with that provider;*
 - (2) select the next most highly qualified provider; and*
 - (3) attempt to negotiate a contract with that provider at a fair and reasonable price.*
- (c) *The entity shall continue the process described in subsection (b) to select and negotiate with providers until a contract is entered into.”*

1.8.1. Professional Services Procurement Method:

For Professional Services contracts, the method of procurement utilized shall be the Request for Qualifications (RFQ) method. Chapter 5 of this Manual provides detailed instruction regarding this procurement method. The process for solicitation and selection of qualified firms through the issuance of an RFQ shall provide maximum open and free competition.

1.8.2. Personal Services and Non-Personal Services Procurement Method:

- A. The method of procurement for Personal Services contracts shall be the Request for Proposals (RFP) method. For Non-Personal Services procurements, the procurement method can be the RFP method or the Invitation for Bid (IFB) method. Chapter 4 of this Manual provides detailed instruction regarding these procurement methods.
- B. During solicitation and selection of qualified firms through issuance of an RFP, METRO shall conduct these procurements in a manner to provide maximum open and free competition.

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C. Sole Source Procurements:

When the goods or services procured are available from only one source, follow the Sole Source method of procurement. Refer to Chapter 6, Non-Competitive Procurements.

D. Temporary Employees:

To request temporary employees, first contact METRO Human Resources Department and review the 'Temporary Employees' Guideline³ Human Resources. If the temporary employees' requirements do not meet the criteria identified in the 'Temporary Employee' guideline, procure them as Contract Temporary Employees in accordance with the procedures of this Manual.

E. Best Practices:

METRO shall maintain a contract administration system to assure Contractor performance with terms, conditions, and specifications of the contract.

The Contract Administrator is responsible for entering into contracts with responsible firms who possess the potential ability to perform successfully under the terms and conditions set forth in the contract. The Contract Administrator is responsible for making judgments and recommendations about the responsiveness of a proposal and the ability of a Contractor to perform the following requirements:

1. Ensuring proposed firms remain in compliance with all regulatory and applicable requirements;
2. Including all provisions for contracts for services to define a sound and complete agreement; and
3. Preventing contract award to a debarred or suspended vendor.

Contract Administrators will review all proposal responses against the criteria set forth in the solicitation.

1.8.3 Innovation Proposal Policy (IPP)

- A. The purpose of METRO's Innovation Proposal Policy (IPP) is to allow external and internal stakeholders to present innovative and novel ideas and provide METRO with various paths to review and potentially implement such ideas while remaining in compliance with applicable laws and procedures. Innovative processes include requests for information, proof of concepts, prototypes, demonstrations, pilot programs, unsolicited proposals and public-private partnerships. Reference Chapter 15

1.9. CODE OF ETHICS: METRO EMPLOYEES

1.9.1 Declaration of Policy

- A. METRO values its Employees and recognizes their enormous contributions to the agency's success. A standard of conduct is required for every METRO Employee. Such standard of conduct is based on integrity and high ethical considerations. It is essential to the proper administration and effective operation of METRO that its Employees be, and give the appearance of being, independent and impartial; that service to METRO not be used for private Benefit; and that there be confidence in METRO's integrity as a public agency. The public interest therefore requires that METRO protect against conflicts of interest by establishing ethical standards with respect to the conduct of its Employees.
- B. The purpose of this Code is to establish rules of conduct that will result in the impartial ethical discharge of official duties by all METRO Employees.

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- C. A conflict of interest exists whenever an Employee is in a position in which any official act or action taken by METRO is, may be, or appears to be, influenced by considerations of personal gain, rather than the general public interest. The fundamental principle underlying conflict of interest rules is that a public Employee occupies a position of public trust and confidence and that he or she should therefore conscientiously avoid not only actual breaches of the public trust, but also the appearance of a conflict of interest.
- D. The principal responsibility for adherence to the provisions of this Code rests with the Persons to whom the Code applies. Thus, the Code gives no consideration to any claim of lack of knowledge or understanding of the provisions of this Code. Whenever a question arises with respect to the applicability of the Code to a particular course of conduct, the Person concerned should immediately contact his or her supervisor, if appropriate, or a higher-level supervisor. Employees are expected to err on the side of disclosure of any perceived potential conflicts of interest to ensure that the highest ethical standards are maintained.
- E. Any comments and examples herein do not have the force and effect of the section of the Code that they follow, but serve as an aid interpreting the Code.

1.9.2 Definitions

- A. 'Board Member' means a member of the Board of Directors of METRO. A Board Member is a local public official, as defined in Tex. Loc. Gov't Code Ann. § 171.001 (1) (West 2016).
- B. 'Benefit' means anything reasonably regarded as pecuniary gain or pecuniary advantage, including Benefit to any other Person in whose welfare the beneficiary is interested, but does not include a contribution or expenditure made and reported in accordance with law. This definition of Benefit includes any gift in excess of fifty dollars.

Source:¹ Tex. Penal Code Ann. § 36.01 (3) (West 2011).

Comment: A nonmonetary award publicly presented in recognition of public service, such as a plaque or a framed certificate, is not, under ordinary circumstances, a Benefit.

- C. 'Business Entity' means a sole proprietorship, firm, holding company, joint stock company, corporation, receivership, trust, partnership, or any other entity recognized by law.
- D. 'Confidential Information' means any information concerning METRO (i) that is not a matter of public knowledge or available to the public on request; or (ii) that METRO is legally required to keep confidential.
- E. 'Contract' means any lease, claim, account or demand against or agreement with any Person, whether express or implied, executed or executory, verbal or in writing.
- F. 'Employee' means any Person employed by METRO on a full-time, part-time, temporary or Contract basis. The term 'Employee' does not include officers or Employees of METRO's independent contractors.

¹ Reference to a statutory source in the Code is not intended to imply incorporation into the Code of the referenced statute. Specifically, criminal penalties or civil remedies provided by such statutes are independent of the Code. Further, procedural processes required by such statutes, including evidentiary standards, are not incorporated into the Code. The source reference is intended only to advise the Persons to whom the Code is applicable of substantially similar statutes which may provide other penalties and remedies in the event of violation. Although the statutory references by their terms may not apply to all Employees, METRO intends to extend those provisions to Employees as provided by this Code.

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- G. 'Employee Policies' are the mandatory rules of conduct for Employees of METRO. Employee Policies require strict compliance and enforcement.
- H. 'Employee Guidelines' are documents produced to provide METRO Employees with guidance regarding compliance with the Employee Policies and METRO's expectations for their conduct as METRO Employees.
- I. 'Employment' means any rendering of services for pay.
- J. 'Executive Level Employee' means all members of the Executive Leadership Team, executive vice presidents, directors, and all managers or other Employees whose official duties include evaluating, selecting, or recommending contractors or vendors to do business with METRO.
- K. 'First Degree' relation means the Employee's spouse, parents and children, as well as the spouse of each of these relatives.
- L. 'Fraud' means wrongful or criminal deception intended to result in financial or personal gain.
- M. 'METRO' means the Metropolitan Transit Authority of Harris County, Texas.
- N. 'Participate' means to take part in official acts or actions or proceedings as an Employee through recommendation, approval, disapproval, decision, investigation, the rendering of advice or the failure to act or perform a duty.
- O. 'Person' means an individual, business, labor organization, representative, fiduciary, trust or association.
- P. 'Remote Interest' means any interest not defined as a 'Substantial Interest' under the terms of this Code.
- Q. 'Second Degree by Affinity' relation means the Employee's spouse and the spouse's parents, children, grandparents, grandchildren and siblings, as well as the spouse of each of those relatives and the spouses of the Employee's children.
- R. 'Substantial interest' means any economic interest of an Employee if:
 - 1. The Employee owns 10 percent or more of the voting stock or shares of the Business Entity, or owns either 10 percent or more, or \$15,000 or more of the fair market value of the Business Entity;
 - 2. Funds received by the Employee from a Business Entity exceed 10 percent of his or her gross income for the previous year;
 - 3. The Employee has an equitable or legal ownership interest in real property with a fair market value of \$2,500 or more; or
 - 4. A Person related in the First Degree by consanguinity or affinity to the Employee and has a Substantial Interest in a business, Contract or real property as defined in numbers 1-3 above.

Source: Tex. Loc. Gov't Code Ann. § 171.002 (West 2016). (applied herein to all Employees).

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- S. 'Third Degree by Consanguinity' relation means the Employee's parents, grandparents, great grandparents, children, grandchildren, great grandchildren, siblings, uncles, aunts, nieces and nephews, but does not include the spouse of each of these, and only includes aunts and uncles who are the siblings of the Employee's parents.
- T. 'Vendor' means a Person or Business Entity that enters or seeks to enter into a Contract with METRO. The term includes an officer or employee of a state agency when that individual is acting in a private capacity, but does not include governmental entities.

1.9.3 Standards of Conduct

A. Prohibitions

No Employee or Person within First Degree relation to an Employee shall:

1. Participate in a matter involving a business, Contract or real property in which the Employee has a Substantial Interest if it will have or is reasonably foreseeable that an action on the matter would have a special economic effect, distinguishable from the effect on the public, on the business, Contract or real property involved, without first notifying his or her supervisor and refraining from any involvement with discussions, recommendations or decisions related to the matter.

Source: Tex. Loc. Gov't. Code Ann. § 171.004 (West 2016) (Applied herein to all Employees).

2. Solicit, accept or agree to accept any gift or Benefit of any kind as consideration for the Employee's decision, opinion, recommendation, vote or other exercise of discretion as a public servant. Employees should be keenly aware and suspect of accepting any gift or Benefit from anyone who may be considered as trying to influence or reward official conduct.

Source: Texas Penal Code Ann. § 36.02(a)(1) (West 2011). An offense under this section is a second-degree felony. It is no defense to prosecution under this section that the Benefit is not offered or conferred, solicited or accepted until after the exercise of discretion has occurred or the Employee has ceased to hold that position of authority. Tex. Penal Code Ann. § 36.02(c), (e) (West 2011).

3. Solicit, accept or agree to accept any gift or Benefit of any kind as consideration for a violation of a duty imposed by law on the Employee.

Source: Texas Penal Code Ann. § 36.02(a)(3) (West 2011). An offense under this section is a second-degree felony. It is no defense to prosecution under this section that the Benefit is not offered or conferred, solicited or accepted until after the exercise of discretion has occurred or the Employee has ceased to hold that position of authority. Tex. Penal Code Ann. § 36.02(c), (e) (West 2011).

4. Solicit, accept or agree to accept any Benefit from a Person the Employee knows is interested in, or likely to become interested in, any METRO Contract or transaction.

Source: Tex. Penal Code Ann § 36.08(d), (h) (West 2011). An offense under this section is a Class A misdemeanor.

Comment: The purpose of this section, and the preceding three sections, is to prohibit the solicitation or acceptance of anything of Benefit, whether in the form of money, services, loans or promises, under circumstances in which it reasonably could be inferred that the Benefit solicited or accepted was intended to influence the recipient, or reasonably could be expected to influence him, in the performance of his official duties. These provisions should not, however, be construed to preclude the payment of lawful

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compensation and reimbursement for necessary expenses incurred by an Employee in the course of performing the duties of his office. Further, this section should be considered in connection with the provisions of Section 3.3, which exclude the acceptance of certain Benefits from the application of this section.

5. Act as surety for a business that has work, business, or a Contract with METRO, or act as surety on any official bond required of an officer of METRO.

Source: Tex. Loc. Gov't. Code Ann. § 171.003 (West 2011).

6. Disclose Confidential Information; use Confidential Information for the purpose of securing a Benefit for the Employee; accept Employment or engage in professional activity which would require, or which the Employee should reasonably expect would require, the Employee to disclose Confidential Information.
7. Use his or her official position, or METRO's facilities, equipment or supplies, to obtain or attempt to obtain private gain or advantage.
8. Represent, for compensation, any Person in any action or proceeding involving the interests of METRO.
9. Engage in any activity or transaction that is prohibited by any law, now existing or hereafter enacted, which is applicable to the Employee by virtue of his or her association with METRO.
10. Commit Fraud against METRO, including the misapplication of METRO funds or property or any other such act injurious to METRO.

B. Disclosure Requirements

1. An Employee cannot recommend, vote, participate in the decision, or confer on a matter if that recommendation, vote, conference or decision provides a special economic effect, (distinguishable from its effect on the public), on that Employees' Substantial Interest in a business, Contract or real property. In addition, the Employee is required to immediately disclose the possibility of an existing 'Substantial Interest' prior to taking any other action on the matter.
2. All Executive Level Employees are required to disclose to their immediate supervisor certain relationships with vendors who have, or seek to have, a Contract with METRO. The disclosure is required at the point when the Executive Level Employee becomes aware that the vendor has, or is seeking, a Contract with METRO. The Executive Level Employee is required to disclose in writing to his/her supervisor if the vendor:
 - a. has an Employment or other business relationship with the Executive Level Employee or a family member related to the Executive Level Employee in the First Degree by consanguinity or affinity that results in the Executive Level Employee or family member receiving taxable income, other than investment income, that exceeds \$2,500 during the 12-month period preceding the date that the Executive Level Employee becomes aware that: (i) a Contract between METRO and the vendor has been executed; or (ii) METRO is considering entering into a Contract with the vendor;
 - b. has given to the Executive Level Employee or a family member related to the Executive Level Employee within the First Degree by consanguinity or affinity one or more gifts that have an aggregate value of more than \$100 in the 12-month period preceding the date the Executive Level Employee

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becomes aware that: (i) a Contract between METRO and the vendor has been executed; or (ii) METRO is considering entering into a Contract with the vendor; or

- c. has a family relationship with the Executive Level Employee within the Third Degree by Consanguinity or the Second Degree by Affinity.
3. The Executive Level Employee shall file the conflicts disclosure statement with his/her supervisor not later than 5 p.m. on the seventh business day after the date on which the Executive Level Employee becomes aware of the facts that require the filing of the statement.
4. Any Employee serving on any evaluation committee must sign the Certifications of Confidentiality and No Conflict of Interest forms.

C. Exceptions to Gifts/Benefits

The prohibitions in Section 3.1 do not apply to the following Benefits accepted by an Employee:

1. A gift or other Benefit conferred on account of kinship or on account of a personal, professional or business relationship independent of the Employee's relationship with METRO;
2. An item with a value of less than \$50, excluding cash or a negotiable instrument;
3. An item issued by a governmental entity that allows the use of property or facilities owned, leased or operated by the governmental entity;
4. Food, lodging, transportation or entertainment accepted as a guest while in the company of the offeror.

D. Other Employment

1. METRO Employees shall not engage in any outside Employment without first securing approval, in writing, from their division director. Executive Level Employees must obtain administrative approval from the President and CEO or his/her designee(s) before engaging in outside Employment. Any approval of outside Employment shall extend only to the specific conduct approved in writing. Any change in the description, role, or place of outside Employment requires new written approval. Approved outside Employment shall be reviewed and re-approved annually.
2. To eliminate unfair competitive advantage, former METRO Employees and their firms and businesses are excluded from competing for procurements in which the former Employee actively took part in developing solicitation materials of any kind including requests for proposals or invitations to bid, contract drawings, technical specifications, statements of work, or scopes of services. Upon request of a vendor, METRO may give a 'clearance determination' as to whether a former employee actively took part in developing solicitation materials so as to disqualify the vendor. A request for a 'clearance determination' may be made directly to METRO's Chief Procurement Officer.

1.9.4 Annual Review and Acknowledgement

A. Annual Review by Employees

Employees shall review the Code of Ethics annually and provide written acknowledgement of this annual review to immediate supervisor. Also, Executive Level Employees may be required to engage in annual

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ethics/open governance training. Once a year, upon completion of a review of the Code of Ethics or completion of ethics/open government training, the Executive Level Employee will execute a written acknowledgment of same to his/her supervisor or to the President & CEO.

B. Acknowledgment by Bidders

All Persons and entities that seek to obtain a Contract with METRO shall be required to acknowledge review of this Code of Ethics as part of any proposal or bid. This acknowledgment recognizes that violations of this Code or participation in violations are grounds for disqualification of a bidder or termination of a contract with METRO.

1.9.5 Employee Policies and Guidelines

To more thoroughly address Employee conduct matters, the Board of Directors has authorized the President and CEO to publish a series of Employee Policies designed to govern the conduct of METRO Employees. The President and CEO is also authorized to generate Employee Guidelines to expound upon METRO's Employee Policies, rules, and procedures as well as to enforce proper Employee conduct. These Policies address specific subject matter situations and supplement this Code of Ethics. The Policies require strict adherence by Employees. Violations of Employee Policies may subject Employees to disciplinary action.

1.9.6 Penalties for Violation of Standards of Conduct

- A. METRO requires strict adherence to this Code. Any violation of this Code of Ethics will subject the Employee to disciplinary action, up to and including termination of Employment, as well as possible criminal actions.
- B. METRO may disqualify a bidder, terminate existing contracts, and/or exclude any business from future business with METRO for a timeframe determined by the METRO Board, if that business offers, confers or agrees to confer any Benefit as consideration for an Employee's decision, opinion, recommendation, vote or other exercise of discretion as a public servant. This includes any Benefit for consideration in exchange for the Employee's having exercised his official powers or performed his official duties or which participates in the violation of any provision of this Code. The Board of Directors of METRO, or its designee, shall make these determinations.

1.9.7 Construction, Applicability and Severability

- A. METRO construes this Code liberally to ensure enactment of its purposes and policies and to supplement such existing laws as may relate to the conduct of Employees.
- B. The enactment of this Code shall not affect the propriety of any official act or action taken by, or transaction involving, any Employees prior to the effective date of this Code.

1.10 CODE OF ETHICS: BOARD OF DIRECTORS

1.10.1 Declaration of Policy

- A. It is essential to the proper administration and effective operation of the Metropolitan Transit Authority ('METRO') that its Board Members be, and give the appearance of being, independent and impartial; that service to METRO not be used for private benefit; and that there be confidence in METRO's integrity as a

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public agency. The public interest therefore requires that METRO protect against conflicts of interest by establishing ethical standards with respect to the conduct of its Board Members.

- B. It is also essential that qualified persons be encouraged to serve METRO. Accordingly, the standards established by the Code should be interpreted and understood so as not to unreasonably frustrate or impede the recruitment and retention by METRO of those persons best qualified to serve it. To that end, METRO's Board Members, who are essentially uncompensated volunteers, should not be denied the opportunity available to all other citizens to acquire and maintain private economic interests, except in circumstances in which a conflict of interest would reasonably result. The purpose of this Code, therefore, is not to establish the standards of ethical conduct that are applicable to METRO's Board Members in the discharge of their official duties, but to prescribe only such essential restrictions against conflict of interest as will not impose unreasonable restrictions on METRO's Board Members.
- C. A conflict of interest exists whenever a Board Member is in a position in which any official act or action taken by him or her is, may be, or appears to be, influenced by considerations of personal gain, rather than the general public interest. The fundamental principle underlying conflict of interest rules is that a public servant occupies a position of public trust and confidence and that he or she should therefore conscientiously avoid not only actual breaches of the public trust, but also the appearance of a conflict of interest. A Board Member should err on the side of disclosure and/or abstention when his or her participation in a matter could reasonably create the impression that any Person or group can improperly influence the Board Member or unduly enjoy his or her favor in the performance of official acts or actions, or that he or she is affected unduly by the kinship, rank, position or association with any Person or group.
- D. No Board Member can disassociate himself so completely from the private sector as to preclude the possibility of a conflict of interest arising. Accordingly, this Code considers the intentions and motives in addition to the external actions of the Person concerned. Although exterior appearances and actions often are an accurate manifestation of interior motivation, intent and motive become particularly relevant whenever the acts themselves fall into a gray area.
- E. The principal responsibility for adherence to the provisions of this Code rests with the Persons to whom the Code applies. Thus, the Code gives no consideration to any claim of lack of knowledge or understanding of the provisions of this Code. Whenever a question arises with respect to the applicability of the Code to a particular course of conduct, the Person concerned should consult with his or her own counsel or make application to METRO's General Counsel for an advisory opinion. Board Members are expected to err on the side of disclosure of any potential conflicts of interest.
- F. Any comments and examples herein do not have the force and effect of the section of the Code that they follow, but serve as an aid interpreting the Code.

1.10.2 Definitions

- A. 'Board Member' means a member of the Board of Directors of METRO. A Board Member is a local Public Official, as defined in Tex. Loc. Gov't Code Ann. §171.001 (1) (West 2016).
- B. 'Benefit' means anything reasonably regarded as pecuniary gain or pecuniary advantage, including benefit to any other Person in whose welfare the beneficiary is interested, but does not include a contribution or expenditure made and reported in accordance with law. This definition of benefit includes any gift in excess of fifty dollars.

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Source:² Tex. Penal Code Ann. §36.01 (3) (West 2011).

Comment: A nonmonetary award publicly presented in recognition of public service, such as a plaque or a framed certificate, is not, under ordinary circumstances, a Benefit.

- C. 'Business Entity' means a sole proprietorship, firm, holding company, joint stock company, corporation, receivership, trust, partnership, or any other entity recognized by law.
- D. 'Confidential Information' means any information concerning METRO (i) that is not a matter of public knowledge or available to the public on request or (ii) that METRO, its Board Members and officers are legally required to keep confidential.
- E. 'Contract' means any lease, claim, account or demand against or agreement with any Person, whether express or implied, executed or executory, verbal or in writing.
- F. 'Employment' means any rendering of services for pay.
- G. 'First Degree Relation' means the Board Member's spouse, parents and children, as well as the spouse of each of these relatives.
- H. 'Fraud' means wrongful or criminal deception intended to result in financial or personal gain.
- I. 'METRO' means the Metropolitan Transit Authority of Harris County, Texas.
- J. 'Participate' means to take part in official acts or actions or proceedings as a Board Member through approval, disapproval, decision, recommendation, investigation, the rendering of advice or the failure to act or perform a duty.
- K. 'Person' means an individual, business, labor organization, representative, fiduciary, trust or association.
- L. 'Public Official' means any elected official of the State of Texas; the Counties of Fort Bend, Harris, Montgomery, or Waller; any of the cities, towns or villages included within METRO's service area; or the federal government.
- M. 'Remote Interest' means any interest not defined as a 'Substantial Interest' under the terms of this Code.
- N. 'Second Degree by Affinity Relation' means the Board Member's spouse and the spouse's parents, children, grandparents, grandchildren and siblings, as well as the spouse of each of those relatives and the spouses of the Board Member's children.
- O. 'Substantial Interest' means any economic interest of a Board Member if:
 - 1. The Board Member owns 10 percent or more of the voting stock or shares of the Business Entity or owns either 10 percent or more or \$15,000 or more of the fair market value of the Business Entity;

² Reference to a statutory source in the Code is not intended to imply incorporation into the Code of the referenced statute. Specifically, criminal penalties or civil remedies provided by such statutes are independent of the Code. Further, procedural processes required by such statutes, including evidentiary standards, are not incorporated into the Code. The source reference is intended only to advise the persons to whom the Code is applicable of substantially similar statutes which provide other penalties and remedies in the event of violation.

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2. Funds received by the Board Member from a Business Entity exceed 10 percent of his or her gross income for the previous year;
3. The Board Member has an equitable or legal ownership interest in real property with a fair market value of \$2,500 or more; or
4. A Person related in the first degree by consanguinity or affinity to the Board Member has a Substantial Interest in a business, contract or real property as defined in numbers 1-3 above.

Source: Tex. Loc. Gov't Code Ann. §171.002 (West 2016).

- P. 'Third Degree by Consanguinity Relation' means the Board Member's parents, grandparents, great grandparents, children, grandchildren, great grandchildren, siblings, uncles, aunts, nieces and nephews, but does not include the spouse of each of these and only includes aunts and uncles who are the siblings of the Board Member's parents.
- Q. 'Vendor' means a Person or Business Entity that enters or seeks to enter into a Contract with METRO. The term includes an officer or employee of a state agency when that individual is acting in a private capacity, but does not include governmental entities.

1.10.3 Standards of Conduct

A. Prohibitions Applicable to all Board Members

No Board Member shall:

1. Participate in a matter involving a business, Contract or real property in which the Board Member has a Substantial Interest as defined herein (including if a First Degree Relation has a Substantial Interest) if it will have, or is reasonably foreseeable that an action on the matter would have, a special economic effect, distinguishable from the effect on the public, on the business, Contract or real property involved.

Source: Tex. Loc. Gov't. Code Ann. § 171.004 (West 2016) (This is the general state statute that establishes standards of conduct for local government officials.)

Comment: If a situation arises whereby a majority of Board Members have a Substantial Interest in the matter under consideration, the individual members of that group shall not be required to abstain from voting as long as the proper disclosure statement, as provided by Section 3.3.1 below, has been filed. This statutory exception insures that METRO will always be able to take action on a matter, even if a majority of the decision-makers have a conflict. Tex. Loc. Gov't. Code Ann. § 171.004 (West 2016).

2. Solicit, accept, or agree to accept any gift or Benefit of any kind as consideration for the Board Member's decision, opinion, recommendation, vote or other exercise of discretion as a public servant.

Comment: Board Members should be keenly aware and suspect of accepting any gift or Benefit from anyone who may be considered as trying to influence or reward official conduct and are reminded that the term Benefit as used in this Code includes anything of pecuniary gain or advantage to a Person in whose welfare the Board Member has an interest.

Source: Texas Penal Code Ann. §36.02(a)(1) (West 2011). An offense under this section is a second degree felony. It is no defense to prosecution under this section that the Benefit is not offered or conferred,

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solicited or accepted until after the exercise of discretion has occurred or the Board Member has ceased to hold that position of authority. Tex. Penal Code Ann. §36.02(c), (e) (West 2011).

3. Solicit, accept or agree to accept any gift or Benefit of any kind as consideration for a violation of a duty imposed by law on the Board Member.

Source: Texas Penal Code Ann. §36.02(a)(3) (West 2011). An offense under this section is a second degree felony. It is no defense to prosecution under this section that the Benefit is not offered or conferred, solicited, or accepted until after the exercise of discretion has occurred or the Board Member has ceased to hold that position of authority. Tex. Penal Code Ann. §36.02(c), (e) (West 2011).

4. Solicit, accept, or agree to accept an honorarium in consideration for services requested in the capacity of, and as a result of, the Board Member's position. This provision does not apply to transportation, lodging or meal expenses in connection with a conference or similar event at which the Board Member speaks, to the extent that those services are more than merely perfunctory, or to appearances by a Board Member in a capacity other than his or her role as a Board Member. Texas Penal Code Ann. §36.07 (West Supp. 2016).
5. Solicit, accept, or agree to accept any Benefit from a Person the Board Member knows is interested in or likely to become interested in any METRO Contract or transaction.

Source: Tex. Penal Code Ann § 36.08(d), (h) (West 2011). An offense under this section is a Class A misdemeanor.

Comment: The purpose of this section, and the preceding four sections, is to prohibit the solicitation or acceptance of anything of Benefit, whether in the form of money, services, loans or promises, under circumstances in which it reasonably could be inferred that the Benefit solicited or accepted was intended to influence the recipient, or reasonably could be expected to influence him, in the performance of his official duties. These provisions should not, however, be construed to preclude the payment of lawful compensation and reimbursement for necessary expenses incurred by a Board Member in the course of performing the duties of his office. Further, this section should be considered in connection with the provisions of Section 3.6, which exclude the acceptance of certain Benefits from the application of this section.

Example: W, a Board Member, requests X, president of a company that is seeking to secure a Contract with METRO, to find Employment for W's brother-in-law in X's company. W's request constitutes a violation of this section.

6. Act as surety for a business that has work, business, or a Contract with METRO, or act as surety on any official bond required of an officer of METRO.

Source: Tex. Loc. Gov't. Code Ann. §171.003 (West 2011).

7. Disclose Confidential Information; use Confidential Information for the purpose of securing a Benefit for the Board Member; accept Employment, or engage in professional activity that would require, or that the Board Member should reasonably expect would require, the Board Member to disclose Confidential Information.

Board Members are prohibited from disclosing matters discussed in executive session to anyone who is not a Board Member and who was not present in the executive session at which the matters were discussed.

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Comment: This provision is based on the principle that Board Members should not use 'inside' information to which they have access solely because of their association with METRO, and which is not available to the public, for their, or another Person's, financial gain. The unauthorized divulgence or premature release of Confidential Information to a relative, friend or business associate tends to undermine public confidence in METRO.

Example: Y, a Board Member, advises his brother to invest in the securities of a company which is about to be awarded a highly profitable Contract with METRO. Y's advice constitutes a violation of this section.

8. Use his or her official position, or METRO's facilities, equipment, or supplies to obtain, or attempt to obtain, private gain or advantage.
9. Represent, for compensation, any Person in any action or proceeding involving the interests of METRO.
10. Engage in any activity or transaction that is prohibited by any law, now existing or hereafter enacted, which is applicable to the Board Member by virtue of his or her association with METRO.

Comment: This subsection is intended to make clear that it is the individual responsibility of METRO Board Members to acquaint themselves and comply with all laws made applicable to them because of their official positions.

11. Commit Fraud against METRO, including the misapplication of METRO funds or property or any other such act injurious to METRO.

B. Prohibition Applicable to City of Houston Appointees

No City of Houston Appointee shall solicit campaign contributions for any candidate for office with the City of Houston in violation of Chapter 18 of the City of Houston Code of Ordinances.

C. Disclosure Requirements

1. Board Member cannot vote, participate in the decision, or confer on a matter if that vote, conference or decision provides a special economic effect, (distinguishable from its effect on the public), on that Board Member's Substantial Interest in a business, Contract or real property. In addition, the Board Member shall file with the Assistant Secretary of the METRO Board, before a vote or decision occurs, an affidavit stating the nature and extent of his or her interest.

Source: Tex. Loc. Gov't. Code Ann. §171.004 (West 2016).

Comment: A disclosure requirement is a fundamental step in the process of monitoring potential conflicts of interest that may arise and is a means of maintaining public confidence in the good faith and impartiality of official acts or actions taken by METRO. It is to be noted, however, that the burden of making such disclosures rests on the individuals concerned, who accordingly should be held to a high standard of care and good faith to ensure that no conflicts of interest they may have go undisclosed. Any Board Member may request METRO's General Counsel to render an advisory opinion as to whether a particular personal or financial relationship warrants public disclosure under this section.

Example: W, a Board Member, owns an insurance company that writes policies for contractors likely to do business with METRO. W should disclose his interest.

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2. Within 30 days of their appointment, Board Members shall disclose in writing to METRO's General Counsel the location by address and approximate acreage of real property located along or adjacent to a METRO route or facility in which they own a Substantial Interest, as defined in Section 2.15. Board Members shall notify METRO General Counsel of the acquisition of a Substantial Interest in additional property located along or adjacent to a METRO route or facility and the sale of any such property within 30 days of such transaction. METRO General Counsel shall prepare and maintain a map denoting the location of any such property for each Board Member.
3. A Board Member who has a legal or equitable interest in property that is to be acquired with METRO funds shall file an affidavit within 10 days before the date on which the property is to be acquired by purchase or condemnation. The affidavit must (1) state the name of the Board Member; (2) state that he or she is a member of the METRO Board of Directors; (3) fully describe the property; (4) fully describe the nature, type, and amount of interest in the property, including the percentage of ownership interest; (5) state the date when the Board Member acquired an interest in the property; (6) include a verification as follows: 'I swear that the information in this affidavit is personally known by me to be correct and contains the information required by Section 553.002, Government Code'; and (7) contain an acknowledgement of the same type required for recording a deed in the deed records of the county. The affidavit must be filed with: (1) the county clerk of the county in which the public servant resides; and (2) the county clerk of each county in which the property is located.

Source: Tex. Gov't Code Ann. §553.002 (West 2012).

4. A Board Member shall file the conflicts disclosure statement available at <https://www.ethics.state.tx.us/forms/CIS.pdf> with respect to a Vendor if: (1) the Vendor enters into a Contract with METRO or METRO is considering entering into a Contract with the Vendor; and (2) the Vendor has:
 - a. an Employment or other business relationship with the Board Member or a family member related to the Board Member in the first degree by consanguinity or affinity that results in the Board Member or family member receiving taxable income, other than investment income, that exceeds \$2,500 during the 12-month period preceding the date that the Board Member becomes aware that: (i) a Contract between METRO and the Vendor has been executed; or (ii) METRO is considering entering into a Contract with the Vendor;
 - b. given to the Board Member or a family member related to the Board Member within the first degree by consanguinity or affinity one or more gifts that have an aggregate value of more than \$100 in the 12-month period preceding the date the Board Member becomes aware that: (i) a Contract between METRO and the Vendor has been executed; or (ii) METRO is considering entering into a Contract with the Vendor; or
 - c. a family relationship with the Board Member within the Third Degree by Consanguinity or the Second Degree by Affinity.

A Board Member is not required to file a conflicts disclosure statement in relation to a gift accepted by the Board Member or a family member related to the Board Member within the first degree by consanguinity or affinity if the gift is: (1) a political contribution as defined by Title 15, Texas Election Code; or (2) food accepted as a guest.

A Board Member is not required to file a conflicts disclosure statement if the Vendor is an administrative agency created under Section 791.013, Government Code.

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The Board Member shall file the conflicts disclosure statement with the records administrator of METRO not later than 5 p.m. on the seventh business day after the date on which the Board Member becomes aware of the facts that require the filing of the statement.

Source: Tex. Loc. Gov't Code Ann. § 176.001, .003 (West 2016).

5. Any Board Member serving on any evaluation committee must sign the Certifications of Confidentiality and No Conflict of Interest forms.

D. Nepotism

No Board Member of METRO with the authority to appoint, elect or hire METRO personnel, whether such authority is granted by statute or delegated by the Board or by the President & CEO, shall exercise that authority in favor of persons who are related to any METRO Board Member exercising such authority within the second degree by affinity or within the third degree by consanguinity. This provision shall not prevent the retention or advancement of any Person who has been continuously employed in his or her position for at least 30 days prior to the appointment of the Board Member related to such Person; provided, however, that the Board Member related to that Person shall not participate in any deliberation, voting or appointment process relating to that Person.

Source: Tex. Gov't Code Ann. §§573.041, .062 (West 2012). An offense under this provision is a misdemeanor involving official misconduct and may result in a significant fine.

Example: X, a Board Member, participates in the approval of the hiring of his niece to work in the Real Estate department. X has violated this provision.

E. Contracts with Former METRO Board Members

METRO may not enter into any Contract (other than a Contract subject to competitive bids) with a former Board Member or other former official of METRO for a period of one year following the Board Member's or official's departure from METRO, unless waived by the Board.

F. Exceptions

The prohibitions above in Section 3.1 on receiving gifts or Benefits do not apply to the following Benefits, which may be accepted by a Board Member:

1. A fee prescribed by law to be received by the Board Member or any other Benefit to which the Board Member is lawfully entitled or for which he or she gives legitimate consideration in a capacity other than as a Board Member;
2. A gift or other Benefit conferred on account of kinship or on account of a personal, professional or business relationship independent of the Board Member's relationship with METRO;
3. A political contribution as defined by Title 15, Election Code;
4. An item with a value of less than \$50, excluding cash, or a negotiable instrument;

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5. An item issued by a governmental entity that allows the use of property or facilities owned, leased or operated by the governmental entity;
6. Food, lodging, transportation or entertainment accepted as a guest while in the company of the offeror.

Comment: A Board Member's employment by a METRO vendor is not considered a gift. However, the Board member may be required to follow the abstention and disclosure processes established by Chapters 171 and 176 of the Local Gov. Code.

Source: Texas Penal Code Ann. §36.10 (West Supp. 2016).

Example: X, a Board Member, is invited on a hunting trip by Y, the representative of an engineering firm which X knows is interested, or is likely to become interested, in METRO matters. Y or Y's firm owns the lease to the hunting site. X may not accept the invitation under such circumstances because the opportunity to hunt free of charge on land that is being leased to another at some charge is not an exception to the general prohibition under this provision.

G. Ethics Advisory Opinions

Board Members desiring further interpretation of the Code as it applies to particular factual situations may seek advisory opinions from the General Counsel for METRO. The General Counsel's opinion shall be advisory only, but a Board Member who acts in reliance on such opinion shall be deemed to be in compliance with the Code. On request of the Board Member, advisory opinions sought pursuant to this provision will not be released to the public. However, the General Counsel shall under no circumstances owe a professional duty of loyalty or confidentiality to the individual Board Member seeking such an opinion. The issuance of advisory opinions does not establish an attorney-client relationship between the General Counsel and the METRO Board Member with regard to the subject matter of the request.

1.10.4 Annual Review and Acknowledgement

A. Annual Review by Board Members

Board Members shall review the Code of Ethics annually. Also, Board Members may engage in annual ethics/open governance training. Once a year, upon completion of a review of the Code of Ethics or completion of ethics/open government training, Board Members shall execute a written acknowledgment of same.

B. Acknowledgment by Bidders

All Persons and entities that seek to obtain a Contract with METRO shall be required to acknowledge review of this Code of Ethics as part of any proposal or bid. This acknowledgment recognizes that violations of this Code or participation in violations are grounds for disqualification of a bidder or termination of a contract with METRO.

1.10.5 Penalties for Violation of Standards of Conduct

A. Board Members

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A Board Member who is found by the Board to have violated this Code is subject to official reprimand by vote of a majority of a quorum of the Board. In the event that the Board determines that the violation constitutes inefficiency, nonfeasance or malfeasance in office, or a violation of Chapter 171 of the Texas Local Government Code, the Board Member may be removed from office by an affirmative vote of the majority of the other Members of the Board, provided that the procedural requirements of Section 451.511 of the Texas Transportation Code are followed.

B. Contractors

METRO may disqualify a bidder, terminate existing Contracts, and/or may exclude any business from future business with METRO for a timeframe determined by the METRO Board, if that business offers, confers or agrees to confer any Benefit as consideration for a Board Member's decision, opinion, recommendation, vote or other exercise of discretion as a public servant. This includes any Benefit for consideration in exchange for the Board Member's having exercised his official powers or performed his official duties or which participates in the violation of any provision of this Code. The Board of Directors of METRO, or its designee, shall make these determinations.

1.10.6 Construction, Applicability and Severability

- A. METRO construes this Code liberally to ensure enactment of its purposes and policies and to supplement such existing laws as may relate to the conduct of Board Members.
- B. The enactment of this Code shall not affect the propriety of any official act or action taken by, or transaction involving, any Board Member prior to the effective date of this Code.

1.11 CONFLICTS OF INTEREST

- A. The FTA requires all recipients of Federal funds to establish written standards of conduct to include both 'personal conflicts of interest' and 'organizational conflicts of interest', both real and apparent, cited in the FTA Master Agreement Section 3 (a)(1) and (2).
 - 1. METRO standards of conduct comply with the above FTA requirement, as well as Texas Local Government Code Chapter 171, 49CFR Section 18.36, FTA Circular 4220.1F, and the METRO Code of Ethics.
 - 2. METRO will evaluate every contracting situation for its particular facts and on the nature of the proposed contract, and exercise common sense, good judgment, and sound discretion when deciding whether a significant potential conflict exists. If conflict does exist, METRO shall resolve the conflict. METRO shall not give any potential Contractor a competitive edge.
 - 3. METRO Board members and other local government officers must file a Conflicts Disclosure Statement (FORM CIS) disclosing the business relationship with a vendor that METRO has contracted with or is considering contracting with if the Board member or local government officer (or his or her family member) has certain business relationships with that vendor.
- B. Vendors doing business with METRO or seeking to do business with METRO are required to file a completed questionnaire (FORM CIQ) disclosing the vendor's affiliations or business relationship with any Board Member or local government officer (or his or her family member).
 - 1. The CIS and CIQ forms are filed at <http://www.ridemetro.org/Pages/ConflictsDisclosure.aspx>.

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- C. Any METRO employee or Board member serving on any evaluation committee must sign the 'Certifications of Confidentiality and No Conflict of Interest form'¹.
- D. Effective January 1, 2016, in accordance with Section 2252.908 of the Texas Government Code and the Texas Ethics Commission (TEC) Rules, any business entity ('contractor') that contracts with METRO must complete and file Form 1295, 'Disclosure of Interested Parties,' **when the value of the contract is \$1,000,000 or more or requires Board approval.** METRO is prohibited from executing any contract unless the business completes Form 1295 filing procedures.
 1. The following article has been inserted into the various solicitation template masters when the value of the contract is \$1,000,000 or more or requires Board approval.
 - a. **REQUIRED SECTION 2252.908 LANGUAGE:**
*In the event the value of this contract is \$1,000,000 or more **or** this contract requires the approval of METRO's Board of Directors, the Contractor hereby confirms and agrees to complete and electronically file Form 1295 on the Texas Ethics Commission's (TEC) website, https://www.ethics.state.tx.us/whatsnew/elf_info_form1295.htm. The Contractor shall also submit to METRO a signed and notarized hardcopy of the Form 1295 generated by the TEC's electronic filing application in accordance with the provisions of Section 2252.908 of the Texas Ethics Commission.*
 2. Assignment of Vendor 1295 ID Numbers
 The business entities that contract with METRO are responsible for submitting Form 1295 on the TEC website, but METRO must supply a unique contract identification number for each 1295 Form, preferably one that describes the type of transaction and contract at hand and does not exceed 30 characters.
 3. The METRO Contract Administrator (CA) must:
 - a. Create an account on the TEC website. The TEC website is https://www.ethics.state.tx.us/whatsnew/elf_info_form1295.htm. After the login and password are set up, the CA will be able to see each of the received Form 1295s.
 - 1) Within 30 days of after the contract award date, the CA must go to the TEC website and electronically 'acknowledge' receipt of the signed and notarized form. After Form 1295 is acknowledged, it will be posted to the Texas Ethics Commission's website within seven (7) business days.
 - 2) To acknowledge, login to your TEC account to access the completed Form 1295s online and acknowledge receipt by clicking 'acknowledge' for each one.
 - 3) Both the form and the acknowledgement (screen shot print-outs) are to be placed in the official contract file under file tab 42 for every relevant contract.
 - 4) The contract cannot be executed until both the Contractor submits the signed signature page of the contract to METRO for execution and Form 1295 is properly executed.
 4. Instructions for Vendors on Section 2252.908: The contractor must:
 - a. File the Form 1295 electronically on the TEC website at the time the business is preparing to enter into the contract. The TEC website is https://www.ethics.state.tx.us/whatsnew/elf_info_form1295.htm.
 - b. After the electronic filing is completed, print a copy of the completed form, which will include a certification of filing that contains a unique certification number.

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- c. The contractor's authorized agent must sign the printed copy of the form and have the form notarized.
 - d. Submit the completed Form 1295 with the certification of filing to METRO when the business returns the signed contract to METRO for final execution.
- E. There are two types of conflict of interest: personal and organizational.

1.11.1 Personal Conflicts of Interest

- A. METRO standards of conduct prohibit METRO employees, officers, board members, or agents, including outside consultants, from participating in the selection, award, or administration of a third-party contract or sub-agreement supported by Federal funds if a real or apparent conflict of interest would be involved.
- B. In a personal conflict of interest, the conflicted party is always a person.
- C. Personal conflicts of interest apply to:
 - 1. METRO employees, officers, board members, agents or outside consultants;
 - 2. Immediate family member or the partner of an employee, officer, board member, agent or outside consultant;
 - 3. An entity or organization that employs or is about to employ any person that has a relationship with the parties named above;
 - 4. Any of the above-named parties have a financial or significant involvement, such as an employment interest (in the past or present) of a present or potential third party participant;
 - 5. Any of the above who solicit or accept gifts, gratuities, favors or anything of monetary value.
- D. A third-party participant includes Contractors, subcontractors and lessees.
- E. A personal conflict of interest can exist during any phase of the acquisition process, from source selection, award, administration, to contract closeout.

1.11.2 Organizational Conflicts of Interest

- A. METRO standards of conduct shall include procedures for identifying and preventing real and apparent organizational conflicts of interest.

Organizational Conflicts exist when:

- 1. A person is unable to render impartial advice or assistance;
- 2. A person's objectivity is impaired; or
- 3. A person has an unfair competitive advantage. This will usually occur in management support contracts, consultant/professional services, systems engineering and technical evaluation work;

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4. There are “biased ground rules” wherein a bidder/proposer has developed specifications, evaluation criteria, statement of work, etc., as part of its performance of a contract.
- B. In organizational conflicts of interest, the conflicted party is always an organization.
- C. Activities, relationships, contracts or other circumstances that result in unfair competitive advantage, allowing an organization to make decisions that favor its own products or capabilities are organizational conflicts of interest. Organizational conflicts of interest occur when:
1. A Contractor is unable, or potentially unable, to provide impartial and objective assistance or advice;
 - a. This situation can arise when an organization can evaluate its own work performance under another contract, or when an organization can evaluate its own offers, or the offers of competitors, for products or services.
 - b. METRO shall not award contracts to a Contractor when doing so will result in circumstances that impair the firm’s objectivity, avoiding allegations of favoritism in the award of production contracts, and thereby ensuring protection of METRO interests.
 2. A Contractor has access to non-public information that may provide it an unfair competitive advantage in current or future contracts when:
 - a. The information is obtained by a Contractor during the performance of a METRO contract;
 - b. A Contractor requires proprietary information from others to perform a METRO contract and can use the leverage of the contract to obtain it;
 - c. A Contractor gains access to proprietary information about other companies that are performing work for METRO;
 - d. The Contractor must agree with the other companies to protect their information from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information for any purpose other than that for which it was furnished. The Contractor shall complete a Disclosure Agreement.
 - e. METRO shall impose restrictions that protect the sharing of proprietary information unless METRO deems the information critical for proper contract performance. These restrictions do not apply to information furnished voluntarily without limitations on its use, or to information available to METRO or Contractor from other sources without restriction.
 3. There exist biased ground rules, established when during the conduct of an earlier procurement, a Contractor develops or drafts specifications, scopes of work, evaluation factors or other similar documents that will apply to a future procurement.
 - a. The following ground rules are the fundamental guidelines of procurement that establish an unbiased or objective basis for conducting procurements contract performance.
 - b. A Contractor could inadvertently favor the Contractor’s own products (including products and equipment) or capabilities (including systems or services), if that Contractor drafts or prepares specifications, statements of work, or scopes of services, or contributes “material leading directly to

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such a work statement” for non-developmental items to be purchased through competitive acquisition thus giving the Contractor unfair competitive advantage. If this situation occurs:

- (i) The Contractor (either as a prime or subcontractor), shall not participate in competition for the contract and shall not provide the items specified above, for a reasonable period, including at minimum, the duration of the initial production of the contract.
 - (i) A Contractor may, however, be permitted to:
 - furnish, at METRO request, general specifications or data regarding a product it provides; or
 - acting as an industry representative, help METRO prepare, refine, or coordinate specifications in situations that involve multiple Contractors, provided this assistance is supervised and controlled by METRO representatives.
 - (ii) METRO should normally prepare its own scopes of work, however, a Contractor may be permitted to do so, or assist in doing so if:
 - 1. The Contractor is the sole source;
 - 2. The Contractor is the selected Contractor for a Work Authorization; or
 - 3. More than one Contractor has been involved in preparing the work statement.
4. A Contractor provides technical direction or system engineering for a project over which the Contractor has no contractual responsibility for development, integration, assembly, production or inspection.
- a. Systems engineering involves determining specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design.
 - b. Technical direction involves developing work statements, determining parameters, directing other Contractors’ operations, and resolving technical controversies.
 - c. Under these circumstances, a Contractor shall not:
 - 1. Be awarded a contract to supply the system or any of its major components; or
 - 2. Be a consultant to a supplier of the system or of any of the system’s major components.

1.11.3 Contract Administrator Responsibilities in Addressing Potential Conflicts of Interest

- A. Contract Administrators should analyze planned acquisitions during the Acquisition Planning stage and perform the following:
 - 1. Identify and evaluate potential conflicts of interest as early in the acquisition process as possible or when the necessary information becomes available to do so; and
 - 2. Avoid, neutralize, or mitigate significant potential conflicts before contract award.
- B. A written analysis including a recommended course of action for avoiding, neutralizing, or mitigating the conflict should be part of the acquisition plan.
- C. Any failure by Contract Administrators to anticipate any conflict of interest during the analysis does not prevent the Contract Administrators from mitigating conflicts at the time of the discovery.

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- D. When evaluating potential conflicts, Contract Administrators should obtain the advice and assistance of Legal Counsel and the appropriate technical specialists for developing any necessary solicitation provisions and contract clauses.
- E. Before issuing a solicitation for a contract that may involve a significant potential conflict, Contract Administrators shall recommend to the head of the contracting activity a written course of action for resolving the conflict.
- F. To fulfill the responsibilities for identifying and resolving potential conflicts, Contract Administrators should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation. Only when a substantive issue concerning a potential organizational conflict of interest exists, Contract Administrators will formally document his/her judgment.
- G. Contract Administrators shall obtain copies of agreements made between Contractors and other companies concerning the use and protection of proprietary information, to ensure proper execution of the agreements.
- H. Contract Administrators shall award the contract to the apparent successful Offeror or Bidder, unless he/she determines an unavoidable or unresolvable conflict of interest exists. Before determining to withhold award based on conflict of interest considerations, Contracting Officers shall:
 - 1. Notify the Contractor;
 - 2. Provide the reasons for withholding the award; and
 - 3. Allow the Contractor a reasonable opportunity to respond.

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2 **DEFINITIONS**

\$1 Coins: To comply with Section 104 of the Presidential \$1 Coin Act of 2005, 31 U.S.C. Section 5312(p), FTA assisted property that requires the use of coins or currency in public transportation service or supporting service must be fully capable of accepting and dispensing \$1 coins

Acceptance: The formal written acceptance by METRO

'After the Fact' Purchase: A type of unauthorized procurement that occurs when a METRO employee orders materials and afterwards requests the Procurement Department to issue a purchase order. Also referred to as an 'unauthorized' procurement/purchase

Amendment: Written revisions to invitation for bids or request for proposals issued by METRO before the bid or proposal due date

Approved Equal: A substitute product offered by a prospective Bidder approved by METRO as being equal to or better than a designated process, service, or manufacturer's brand-name product

Arbitrary Action: Strictly prohibited; an action or decision not based on reason or judgment but on personal will or discretion without regard to rules or standards

Architect engineer (AE) Professional Services: Types of services included in Chapter 2254.002 of the Texas Government Code (as per the Texas Professional Services Act) as being certain types of defined 'professional services,' which, by Texas law, must be contracted by negotiation. See 'Professional Services' listing in this chapter

Articles: A part of the contract that sets forth the rights and responsibilities of the contracting parties; Words, such as 'clauses', 'terms', 'conditions' and 'articles' are sometimes used interchangeably

Authorizations and Approvals: Requestors must obtain the necessary authorizations and approvals based on the type of procurement being made. The 'Delegation of Authority Guideline and Authorized Approval' matrix establishes the authority levels and identification of employees authorized to procure goods, services and construction and/or to approve Shopping Carts.

Best and Final Offer (BAFO): A formal written offer from proposers, after all negotiations are complete, which includes pricing and terms, and summarizes to what both parties have agreed

Bid: The document that conveys an offer from a party wishing to provide or procure goods or services in response to an Invitation for Bid (IFB)

Bid Documents: A set of documents (information and various procurement forms) issued by METRO in a solicitation, including (as applicable) but not limited to: Invitation for Bids (IFB); amendments; Instructions to Bidders; Bid Form; Contractor's Certification; Model Contract Form and Articles; Prevailing Wage Rate Schedule; Statement of Work, Scope of Service or Technical specifications; and Contract Drawings

Bid Samples: Furnished sample from a Bidder required by the IFB as part of its bid to show the characteristics of a product offered in its bid to assure procurement of an acceptable product. The Contract Administrator may request physical samples when the written specification does not adequately describe certain characteristics of a product

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Bid Security: The certified check, Cashier's check, or Bidder's bond accompanying the bid submitted by the Bidder, as a guarantee that the Bidder will enter into a contract with METRO for the performance of the work and that it will provide the required bonds and insurance if METRO awards the contract to the Bidder. Also referred to as a 'bid bond'

Bidder: The general term for the legal entity who submits a response to a solicitation, typically for specified products or services. A Bidder may be any individual, sole proprietorship, firm, partnership, corporation, or Limited Liability Company that submits a bid for the work contemplated, acting directly or through a duly authorized representative; this term may be used interchangeably in this Procurement Manual with the terms 'proposer' or 'offeror,' which relate to negotiated procurements

Bidders List: A compilation of sources from which potential Bidders to solicitations can be drawn, including but not limited to: names and addresses obtained from people or companies asking to be included in the list; listings of bid package holders; Bidders from previous procurements; and, sources suggested by technical staff and consultants. Vendors may also register themselves on the METRO Procurement website, and select the applicable commodities or services with which they wish to be associated

Blanket Purchase Credit Agreement (BPCA): A simplified method for filling anticipated, repetitive needs for small quantities of supplies or services. The method establishes 'charge accounts' between certain vendors and METRO for a specified period of time, with a specified dollar limitation as to both total amount and individual call amount, and with a specific person or persons designated as the authorized ordering agent(s) to place orders or calls under the BPA. METRO may execute a BPCA for one (1) year and extend for one (1) more year if sufficient funds remain

Board or Board of Directors: The governing body of METRO that exercises and performs all powers, duties, functions, rights, and privileges vested in METRO

Brand Name Product: A commercial product described by brand name and make, model number, or other appropriate nomenclature by which the particular manufacturer, producer, or distributor offers the product for sale to the public. The brand name is only for establishing identification and a general description of the item

Business: A firm, company, corporation, partnership, individual, sole proprietorship, joint venture, or other private legal entity

Change Order: A written order issued by METRO's Contracting Officer, which, under the Changes Article of the contract, authorizes changes to the contract with the consent of the Contractor

Chief (name of function) Officer: The person appointed to manage a METRO department, either on a permanent, temporary or acting basis. Such titles are generally interchangeable with Vice President (VP). Refer to 'Titles' and 'Vice President' definitions

Clarification: Communicating with an Offeror to discuss elimination of minor irregularities or clerical errors; Clarification may not include discussion of revisions or modifications

Conflicts of Interest: Conflicts of Interests can be either 'personal' or 'organizational'

1. **Personal Conflict of Interest** occurs when an employee, officer, board member or agent, including any member of the person's immediate family, partner or organization that employs or intends to employ, has a financial interest in the entity selected for award. The conflicted party is always a person

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2. **Organizational Conflict of Interest** can be real or apparent and exists when the work to be performed under an agreement without some restrictions on future activities result in an unfair competitive advantage or impair objectivity in performing the contract work. The conflicted party is an organization

Consensus: A process used by an evaluation committee wherein the committee as a whole arrives at a common understanding as to the ranking of offers using narrative appraisals of the significant strengths, weaknesses and risks of each proposal or qualification, or adjectives such as poor, fair, excellent, or most important, very important, important, rather than numerical scoring. May also be referred to as the 'narrative' method

Construction Methods of Procurement:

1. **Competitive Bidding:** METRO awards a contract to the lowest bid, responsible bidder.
2. **Competitive Sealed Proposals:** METRO requests proposals, ranks the submittals based on the evaluation criteria established for the proposal, negotiates and enters into a contract with a general contractor.
3. **Construction Manager Agent:** METRO awards a contract to a firm to provide administrative management services during the design and construction phases of a project is METRO's agent/representative.
4. **Construction Manager at Risk:** METRO awards a contract to a firm that assumes the risk of the project at the contracted price as a general contractor using either a Fixed or Guaranteed Maximum Price.
5. **Design-Build:** METRO awards a contract to an entity to provide both design and construction using either a Fixed or Guaranteed Maximum Price.
6. **Job Order Contract:** Used for maintenance, repair, alteration, renovation, remediation or minor construction of a facility when the work is of a recurring nature but the delivery times, type and quantities of the work are indefinite.

Consultant: See 'Contractor'

Contract: A binding legal relationship that establishes terms and conditions, obligates the seller to furnish property or services (including construction), and obligates METRO to pay for the property or services. It is the written document resulting from acceptance of offers by awards or notices of award. The contract becomes effective by written acceptance or performance in a definite agreement between METRO and the vendor. It takes such forms as purchase orders (PO), letter of agreements (LA), or blanket purchase agreements (BPA), etc.

Contract Administration: A system for ensuring that Contractors conform to contract terms, conditions, and specifications, and for assuring adequate, timely monitoring of the contract

Contract Change: A written order issued by METRO's Contracting Officer, according to the 'Changes' Article of the contract that authorizes changes to be made to the contract with the consent of the Contractor

Contract Drawings: The official plans, profiles, typical cross-sections, elevations, and details listed or referenced in the specifications or amendments thereto; and supplemental drawings approved by METRO; which show the locations, character, dimensions, and details of the work to be performed

Contract Modifications: Any written alteration in the specifications, delivery point, and rate of delivery, contract period, price, quantity, and exercise of options or other contract provision of an existing contract, accomplished by 1) a bilateral mutual action of the parties to the contract, and/or 2) the procedures followed and paperwork completed by Procurement

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personnel when adjustments of most any kind are made to a procurement project (PO, contract, or work authorization). (Also see 'Modifications to Contracts-POs-Work Authorizations')

Contract Payment Certificate: METRO payment form used for processing and payment of contractor invoices in accordance with METRO's Contract Payment Guideline.

Contract Scope: Also referred to as 'Scope of Work,' or 'SOW.' A part of a contract/agreement that describes the work to be performed. An SOW should contain any milestones, reports, deliverables, and end products that will be required. (Also see 'Statement of Work')

Contract Termination: An action taken by METRO per provisions in a contract that permit METRO to terminate contracts for convenience, when a reduced need or other circumstance is deemed to be in the best interests of METRO, or for default, when the Contractor has failed to perform in accordance with the contractual requirements

Contracting Officer (CO) or (Contract Administrator): The person assigned to the procurement. This person is responsible for the preparation and issuance of the solicitation, evaluation of bids, and negotiation of the contract and processing of the contract for award. The CO's post-award responsibilities include: (1) monitoring the contract for compliance; (2) enforcing contract provisions; (3) reviewing payments to ensure they are in accordance with the terms of the contract; (4) preparing contract modifications as necessary; and (5) acting to close out the contract. On a case-by-case basis, the CO has limited authority to execute contract modifications and work authorizations that will contractually bind METRO

Contractor: Any individual, sole proprietorship, partnership, firm, company, corporation, joint venture, authorized representative, limited liability company, or other legal entity who enters into a third-party contract with METRO. May also be referred to as 'vendor' or 'consultant'

Cost Analysis: Review and evaluation of a Contractor's cost data and of the judgmental factors applied in projecting from the data to the estimated costs in order to form an opinion of the degree to which a Contractor's proposed costs represent what performance of the contract should cost. The analysis should be in accordance with accepted accounting standards and Federal regulations

Cure Notice: Document outlining that a Contractor has not performed and must therefore submit a plan to return to the requirements of a contract within a certain timeframe

Data: Recorded information, regardless of form or characteristic

Davis-Bacon: Federally mandated salaries and wage rates that apply to Contractor personnel who are working on federally funded METRO construction projects. Procurement is responsible for assigning prevailing wage rates as determined in accordance with the Davis-Bacon Act. The Code of Federal Regulations, Part 29 CFR mandates that hourly rates and fringe benefits payments on all federally funded construction contracts; see Chapter 14 for additional information about Davis-Bacon wage determinations

Days: When referring to the contract period of performance, days shall mean calendar days unless otherwise specified. In computing any timeframe prescribed by this Manual, the day of the event from which the designated timeframe begins to run shall not be included, but the last day shall be included. Saturday, Sunday, or federal or Texas holidays are included unless otherwise specified

Deficiency: Any part of a proposal that fails to satisfy METRO's requirements

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Deputy Chief: The person appointed by the President & CEO of METRO to be second-in-command of the Authority. Generally interchangeable with a title such as 'AVP.' Refer to 'Titles,' 'Chief (name of function) Officer, and 'Vice President' definitions

Descriptive Literature: Information such as catalogue cuts, illustrations, drawings, and brochures, which show the characteristics or fabrication of a product or explain its operation, furnished by a Bidder as a part of its bid to describe the products offered in its bid and required only when specified in the IFB

Design Bid-Build Project: A construction project under which a recipient commissions an architect or engineer to prepare drawings and specifications under a design services contract, and separately contracts for construction, by engaging the services of a Contractor through sealed bidding or competitive negotiations to complete delivery of the projects

Design-Build Project: Defined in 49 U.S.C. Section 5325(d)(1) as a project under which a recipient enters into a contract with a seller, firm, or consortium of firms to design and build a public transportation system, or an operable segment of such system such that it that conforms to specific performance criteria. It may include an option to finance, or operate for a period of time, the system or segment or any combination of designing, building, operating, maintaining such system or segment. Apart from the definition at 49 U.S.C. Section 5325(d)(1), a 'design-build project' also means a construction project under which a recipient enters into a contract with a seller, firm or consortium of firms both to design and construct a public transportation facility that is the subject of the project

Designee: A duly authorized representative of a person having specific authority

Discussion: Any oral or written communication between METRO and an offeror, whether or not initiated by METRO that (a) involves information essential for determining the acceptability of a proposal, or (b) provides the offeror an opportunity to revise or modify its proposal

Dispute: A controversy or difference of interpretation or opinion about the terms, conditions, specifications or drawings in a contract, arising between the Contractors awarded a contract and METRO

Emergency Procurements: An emergency is any condition that creates a threat to METRO employees, property or operations or to public health, welfare and safety arising from natural forces (fire, wind, flood, storm and other natural disasters) and/or hostile acts that requires immediate action to procure goods and services outside of the normal procurement process

Employee: An individual drawing a salary or wages directly from METRO

Environmental and Energy Efficiency Preferences: Federal laws and regulations require all recipients to comply with all applicable environmental requirements and implement them as necessary through its Contracts, which also flow-down to subcontractor agreements

Equitable Adjustment: An adjustment to the contract price or other provision pursuant to a contract clause providing for an 'equitable adjustment' or a determination made by the President & CEO or Chief Procurement Officer

Executive Vice President (VP): A person appointed by the President & CEO of METRO to command multiple departments and functions within the Authority

Field Change Order: The written document executed in accordance with METRO's 'Construction Field Change Order' Guideline applicable only to construction projects

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Final Acceptance: Final acceptance of the work occurs when METRO is satisfied that work is fully and absolutely complete, and is in strict compliance with the contract documents

Grantee: an entity that receives funds from the Federal Transit Administration

Interested Party(ties): Anyone who has participated in a solicitation

Inventory Item: Parts/commodities purchased to keep METRO's equipment in working order

Invitation for Bid (IFB): A formal request to interested parties to provide or procure specified goods or services. METRO awards IFBs to the lowest responsive and responsible Bidder. IFBs require clear and accurate descriptions of requirements for commodities/services for delivery

Lease vs. Purchase: FTA requires that a 'lease vs. purchase' analysis be done to determine 'best value' when acquiring property. Before any recipient may purchase or lease an asset, FTA regulations require the recipient to make a written comparison of the cost of leasing the asset compared with the cost of purchasing or constructing the asset. Costs used in the comparison must be reasonable, based on realistic current market conditions, and based on the expected useful life of the asset

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

Liquidated Damages: An amount established prior to contract award and assessed when a Contractor fails to complete delivery, installation, services, or the work specified in a contract within the contract period of performance or schedule, which causes increased costs to METRO or FTA. The amount is pre-established because the extent of actual damages would be difficult or impossible to assess. The assessment of liquidated damages shall be at a specific rate per day, for each day of overrun in contract time, and the contract identify these specifics. METRO shall credit any liquidated damages assessed to the project account involved unless the FTA permits otherwise. 'The rate and measurement standards must be calculated to reasonably reflect METRO's costs should the standard not be met, and must be specific in the solicitation and the contract'

Memorandum of Negotiation: A detailed written record that describes METRO's pre-negotiation position, negotiations held with the proposer or Contractor, and the final negotiated settlement

Metric Usage: In compliance with the Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act, 15 U.S.C. Sections 205a et seq., the Common Grant Rules require the recipient to accept dimensions in metric measurements for property and services, to the extent practicable and feasible. Refer also to Executive Order No. 12770, 'Metric Usage in Federal Government Programs,' July 25, 1991, 15 U.S.C. Section 205a note; and applicable federal regulations

METRO: The shortened name for the Metropolitan Transit Authority of Harris County, Texas. May also be referred to as the 'Authority'

METROBids: METRO's Procurement website

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Modifications to Contracts-POs-Work Authorizations: The electronic SAP procedures and hardcopy forms used to change and document an existing award for a variety of reasons, such as changing a unit price, period of performance, account number or G/L code, or any other aspect of procurement. Requests for Procurement personnel to modify information within SAP must be initiated by the requester through submission of the PO/Contract/WA Change Request form². (Also see 'Contract Modifications')

Narrative Method: See 'Consensus'

Necessity: The Common Grant Rules requires the recipient to establish procedures to avoid the purchase of unnecessary property and services (including duplicative items and quantities or options not intended for use, or whose use is unlikely). In monitoring whether a recipient has complied with its procedures to determine what property or services are unnecessary, FTA bases its determinations on what would have been a recipient's reasonable expectations at the time the recipient entered into the contract

Negotiated Procurement: A contract awarded using other than sealed bidding procedures

Non-inventory Item: Items/commodities purchased throughout METRO, necessary to complete work. Examples are office supplies, paper, etc.

Non-personal Services: All other services performed by METRO except for legal services, as defined under *Personal Services* or *Professional Services*

Notice to Proceed: Written direction given to the Contractor to commence performance as provided for in the contract

Numerical Scoring: A process used by an evaluation committee that quantifies rather than qualifies committee evaluations, wherein the maximum number of points is determined in advance for each criterion. Individually, every voting committee member assigns points to each criterion for the proposal or qualification evaluated

Offer: A bid or proposal submitted in accordance with solicitation instructions

Offeror: Legal entity that submits a response to a solicitation

Overhead or Indirect Costs: The necessary costs, which not specifically identified by a Contractor as directly attributable to contract work; usually the general costs of running the business

Owner: METRO

P-Card: A procurement method whereby authorized personnel may purchase small dollar items, using a METRO credit card in lieu of petty cash and check requests, decreasing the number of small purchase orders. METRO may use P-cards to pay contractual agreements and BPCAs

Payment Bond: A bond assuring payment of all persons supplying labor and material in the execution of the work provided for under the contract

Performance Bond: Issued by a bank or insurance company, this surety bond guarantees satisfactory completion of a project. Construction projects require a bond-securing fulfillment of all the contractor's obligations under a contract. An irrevocable Letter of Credit (LOC) or a certified check may be used for other than construction projects

Period of Performance: The period of performance is the timeframe allowed for completion from effective date through final date specified in the contract

¹ see Procurement Intranet Home page-Procmt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools

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³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

Personal Services: Those services performed by an individual or firm possessing special expertise or knowledge of a particular subject or field in a capacity as a consultant, advisor or informer to METRO regarding the subject or field of the special expertise or knowledge

Piggybacking: The post-award use of an existing contract that allows an agency not contemplated in the original procurement to purchase the same supplies or equipment through that original document or process. Certain FTA requirements apply. Refer to 'Piggybacking Worksheet'¹.

Pre-Award Survey: Bidder or proposer questionnaire included with the solicitation package

Pre-Construction/Pre-Performance Meeting: A meeting with representatives of the Contractor and METRO before beginning the contract work

President & Chief Executive Officer (CEO): The person appointed by the Board to be the President & CEO of METRO

Price Analysis: Process of examining and evaluating the reasonableness of a Bidder/Proposer price, without evaluating the separate cost elements or proposed profit of the Bidder/proposer

Prime Contractor: A person or firm who has a direct contract with METRO

Prime Contractor Participation: The amount of work performed by the Contractor with its own staff

Procurement: Buying, purchasing, renting, leasing, or otherwise acquiring any equipment, supplies, services, or construction by contract. It also includes all functions that pertain to the obtaining of goods, services or construction, including description of requirements, solicitation and selection of sources, preparation and award of contract, and all phases of contract administration

Procurement Process: The sequence of phases that begins with creation and approval of Shopping Cart for non-inventory purchases or a Requisition for inventory purchases. These electronic actions authorize Procurement staff to procure the necessary items/services

Procurement Summary: A documented account of the procurement also referred to as the Summary of Procurement

Professional Services: Chapter 2254.002 of the Texas Government Code (as per the Texas Professional Services Act) defines professional services as those 'within the scope of the practice of accounting, architecture, landscape architecture, land surveying, medicine, optometry, professional engineering, real estate appraising, or professional nursing, or services provided in connection with the professional employment or practice of a person who is licensed as a certified public accountant, architect, landscape architect, land surveyor, physician, surgeon, optometrist, professional engineer, state-certified or state-licensed real estate appraiser, or registered nurse in connection with his professional employment in practice'

Progress Payments: Reimbursement to a Contractor for costs incurred, either by a percentage or by stage of completion of the contract work

Progress Reports: Periodic reporting of progress as set forth in the contract requirements.

Proposal: The submission by a potential Contractor in response to a Request for Proposal (RFP) issued by METRO

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Proposer: The general term for the legal entity that submits a response to an RFP; may be any individual, sole proprietorship, firm, partnership, corporation, or limited liability company (LLC) submitting a proposal for the work contemplated

Protest: A written complaint describing an unresolved disagreement, or controversy stemming from solicitation

Protestor: The person or firm filing the protest

Provisional Overhead Rates: Rates used when a Contractor cannot present audited financials. Rates shall be as follows:

One Hundred Fifty (150) % - In-house overhead rate

One Hundred Twenty-Five (125) % - Field overhead rate

Request for Board Action (RBA) form:² ^{Executive:} Used for informational purposes, Board approvals, a briefing document and award of a contract

Request for Information or Interest (RFI): A method by which METRO extends requests for information to determine how many sources can provide a product/service, or determines what sources are interested in participating in a certain solicitation

Request for Proposals (RFP): A comprehensive document issued to request from interested and qualified responders' submissions of proposals to perform specific project or service or provide a stated item. RFP proposals are negotiated procurements and are evaluated on price and other stated criteria

Request for Quotes (RFQ): Requesting pricing on small purchases resulting in Purchase Orders

Requestor: A METRO employee who prepares a Shopping Cart. This entails securing all necessary approvals and delivering an approved Requisition and applicable attachments to the Procurement Department. Although Procurement staff is responsible for creating final solicitation documents, the requestor must possess the technical knowledge of the specific requirements of the product or services needed and usually serves as Project Manager (See 'Authorizations and Approvals')

Requirements: The description of goods or services needed by METRO and are only available from sources outside of METRO through the execution of a written contract. Such contracts are 'requirements type' contracts.' (Also see 'Shopping Cart')

Requisition: The authorizing document for the Procurement, Materials Management & Small Business Department to initiate the contracting process for inventory goods. Also used to replenish inventory items, whether for a one-time purchase or for issuance of a delivery order for inventory items on requirements-type contracts (See 'Shopping Cart' [used for purchase of non-inventory goods and services])

Responsible Bidder/Proposer: A Bidder/Proposer who has the financial resources, judgment, skill, integrity, performance record, and overall ability to fulfill contract requirement

Responsive Bidder/Proposer: A Bidder who submits a bid that conforms to all technical and legal requirements of the solicitation

Revenue Requisition: Used when METRO receives payments from a contractor, rather than METRO expending money. It comes into play in circumstances where a Contractor pays a portion of monies collected from concessionaires, or when

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METRO receives monies from the sale of surplus or other revenue-generating contracts. As such, it is an exception to the typical procurement process

RFx: The SAP generic term for the electronic solicitation document used to procure services, and inventory and non-inventory goods.

SAP: METRO's electronic procurement system that encompasses procurement-related data, both contractual and monetary; supplemented with additional documental forms to standardize recordkeeping

Sealed Bidding Procedures: A procurement method that keeps Bidders' pricing submissions secret from all parties until completion of bid openings at a pre-determined date and time and after selecting the Bidder with the lowest cost

Shopping Cart: The authorizing document for the Procurement, Materials Management & Small Business Department to initiate the contracting process for non-inventory items, such as tools, equipment, materials and supplies, and services. Also used to issue work authorizations for services or delivery orders for non-inventory items on requirements-type contracts (See 'Requisitions' [used for inventory goods purchases])

Show Cause Notice: A notice requesting information from a Contractor on why not to terminate the contract with them

Sources: A recipient will have several sources from which to acquire property and services and all federal rules and regulations shall apply. The sources include: 1) force account; 2) shared use; 3) joint procurements; 4) state and local government purchasing schedules/contracts; 5) federal excess and surplus property; 6) federal supply schedules; 7) existing contracts; and 8) the open market

Scope of Services: A description of professional, personal or non-personal services needed. The scope of service is the contractual document for expressing exactly what services are required.

Small Purchases: Goods and services purchased that are valued in total for \$50,000 or less. Authorized small purchase procurement methods include Requisitions and purchase orders; the Purchasing Card program (P-card); blanket purchase agreements, petty cash, BPCAs, etc.

Sole Source: METRO solicits and negotiates the purchase of equipment or specialized parts/equipment with one source. METRO will post the solicitation for 14 days and justify the rationale for sole source before contract execution

Specification: A description of the requirements for equipment, supplies or construction to be delivered; it may relate to either the design or performance of a project. A design specification prescribes exact dimensions, materials or workmanship. A performance specification identifies how the desired product should perform. The Contractor uses the performance information to prepare a detailed specification, and then manufactures the product to meet the stated performance requirements. The specification also serves as the base the selection criteria evaluated to confirm all technical requirements of the contract

Statement of Work: A description of the requirements for personal and non-personal services and equipment described with less data than that contained in a specification. A statement of work outlines the nature of the work, the level of effort required and the anticipated results of the work. (Also see 'Contract Scope')

Summary of Procurement (SOP): A written record detailing the significant history of any procurement (see Procurement Summary)

System Requisition: (Also referred to as an Inventory Requisition); Used to replenish inventory items, whether for a one-time purchase or for issuance of a delivery order for inventory items on a requirement-type contract

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Technical Evaluation Memorandum: A document supporting the analysis of the Bidder/Proposer technical responsiveness to the solicitation documents

Texas Government Code Chapter 2258: The Procurement, Materials Management & Small Business Department is responsible for assigning prevailing wage rates for any construction projects performed under purchase order, contract or work authorization that are locally funded and have a value of \$2,000 or more. The chapter also cites numerous requirements of contractors and subcontractors as to workers' pay and payroll administration, as well as penalties for non-compliance.

Third-Party Contract: A federally funded or partially federally funded contract between METRO and a Contractor to furnish equipment, supplies, materials, construction, services, or combinations thereof. Typically, third-party contracts involve the FTA or FTA-funded contracts

Titles: Subject to change at discretion of executive management and/or Board of Directors. Titles in use at any given time are generally interchangeable with previous titles. For example, 'Vice President, Procurement' is interchangeable with 'Chief Procurement Officer'

Unauthorized Procurement: A verbal or written agreement made by an unauthorized METRO representative. Any employee representative who initiates a contractual obligation without proper authorization may be liable for that obligation and may be subject to disciplinary action, including suspension or termination

U.S. Department of Transportation – Federal Transit Administration (FTA): Federal grantor agency referred to in the contract documents as 'FTA,' under whose grants of financial assistance and grant contracts, goods are provided or services are performed by third parties; i.e. METRO Contractors

Vendor: Companies doing, or wishing to do, business with METRO

Vice President (VP): The person appointed to manage a METRO department, either on a permanent, temporary or acting basis. Such titles are generally interchangeable with Chief (name of function) Officer. Refer to 'Titles' and 'Chief' definitions

Work Authorization: A document authorizing work on a contract containing its own scope of service, specification or statement of work (Also see Job Order Contract under 'Construction Methods of Procurement')

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3 CONTRACT MANAGEMENT AND ADMINISTRATION

3.1 GENERAL REQUIREMENTS

- A. The term 'contract administration' summarizes all activities required to obtain and manage the documentation required to procure a product or service. A contract management and administration system ensures and maintains Contractor performance with terms, conditions, and specifications of the contract. Personnel involved in a particular solicitation may vary depending on the type of solicitation used for the purchase of an item or service, but generally, several key roles remain constant. They are Contract Administrator, Contracting Officer, Project Manager, and Procurement Manager.
- B. In the course of administering a contract, Contract Administrators works with a variety of departments and functions, including Internal Audit, Legal, Construction Management, Risk Management, Accounting, Cost Estimating, and Scheduling, as well as with any user department.
- C. It is the Contract Administrator's responsibility, in concert with the Procurement Manager, to address all FTA issues prior to contract award. For example, if a Buy America Certificate is unsigned or is signed, but non-compliant, it is imperative that Contract Administrators and or the Procurement Manager notify all applicable parties both verbally and in writing that an issue may exist. The Contract Administrator, in coordination with the Chief Procurement Officer and the METRO Legal Department, may request an exception waiver from the FTA prior to contract award.
- D. Contract Administrators are responsible for remaining diligent about only entering into contracts with responsible firms who possess the potential ability to perform successfully under the terms and conditions set forth in the contract. Contract Administrators are responsible for making judgments about the responsiveness of a proposal and the ability of a Contractor to perform the work required, to include:
 - 1. Ensuring proposed firms remain in compliance with all regulatory and applicable requirements;
 - 2. Including all provisions for contracts for services to define a sound and complete agreement;
 - 3. Preventing contract award to a debarred or suspended vendor. A printout or screenshot from <https://www.sam.gov/SAM> confirming the vendor's status as not being debarred or suspended must be filed in the contract file folder.
- E. Contract Administrators/Contracting Officers are responsible for the overall administration of a contract, and, as such, serve as a member of the project team along with the PM, the Construction Manager if applicable, and other technical staff. Contract Administrators/Contracting Officers prepare solicitations, contracts, change orders or modifications to contracts for execution by the proper authority. Contract Administrators/Contracting Officers fully document the contract file, (to ensure that it contains all necessary contract-related data), because when a matter comes into controversy or at the time of a post-contract performance audit or review, key personnel may not be available to respond to issues.

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3.2 CONTRACT ADMINISTRATION ROLES AND RESPONSIBILITIES

3.2.1 Contract Administrator Responsibilities

- A. The Contract Administrator interfaces with the Project Manager and contributes to the success of the project by performing the following basic functions:
1. Prepare solicitations and contract documents;
 2. Conduct pre-award due diligence to determine prospective Contractor capabilities for successful contract performance;
 3. Negotiate the contract and any subsequent modifications and documents all actions
 4. Recommend a contract award;
 5. Coordinate with applicable parties regarding the issuance of contract change orders;
 6. Administer the contract to ensure compliance by both METRO and the Contractor;
 7. Clarify or interpret contract terms and conditions as required;
 8. Process disputes and claims, and recommend disposition;
 9. Perform contract closeout.
- B. The following are routine duties of the Contract Administrator:
1. Be present in the Procurement Plan Room at least fifteen (15) minutes prior to deadline for receipt of bids/proposals, and to check periodically with the Mail Room and Security Desk for any receipts;
 2. Checking the receipt log prior to bid/proposal receipt deadline to:
 - ensure sufficient number of bids received to substantiate adequate competitive;
 - determine that a bid/proposal has been submitted by any incumbent who had shown interest in bidding/proposing;
 - determine other identified vendors, manufacturers, suppliers, etc. who expressed interest have submitted a bid/proposal.
 3. In the event of insufficient competition, extend the bid/proposal opening by issuing an amendment to the solicitation;
 4. Contacting parties who did not submit bids/proposal as expected to determine why, and document in the solicitation file.
- C. Contract Administrators assume the role of Contracting Officer after award of a contract, and the contract makes this identification. The Contracting Officer acts as the METRO representative for all Contractor performance requirements, and, unless otherwise specified herein, for all determinations, consents and approvals of METRO required by the contract.

3.2.2 Contracting Officer Responsibilities

- A. After execution of the basic contract, the technical administration of the contract becomes the responsibility of the Project Manager and the contractual administration becomes the responsibility of the Contracting Officer. The Contracting Officer and Project Manager should establish and implement methods or procedures to monitor performance of the contract. Exercise caution to assure that such methods do not place requirements on the contractor, which are outside of the scope of the contract and thus constitute a compensable change that neither individual has the capacity or the authority to direct.

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B. The following are routine duties of the Contracting Officer:

1. Receiving and transmitting all correspondence with the Contractor, and providing direction to the Contractor regarding contractual matters;
2. Negotiating, reaching agreement with, and coordinating with Contractors proposed contract changes, including any administrative changes;
3. Issuing unilateral and bilateral change orders to contracts, transmitting instructions, receiving information, and interpreting and defining METRO policies and decisions;
4. Obtaining cost and/or price proposals, overseeing audits, assessing the impact of contractual requirements, obtaining all necessary approvals, and initiating contract changes;
5. Reviewing invoices issued against contracts, verifying format, completeness, accuracy, and acceptability of costs, advising of any necessary adjustments, and electronically documenting the receipt of all services, equipment and supplies;
6. Verifying and validating invoices submitted against contract line items or total contract value, signing (indicating approval) Contract Payment Certificate (CPC) forms² within two business days of receipt from a Project Manager and forwarding to the Contract Services Assistant in the Procurement File Room for photocopying and sending to Accounts Payable for processing;
7. Maintaining Contractor insurance and bonds, as applicable, throughout the life of the contract (Refer to Chapter 9 'Bonds, Other Security, Insurance and Safety');
8. Reviewing subcontracts submitted by the Contractor for compliance with contract requirements, and placing copies of executed subcontractor agreements into contract files;
9. Review and verify all assigned task orders and work authorizations match the scope of services and corresponding pricing/fees prior to issuance.
 - a. Changes are likely often to occur after a WA is issued initially. To minimize the need later to go back and modify a WA after contract expiration when additional time or money is needed to complete the work, please use the following language in the WA Contract Article to define the period of performance:

The period of performance shall be effective ____ through ____, or until completion of the work or exhaustion of funds, whichever occurs later.
 - b. Worded the article in this way removes the need to make additional modifications later to a WA should more time be required, and allows the end date of the WA to be extended if necessary without any modification to the WA. However: this wording cannot be applied to WAs issued against contracts that include liquidated damages or when time is of the essence.
 - c. For more information, refer to Procurement Bulletin #43, filed on the Procurement Intranet home page. Procurement Department staff can help other METRO personnel access this document.
10. Performing other duties as may be required to enforce contract terms and conditions.

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11. Entering all contract, modifications and work authorizations into the electronic Procurement System immediately upon their execution.
 12. Closing out contracts, ensuring that all close-out paperwork is properly signed and filed, and that the electronic procurement system reflects the closeout.
- C. The Chief Procurement Officer may also assign additional METRO staff members to assist in carrying out the above functions.

3.2.3 METRO Project Manager Responsibilities

- A. The METRO Project Manager represents the department that will use the service or item procured and serves as the subject matter expert on the service or item. To ensure that the service or item ultimately purchased meets the exact requirements of the end user, and to enable Contract Administrators to perform effectively, the Project Manager must provide a well-defined statement of work, scope of service or detailed specification data for the service or item procured. For assistance in preparing a spec, SOW or SOS, refer to the Scope Guide and Examples⁴. These are available under the 'Project Manager Tools' tab on the Procurement Intranet page.
- B. During the pre-solicitation and solicitation phases of the procurement, the Project Manager serves as a facilitator and communications link between the stakeholder and Contract Administrators by establishing and clarifying statements of work, scopes of services and specifications to Procurement staff.
- C. After the contract award, the Project Manager must inform the Contract Administrator of any change in circumstances that could result in a need to modify the terms of the contract. The Project Manager must also provide to the Contract Administrator periodic assessments of the quality and timeliness of the Contractor's performance, and provide judgment of the materials or service provided as either acceptable or not acceptable.
- D. After award and execution of the contract and after the Contractor begins work on the project, the technical administration of the contract becomes the responsibility of the Project Manager. It is the Project Manager's responsibility to oversee the Contractor's performance throughout the work process to ensure performance in accordance with specific tasks, milestones, and review procedures stipulated in the contract. It is also the Project Manager's responsibility to oversee Contractor performance through completion of work METRO acceptance of inspections on the product or service. The Project Manager provides technical direction to the Contractor and responds to correspondence on technical matters from the Contractor's designated representative. The Project Manager may initiate review by other METRO staff when deemed appropriate. It is also the Project Manager's responsibility to send copies of all correspondence to the Contracting Officer for inclusion in the contract file.

Technical Administration Responsibilities of the Project Manager include:

- A. Reviewing invoices for accuracy and content and preparing a 'Contract Payment Certificate' (CPC) form², as needed. For construction contracts, the Contractor must submit an 'Application for Payment and Contractor's Invoice' form along with the invoice, as per METRO Guideline 'Contract Payment Certificate'³.
- B. Reviewing documentation and expenditure reports submitted periodically by Contractors to report the amount of time and money spent on the contract (as required by certain types of contracts) to ensure that all work progress milestones, materials and deliverables and other contract requirements are met and that invoicing is accurate;

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- C. Monitoring the progress of the CPC and the 'Application for Payment' form noted in paragraph 1 above (as applicable) to ensure timely payment is made to the Contractor in accordance with contract terms and conditions; and
- D. Informing the Contracting Officer of a Contractor's performance, including scope adherence, or non-compliance of contract requirements, including deliverable and milestones.
- E. If, as work progresses, it becomes apparent that a change is required to the statement of work, scope of services, specifications or drawings, or to the dollar value of the contract, the Project Manager will initiate a PO-Contract-WA Change Request Form² to modify the contract and provide changes to the technical requirements. The Project Manager will forward all appropriate documentation to the Contracting Officer. The Contracting Officer, with assistance from the Project Manager and other appropriate staff, will negotiate the changed technical requirement, change of schedule, and the cost of the change, if any, with the Contractor before a contract modification is processed.
- F. The Project Manager may, when necessary and when approved by his/her appropriate management designate other personnel to assume the role's responsibilities and obligations.
- G. The Project Manager and other representatives from other METRO departments shall work with the Contracting Officer during the contract closeout process and complete the Contract Closeout /Contractor Performance Evaluation Form¹.

3.2.4 Contractor's Project Manager Responsibilities

The Contractor shall appoint a Project Manager, who acts as the Contractor's primary representative in all matters relating to the contract and performance of the work specified in the contract. The Contractor's Project Manager has authority to transmit instructions and receive information to and from METRO Contracting Officer and Project Manager.

INITIATING A PROCUREMENT

3.3 PROCUREMENT PLANNING

Refer to the 'Acquisition Planning' Guideline³ for detailed procedures.

- A. METRO Procurement Policy requires that all acquisitions estimated to exceed \$50,000 be subject to procurement/acquisition planning and that the Contract Administrator complete a Procurement Plan form¹. Such planning should occur as soon as identifying the requirement, preferably before annual budget preparation for the fiscal year in which such a requirement will occur. The earliest possible initiation will enable the Procurement, Materials Management & Small Business Department to provide for adequate work force and resources for the accomplishment of such procurements and the administration of the resultant contracts in a timely and cost-effective manner.
- B. The Procurement Plan¹ form includes a section that provides justification as to why a certain method of procurement has been determined as most suitable.
- C. A Scope of Work must accompany Shopping Cart through the procurement process. For assistance in preparing a spec, SOW or SOS, refer to the Scope Guide and Examples⁴. These are available under the 'Project Manager Tools' tab on the Procurement Intranet page.

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3.4 **REQUISITIONS AND SHOPPING CARTS**

- A. There are two ways to initiate the procurement process:
 - 1. **Requisition**: A requisition created in the SAP procurement system is the authorizing document for the Procurement, Materials Management & Small Business Department to initiate the contracting process for inventory goods. A requisition is also used to replenish inventory items, whether for a one-time purchase by purchase order or contract, or for issuance of a delivery order for inventory items on requirements-type contracts
 - 2. **Shopping Cart**: A shopping cart created in the SAP procurement system is the authorizing document for the Procurement, Materials Management & Small Business Department to initiate the contracting process for non-inventory items, such as tools, equipment, materials and supplies, construction, architect engineer (AE) work authorizations, professional, personal or non-personal services. A shopping chart is also used to issue work authorizations for services or delivery orders for non-inventory items on requirements-type contracts.
- B. A Shopping Cart or requisition is initiated by the Project Manager. The Shopping Cart identifies the initiating METRO department or division, procurement requirements, funding data, and contains all necessary approvals.
- C. A Shopping Cart is not required in the following instances:
 - 1. When paying for goods and services by check request. Refer to the 'Check Wire Request' Guideline³ Finance for details.
 - 2. When using an authorized METRO Purchasing Card. Refer to the 'Purchasing Card Program' Guideline³ for details.
 - 3. When purchasing temporary employee services through Personal Services Agreements. These services are limited to agreements of not more than six (6) months in length and payment of not more than \$25,000 in any give 12-month period. Refer to the 'Temporary Employees' Guideline³ Human Resources for details.

3.4.1 **Processing the Shopping Cart**

- A. For construction and architect engineer (AE) requirements, the requestor must send one copy of the drawings and specifications, detailed statement of work/scope of service or list of drawings, as applicable, with the Shopping Cart.
- B. Before issuing a Shopping Cart in SAP, the Project Manager must coordinate all drawings and specifications with the Capital Programs and Facilities Maintenance Departments when construction requirements are applicable.

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- C. For services other than construction and architect engineer (AE) requirements, a detailed scope of services/scope of work must be developed and attached to the Shopping Cart, along with all applicable forms relating to the project. Refer to the File Checklist: Purchase Order Award form¹ and Folder Review Checklist: Contract Solicitation, Award, Modification form¹. For assistance in preparing a spec, SOW or SOS, refer to the Scope Guide and Examples⁴. These are available under the 'Project Manager Tools' tab on the Procurement Intranet page.

3.4.2 Authorizations and Approvals for the Shopping Cart

- A. The requestor must obtain the authorizations and approvals noted in the Delegation of Authority, Table 1, in Chapter 1 of this Manual. This table sets forth the authority levels and identifies the METRO positions authorized to requisition and procure goods, services and construction.
- B. Approval represents authorization to purchase the items or services requested and represents that the items or services are not duplicative or unnecessary in nature. The workflow function of SAP will obtain all necessary electronic approvals so that only procurements that are fully approved flow to Procurement & Materials Management personnel in the form of Shopping Carts (non-inventory items and services) or requisitions (inventory items). Following such receipt, the Procurement Director and/or Manager and Contract Administrator assigned to handle a Shopping Cart or requisition, will bring suspected instances of duplicative or unnecessary items or services to the attention of the initiator, as part of the specification/scope of service review and procurement planning process, to resolve any issues before taking any purchasing action.

3.4.3 Procurement Assignment and Administration of the Shopping Cart

- A. Upon receipt of all necessary information and approvals, the responsible Procurement Manager or Director will assign a Contracts Administrator to manage the procurement.
- B. The Contract Administrator will review the Shopping Cart and related documents.
 - 1. If the documents and/or information are incomplete or if the Contract Administrator identifies a problem(s) with the information provided, he/she will contact the requisitioner to resolve the concerns.
 - 2. If the documents and/or information are still not satisfactory, the Contract Administrator may elect to forward a memorandum notification to the requisitioning division Director indicating that some of the documents submitted were not adequate for contracting purposes. The Contract Administrator will forward a copy of this memorandum to the Procurement Manager, Chief Procurement Officer and responsible Vice President.
 - 3. After the Contract Administrator deems the documents acceptable, he/she will initiate the procurement.

3.5 DELIVERY AND PERFORMANCE REQUIREMENTS

- A. It is the responsibility of the Contract Administrator to ensure that all contracts stipulate that METRO Central Supply warehouse will receive all tangible personal property procured by contract, unless there is an approved exception. Shipments to other facilities are an exception and require approval of the Chief Procurement Officer, or authorized designee. Although reiterated herein, delivery shall be as set forth in the 'Delivery of Equipment, Supplies, Parts and Materials' Guideline³.

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- B. Receipt and tagging of assets shall be in accordance with the 'Property Services' Guideline³.
- C. Each solicitation shall clearly state the time of delivery or performance, which are essential contract elements. The Contract Administrator shall ensure that a delivery or performance schedule is realistic and meets the requirements of the procurement.
- D. When establishing a contract delivery or performance schedule for goods or services, the Contract Administrator shall consider applicable factors, including the following:
 - 1. Urgency of need;
 - 2. Production time;
 - 3. Market conditions;
 - 4. Transportation time;
 - 5. Industry practices;
 - 6. Timeframe for obtaining and evaluating Bids or offers and awarding contracts;
 - 7. Timeframe for Contractors to comply with any condition precedent to contract performance;
 - 8. Timeframe for METRO to perform its obligations under contract, such as furnishing
 - 9. METRO property to the Contractor
- E. The Contract Administrator may establish contract delivery or performance schedules on any of the following:
 - 1. A specific calendar date or dates;
 - 2. A specific period or periods from the date of the contract;
 - 3. A specific period or periods from the date agreed upon by the parties and set forth in the contract for actual commencement of performance on the contract; or
 - 4. In contracts containing indefinite delivery provisions, a specific time for delivery after receipt by the Contractor of each individual order issued under the contract.
- F. When scheduling the time for performance of a construction contract, the Contract Administrator shall consider applicable factors, such as the following:
 - 1. The nature and complexity of the project;
 - 2. The construction seasons involved;
 - 3. The required completion date;
 - 4. The availability of materials and equipment; and
 - 5. The use of multiple completion dates.

3.6 PREVAILING WAGE RATES

- A. In accordance with the Davis-Bacon Act, Contract Administrators are to assign the prevailing wage and salary rates determined by the Department of Labor for federally funded construction projects performed under purchase order or contract. The Davis-Bacon Program Specialist monitors METRO's compliance with the prevailing wage rate requirements using the LCPTracker software tool.

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- B. To meet requirements of Texas Government Code Chapter 2258, Prevailing Wage Rates, Contract Administrators are to assign prevailing wage and salary rates to locally funded purchase orders or contracts that have a value of \$2,000 or more.
1. For locally funded construction projects valued at \$2,000 or more, METRO shall:
 - a. Determine and include applicable prevailing wage rates on all construction contracts, purchase orders and work authorizations
 - b. METRO's Contract Administrators and Program Specialist will make periodic site visits to ensure contractor compliance
 2. For locally funded construction projects valued at \$2,000 or more, contractors shall:
 - a. Post the certified payroll placards on the jobsite as they do now for Davis-Bacon
 - b. Contractors will not be required to submit certified payrolls to METRO
 3. For locally funded construction projects valued at \$2,000 or more, contractors are:
 - a. Not required to enter certified payrolls into LCPTracker
 - b. Required to make certified payroll information available to METRO at METRO's discretion
- C. See Chapter 14.1 Section D for additional information about Davis-Bacon requirements and determinations of prevailing wage rates.

3.7 INDEPENDENT COST ESTIMATE, PRICE ANALYSIS, AND COST ANALYSIS

3.7.1 Requirements for Price and Cost Estimating and Analysis

- A. This chapter discusses the independent cost estimate (ICE), and price and cost analyses. The purpose of conducting price or cost estimates and analyses is to establish that the dollar amount paid for products or services procured is fair and reasonable.
- B. The Federal Transit Authority (FTA) Circular 4220.1 F, Chapter VI, Section 6, requires transit authorities to conduct a price or cost analysis for every procurement action, including contract modifications and change orders.

3.7.2 Independent Cost Estimate (ICE)

- A. METRO requires an independent/internal cost estimate for the approximate dollar amount that METRO will likely pay for any procurement before soliciting for bids or proposals. An independent cost estimate (ICE), along with the facts surrounding a particular procurement situation, helps determine the type of procurement to use to buy a product or service. It also provides essential procurement and financial planning information, and gives an indication of what federally regulated certification and bonding requirements the procurement contract must meet. A cost estimate also helps to determine whether a price or cost analysis is the more appropriate method to use later in the procurement process.
- B. Preparing an ICE is important because it helps METRO ensure that it pays a fair and reasonable price for the products and services it buys, and provides a basis on which to determine if the benefits of procurement warrant the prices presented by offerors. The estimate alone may be sufficient to determine whether the price is reasonable or will supplement other pricing data in making the determination.

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- C. An ICE can contain data from the marketplace, including information attained from bids submitted in prior solicitations with adequate competition.
- D. Contract Administrators shall hold estimates as confidential and not disclose its contents to potential bidders before the receipt of bids.
- E. The independent cost estimate should include the name of the person preparing the estimate and the date it was prepared.
- F. An independent cost estimate is required for the following:
 - 1. Negotiated procurements;
 - 2. Sealed bid procurements that did not result in sufficient price competition;
 - 3. Procurements made through non-competitive awards; and
 - 4. Contract changes
- G. For federally funded non-inventory procurements of less than \$50,000 or, including purchase orders and blanket purchase agreements, use the ICE < \$50,000 Independent Cost Estimate form¹.

For locally funded non-inventory procurements of less than \$50,000, no ICE form is required.

For procurements of \$50,000 or more, use the ICE ≥ \$50,000 Independent Cost Estimate/Scope Review Checklist form¹ and attach the ICE document.

3.7.3 Price Analysis (Use the P.O. Award Justification-Price Analysis form¹)

- A. A price analysis is the more frequently used technique to determine the fairness and reasonableness of proposed contract prices because it is less complex and time consuming than cost analysis. While there are a number of ways to approach a price analysis, the technique involves evaluating only a proposed price and not its separate cost and profit elements, using data that is verifiably independent from an offeror's data.
- B. In order of preference, the accepted ways to conduct price analysis are:
 - 1. *Adequate Price Competition* - A comparison of competitively priced bids or proposals received in response to a solicitation, wherein the contract will be awarded to the responsive and responsible offeror submitting the lowest evaluated price, under the following conditions:
 - a. At least two responsible offerors have responded;
 - b. Each offeror satisfies the requirements of the solicitation, and has submitted a responsive price offer; and
 - c. The offerors must independently contend for the contract award.

If after meeting the three conditions above, price competition is adequate to assure a reasonable price unless:

- a. The solicitation was made under conditions that unreasonably deny one or more known and qualified offerors an opportunity to compete;
- b. The low competitor has such an advantage over the competitors that it is practically immune to the stimulus of competition; or

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- c. Factual data proves that the lowest final price is not reasonable.
- 2. Prices Set by Law or Regulation - A review of the rate schedules set by the applicable law or regulation. Note that the independent regulatory body sets the effective rates for utilities.
- 3. Established Catalog Prices - A comparison of competitive published price lists, published market prices of commodities, similar indices and discount or rebate arrangements, given that:
 - a. Established catalog prices exist;
 - b. The items procured are commercial in nature;
 - c. The items sold are in substantial quantities;
 - d. The items sold are to the public
- 4. Comparison to Previous Purchases - A comparison of proposed prices with those received in prior procurement actions for the same or similar end-items. To ensure that 'like' comparisons, the Contract Administrator must review prior contract files to verify that the prior procurements prices were competitive, fair and reasonable.

The Contract Administrator must also review prior procurements for factors that can cause price variations, such as changes in quantity, quality, delivery schedules, the economy, an inclusion of non-recurring costs such as design, capital equipment, etc.

- 5. Comparison to a Valid Independent Estimate - A comparison of proposed prices with the ICE prepared prior to the opening of bids or proposals.

This form of price analysis alone is seldom adequate to warrant a determination that the price is reasonable. It is important that the facts, assumptions, and judgment used by the estimator are verified, so close review of the data used to develop the estimate is necessary.

- 6. Value Analysis - rough yardsticks analysis such as dollar per pound, per horsepower, or other unit to compare the differences in economy or efficiency of items to determine their worth from a functional perspective. Consider performance expectations for the item procured, as it relates to the Project Manager or representative from the department that will use the item.

C. Price comparison tools include but are not limited to the following:

- 1. Competitors' Catalogs - should all be issued during the same time frame;
- 2. Newspaper Advertisements - must be current;
- 3. Government Catalogs and Federal Supply Schedules – good sources for price comparison even if cannot be used as a procurement source;
- 4. Industrial Catalogs – provide data by industry or functionality. For example, the National Mechanical Contractor Estimator (NMCE) is an excellent source for pricing mechanical items;
- 5. Government Price Index - can be used with historical prices to analyze, compare, and predict current prices for a specific product or service; Use as a comparison approach to price and cost analysis.

- D. The Contract Administrator is responsible for conducting a price analysis for competitively awarded contracts unless determined by the Procurement Manager that another official, such as an auditor, should do so.

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3.7.4 Cost Analysis In cases when a price analysis is not sufficient, a cost analysis must be performed. Generally, costs analyses are conducted by the Audit Department. Procurement staff can request a cost analysis by completing the Audit Services Request form¹.

- A. A cost analysis is the more complicated and time-consuming used technique used to determine the fairness and reasonableness of proposed contract prices. It entails review, evaluation and verification of the separate cost elements and the proposed profit of an offeror's cost or pricing data, and the judgmental factors applied in estimating the costs.
- B. A cost analysis is necessary whenever price data is insufficient, price competition is lacking, for sole source procurements, and for non-competitive procurements. This includes contract modifications or change orders, unless, price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public, or on the basis of prices set by law or regulation.
- C. A cost analysis, in accordance with generally accepted accounting principles, is also mandated when an offeror is required to submit the elements of an estimated cost (i.e., labor hours, overhead, materials, etc.), such as with professional and personal services, and architect-engineer services contracts. This helps determine the degree to which the proposed price, including profit, represents what the performance of the contract should cost, assuming reasonable economy and efficiency and associated risk.
- D. A cost analysis is to be performed for the following:
 - 1. Contracts over \$50,000;
 - 2. All contract modifications, unless issue of the modifications is pursuant to construction change orders duly issued in accordance with the Construction Change Order procedures detailed in Chapter 5.
 - 3. A post-solicitation cost analysis for a small purchase, if deemed necessary by the Contract Administrator or Procurement Manager.
- E. In conducting a cost analysis, it is not sufficient to assess only a contractor's proposed figures on the number of hours his staff will work, the amounts and costs of materials, and the rates of labor and overhead from accounting records. Further, it is not enough to project the actual cost experience and call it the estimate of future costs. Rather, the Contract Administrator should use the cost analysis as a tool for in-depth scrutiny of the following:
 - 1. The necessity for inclusion of certain costs;
 - 2. The reasonableness of amounts estimated for direct labor and material;
 - 3. Subcontracted items or work;
 - 4. The overhead costs of the following:
 - a. Engineering;
 - b. Labor;
 - c. Manufacturing; and
 - d. General and Administrative
 - 5. The appropriateness of allocations of particular overhead costs to the contract;
 - 6. Forecasts of future cost trends;
 - 7. Allowances for contingencies, and;
 - 8. The reasonableness of the profit percentage and its affects the proposed price.

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- F. A cost analysis is also a way to evaluate whether the contractor is applying sound management in proposing the application of resources to the contracted effort and whether costs are proper, allowable and allocable, in accordance with federal cost principles and procedures.
- G. Contract Administrators are to use federal cost principles stated in the Federal Acquisition Regulation (FAR) Chapter 48 CFR 31 when conducting cost analyses. This is necessary to ensure that the costs are consistent with the principles, and therefore 'allowable' for METRO to pay for with federal funds. FAR 48 CFR 31.201-2 defines 'allowable costs,' which are important considerations with cost-plus-fixed fee contracts, cost-reimbursement contracts, and when the Contract Administrator evaluates and negotiates cost estimates submitted by a bidder to determine prices for fixed-price contracts. Additionally, the 'common grant rule,' cited in FAR Chapter 49 CFR 18.22 and OMB Circular A-87, requires that federal cost principles be used to determine allowable costs for commercial ('for-profit') organizations.
- H. Negotiate profit as a separate element of the price for each contract in which there is no price competition, and in all cases when conducting cost analysis.
- I. Tools used for cost analysis include but are not limited to the following:
 - 1. Technical Evaluation - assesses the quantitative and qualitative factors that influence the offered price and is effective for evaluating offers by cost analysis or by price analysis. Accounting records provide the cost of a job but are of limited value in determining reasonableness. Technical skills and judgments are required to determine reasonableness and necessity of those costs. Although directly related to price, a technical evaluation facilitates evaluation of the functions that cause costs. Technically trained and experienced personnel can assist in analyzing hours, quantities, tooling, testing, head counts, productivity, and similar factors.
 - 2. When a technical evaluation is required prior to negotiations it should address:
 - a. An estimate of necessary labor-hours with an indication as to where adjustments are desirable;
 - b. Reasonableness of proposed material type, quantity, and necessity;
 - c. The need for acquiring equipment, and what equipment should be considered general purpose or unique to the performance of a particular contract;
 - d. The possibility of use and availability of grantee-furnished property;
 - e. Number, location, and need for any grantee-funded trips by contractor personnel;
 - f. Assessment and stated summary as to whether or not labor, material, travel, and other costs elements are reasonable along with the evaluator's rationale.
 - 2. Auditor Pricing Support – data compiled and analyzed by an auditor provides verification of what elements were included, or should or should not have been included in calculating proposed costs and estimates. For example, certain categories of materials, salaries of contractor personnel, or the actual cost elements may have contributed to an overhead rate. An auditor can advise of prohibited costs included in the contractor's proposal.

3.8 FEDERAL THIRD-PARTY CONTRACT PROVISIONS

The Contract Administrator will review the federal checklists entitled 'Applicability of Third Party Contract Provisions' and verify that all required federal contract provisions are included in the solicitation documents or form of contract before advertising the contract. The Contract Administrator will document the results in the

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contract file. Refer to Chapter 14 of this Manual for details. The checklists are included in Section 15.3, as Appendices C1-14 of FTA Circular 4220.1F.

CONDUCTING ALL PROCUREMENTS

3.9 ADVERTISEMENTS AND ANNOUNCEMENTS OF BID SOLICITATIONS

3.9.1 Bid Solicitations and Competitively Negotiated Contracts

- A. METRO will place advertisements in the local major newspaper, the *Houston Chronicle*, at a minimum and frequency of no less than once a week for two (2) consecutive weeks before the date fixed for receiving bids.
- B. In addition to but not in replacement of the above requirement, METRO may place an advertisement a single time in a national publication before the date fixed for receiving bids, upon written approval by the Chief Procurement Officer.
- C. METRO shall post an announcement of solicitations for public inspection on METRO's website address at <https://www.ridemetroapp.org/procurement/solicitations.aspx> and in the Procurement Plan Room, located at METRO's Administrative Building.

3.9.2 Public Posting

- A. METRO shall post an announcement of all proposed negotiated contracts over \$50,000, except emergency procurements, on the official notice board in the Procurement Plan Room for at least fourteen (14) consecutive calendar days prior to award.
- B. The first and last day of public posting may be included in calculating the fourteen days. METRO may remove the post on the fifteenth (15th) calendar day.
- C. METRO shall not award the proposed contract until at least the 16th consecutive day after posting the announcement.
- D. The proposed Contractor may sign the contract and METRO may process the contract to the point of award during the public posting period.
- E. The Public Notice will describe the procurement in general terms and reference the solicitation document for the specific terms. The Public Notice will state the date, time and place Proposals are due and the time of public opening, which must allow sufficient time to prepare proposals prior to Bid opening. If a Bid Guarantee is required, the Public Notice will so specify.

3.9.3 Advertising for Sole Source and Emergency Procurements

- A. METRO must post sole source procurements for fourteen (14) days on Procurement's website and in the Procurement Plan Room. It may be removed on the fifteenth (15th) day and contract awarded on the 16th day.

There is no need to advertise sole source procurements, but the Contract Administrator should take appropriate steps to seek alternative sources for items historically considered sole source items.

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- B. METRO need not publicly post or advertise emergency procurements in local newspapers prior to contract award since time is of the essence in finalizing the contract.

3.10 PRE-SOLICITATION CONFERENCES

- A. Generally, Contract Administrators will convene a pre-solicitation conference for complex acquisitions as a means of briefing prospective Bidders/Proposers on complicated specifications and requirements. Contract Administrators will schedule the conference as early as is reasonable after issuing the solicitation, but before receiving the bids/proposals. The conference also serves as an open forum for potential Bidders/Proposers to address items in the solicitation documents that require clarification. Notice of the conference day, place and time shall be included in the solicitation.
- B. Contract Administrators will schedule the pre-bid conference no earlier than seven (7) days after advertising and send a notification to prospective Bidders/Proposers two-weeks prior to the meeting. Contract Administrators will include instructions that Bids/Proposals are due no earlier than two weeks after the date of the pre-bid/proposal meeting.
- C. Contract Administrators shall do the following:
 - 1. Facilitate the pre-bid/proposal conference;
 - 2. Furnish all Bidders/Proposers with identical information concerning the proposed procurement;
 - 3. Make a complete record of the conference;
 - 4. Promptly furnish a copy of that record to all Bidders/Proposers.
- D. If time allows, Contract Administrators will request prospective Bidders/Proposers to submit written questions in advance so Contract Administrators can deliver the prepared answers during the conference.
- E. Contract Administrators will arrange for project management, technical, safety, risk management, and small business personnel to attend the conference, as appropriate.
- F. Contract Administrators will conduct the pre-solicitation conference, furnishing all prospective Bidders/Proposers with identical information concerning the proposed acquisition, including Bidders/Proposers who did not attend the pre-bid conference.
- G. Contract Administrators will advise all pre-bid conference attendees that statements and explanations made during the conference shall not alter or change the terms of the solicitation; terms of the solicitation and specifications will remain unchanged unless the Contract Administrator amends the solicitation in writing.
- H. Procurement staff will record the conference for future reference. A sign-in sheet shall note 'No Attendance' if there are no attendees.
- I. METRO authorizes the use of teleconference or electronic meetings in lieu of in-person meetings conducted during the procurement process in times of natural disasters, pandemics, etc. by teleconference or electronic platforms such as Zoom, Skype, etc., or as needed.

3.10.1 Clearance Determination for Former Employee Potential Conflict of Interest

To eliminate unfair competitive advantage, vendors that employ a former METRO employee are prohibited from responding to any solicitation in which the employee actively took part in developing solicitation materials of any kind including, requests for proposals or invitations to bid, contract drawings, technical specifications, statements

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of work, or scopes of services. Upon the request of the vendor, METRO may give a 'clearance determination' as to whether the former employee actively took part in a particular solicitation so as to disqualify the vendor. The request for a 'clearance determination' must be made directly to METRO's Chief Procurement Officer any time after seven (7) days following the issuance of the solicitation, but not less than thirty (30) days before the deadline for submission. Any such request must be timely and all decisions by METRO relating to the request are final.

3.11 AMENDMENTS TO SOLICITATIONS

Contract Administrators shall promptly furnish any information given to a single prospective Bidder/Proposer concerning a solicitation to all prospective Bidders/Proposers, in writing. Contract Administrators shall issue an amendment to the solicitation if such information materially changes the solicitation by posting the information on the Procurement website. The amendment to the IFB, RFP or RFQ shall include, among other things, changes or corrections in:

1. Quantity;
2. Specifications;
3. Statement of work;
4. Scope of service;
5. Delivery schedules;
6. Opening dates;
7. Augment deficient or ambiguous solicitations;
8. Solicitation Questions and Answers¹ template

3.12 CONTRACT FILE DOCUMENTATION REQUIREMENTS

- A. The documentation in each contract file maintained by the Procurement, Materials Management & Small Business Department shall be sufficient to constitute a complete history of the transaction, including but not limited to, the basis for the procurement and the award, the assignment of contract administration (including payment responsibilities) if any, and any subsequent action taken by the Procurement, Materials Management & Small Business Department. Refer to the Official Contract File: Table of Contents form¹ for a checklist of all required documentation. The types of documentation addressed in this section are appropriate for all contracts including federally funded contracts. All documents in the permanent file shall serve as an audit trail and shall comply with METRO Record Retention Policy and requirements.
- B. Unless otherwise stated, Contract Administrators are responsible for providing the required documentation.
- C. Documentation that must be included in the official contract file includes:

1. Sole Source - Non-Competitive Procurement Justification form¹, as appropriate

Sole Source - Brand Name Procurements

In accordance with state and federal law, METRO must use factually supported data to document the special circumstances that warrant the use of either type of procurement, and to justify why its use is necessary to meet procurement requirements. Refer to Chapter 6 of this Manual for details in processing Sole Source and Brand Name Justification procurements.

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- a. The Project Manager is responsible for drafting the justification documentation and obtaining approvals. This documentation must be prepared for all sole source and brand name procurements for equipment, supplies, parts, materials, construction, and professional /personal/non-personal services.

Sole Source - Non-Competitive Proposals

- a. Sole Source procurements are through solicitation or acceptance of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. A contract amendment or change order that is not within the original scope is a sole source procurement that must be justified.
- b. Follow the procurement by non-competitive proposals method only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and at least one of the following circumstances applies:
 1. The item is available from a single source;
 2. An emergency for the requirement will not permit a delay resulting from competitive solicitation;
 3. FTA authorizes noncompetitive negotiations;
 4. After solicitation of a number of sources, competition deemed inadequate;
 5. The item is an associated capital maintenance item as defined in 49 U.S.C. 5307 (a) (1) procured directly from the original manufacturer or supplier of the item to be replaced. The grantee must certify in writing to the FTA, (i) that such manufacturer or supplier is the only source for such item; and (ii) that the price of such item is no higher than the price paid for such item by like customers.
2. Perform the required cost analysis or price analysis to verify the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit.
3. Requests for Board Action (RBA)^{2 Executive}, if applicable
The RBA form is used to obtain Board authorization. The Project Manager is responsible for preparing, obtaining staff concurrences and approvals, and submitting the RBA to the Board Office, along with a Summary of Procurement¹, which is prepared by the Contract Administrator.
4. Summary of Procurement (SOP)¹ (see above paragraph):
This document should justify the selection of a specific Contractor and the fair and reasonable price.

The SOP includes a brief synopsis of the following procurement actions:

- a. Tabulation of bids and proposals received, prepared for every solicitation by the Contract Services Assistant;
- b. Technical analysis;
- c. Reason for the determination of a successful proposer/Bidder;
- d. Explanation of the specific procurement process for a specific contract;
- e. The basis of Contractor selection;
- f. Basis for type of contract;
- g. Incorporation of or reference to cost/price analysis, if applicable;
- h. Results of negotiations if Board approval not required; and
- i. Contractor responsibility determinations.

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An SOP is required for all contracts, all contract modifications, and is required by the FTA for all federally funded procurements.

5. Technical Evaluations and Selection Committee Evaluation Reports:

This documentation supports the technical analysis in competitively bid and, in some cases, negotiated contracts. Its purpose is to determine whether the apparent low Bidder or, the most highly qualified offeror is technically responsive. The Project Manager is responsible for preparing the technical evaluation documentation, which is a requirement by both METRO and the FTA.

Contract Administrators prepare the Selection Committee Evaluation Report; the Project Manager prepares the technical aspects of the report.

6. Cost Analysis or Price Analysis*: Some form of cost or price analysis is required for every contract action including contract modifications. Generally, the Audit Department will prepare cost analyses. Use the Audit Services Request form¹. Refer to Chapter 3 for additional information. Documentation that confirms a fair and reasonable price is also necessary under the following circumstances:

- a. Single Bidder or No Acceptable Bids Received: Given proper documentation, this procurement practice is usually acceptable if METRO dissolves the IFB and negotiates the contract as outlined in Chapter 5;
- b. Award to Other Than Low Bidder: Given proper documentation, this practice is acceptable.

*The PO Award Justification-Price Analysis form¹ includes sections to document price analysis, single/no acceptable bids received, and award to other than low bidder.

7. Audit Reports:

Findings and conclusions of all audits conducted before or after contract award. Use the Audit Services Request form¹.

8. Bid Sample Memorandum

For FTA-funded projects, in any instance, that require submission of descriptive literature or bid samples as part of a bid, Contract Administrators must prepare a Bid Sample Justification memorandum. This document should detail the reasons why it is necessary to obtain this information as a part of the bid and how the information affects the selection of the Contractor. Contract Administrators shall prepare and sign the memorandum; the Procurement Manager shall approve the memorandum.

9. Shortened Bidding Time Memorandum for FTA Funded Projects

In accordance with METRO's policy, bidding time for FTA-funded projects is at least thirty (30) calendar days for procuring both standard commercial items and for other than standard commercial items. The bidding time may be shortened to a minimum of twenty-one (21) days, but must have the written approval of the CPO, which may be indicated with the signature of the CPO on the solicitation approval routing documents.

10. Shortened Bidding Time Memorandum for Non-Federally Funded Projects

in accordance with METRO's policy, bidding time for non-federally funded projects is at least thirty (30) calendar days for procuring both standard commercial items and services, and for other than standard commercial items and services. The bidding time may be shortened to a minimum of fifteen (15) days, but must have the written approval of the CPO, which may be indicated with the signature of the CPO on the solicitation approval routing documents.

11. Single Bid

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METRO may award a contract to a single Bidder if Contract Administrators completes an analysis, which demonstrates that the price is fair and reasonable. Usually, however, this requires that Contract Administrators dissolve the IFB and negotiate the contract. In addition, if METRO advertises the IFB for competitive bids but receives no acceptable bids, Contract Administrators may negotiate the contract. Contract Administrators must fully document these negotiations, including the analysis demonstrating that the cost is fair and reasonable.

12. Award to Other Than Low Bidder

The contract action must be fully justified and documented including a determination that the price is fair and reasonable. Use the PO Award Justification-Price Analysis form¹.

NOTE: Although METRO is self-certified with the FTA, which greatly reduces the number and type of FTA pre-award reviews, the FTA reserves the right to perform pre-award reviews for any procurement on a case-by-case basis.

13. Responsible and Responsiveness Checklists form¹ to verify that Contract Administrators vetted the awarded Contractor for responsiveness (responded fully to all bid/proposal requirements) and responsibility (has the economic and business means to fulfill project requirements). A printout or screenshot from <https://www.sam.gov/SAM> confirming the vendor's status as not being debarred or suspended must be filed in the contract file folder.

14. Memorandum of Negotiation

Board approval IS required for procurements conducted with negotiation for procurements ≥ \$100,000. (Refer to Chapter 1, Table 1.) In these cases, the Contract Administrator is to prepare a separate memo to describe the negotiation plan for the procurement, to obtain Board approval to enter a contract with the recommended contractor.

If Board approval is NOT required, negotiation results can be included in the Summary of Procurement¹.

The Memorandum of Negotiation or negotiation information included in an SOP is to include a summary of METRO's pre-negotiation position. A separate pre-negotiation memo is required only if Procurement management so directs.

15. An Abstract of Bids or Abstract of Proposal Pricing, prepared by the Contract Services Assistant for procurements conducted by the competitive bidding method.
16. Board Resolution, if issued
17. Copies of all correspondence with Proposers and the successful Contractor
18. Notice of Award letter, using a template provided by the Contract Services Assistant
19. Notice-to-Proceed letter, prepared by the Contract Administrator, on METRO letterhead stationery

POST-AWARD ACTIVITIES

3.13 ESTABLISHING RETAINAGE AND DOCUMENTING RETAINAGE REDUCTIONS

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- A. The amount of retainage to be withheld on construction contracts is typically determined at the time of contract execution by the CA and PM. METRO's usual construction retainage is 5%, and is included in the Compensation and Invoicing articles of the contract. Both the CA and PM should concur on the percentage of retainage, and this concurrence shall be documented in the contract file.
- B. If it is deemed appropriate by the CA and PM to reduce or release the retainage of a construction contract, documentation of the decision and its rationale must be included in the contract file, as well as a notation made on all subsequent Contract Payment Certificates² (CPCs). Reducing the retainage percentage is sometimes used to reward contractors for superior performance.
- C. Retainage reductions must be made in coordination with bonding companies and documented in the contract file.

3.14 CONTRACT CHANGES (MODIFICATIONS, CHANGE ORDERS)

- A. As appropriate, contract modifications shall be issued in accordance with the 'Changes' article in the contract when it is necessary to change the contract price, cost and/or fee, technical requirements, period of performance, or any other contract item that is mutually agreeable between METRO and the Contractor. An authorized METRO official representative must execute all contract modifications, in writing and in accordance with the Delegation of Authority, Table 1, in Chapter 1 of this Manual.
- B. Major (cardinal) additions, revisions or increases in quantities or in the scope of work, scope of service, or specifications may require processing a new procurement.
- C. Occasionally, the Contract Administrators may issue minor administrative contract changes that do not affect the substantive rights of either party. The changes shall be in writing, signed by the Contract Administrator, and placed in the contract file. Contract Administrators and Project Managers are to work jointly to prepare and issue either Directive or Bi-Lateral Change Order forms². For construction projects, Contract Administrators should refer to the procedures noted in the Resident Engineer's (RE) Manual, authored by the Engineering and Capital Projects Department.
- D. The Project Manager shall coordinate a contract modification with the Contract Administrator immediately upon identification of the need, and shall provide the necessary documentation to permit processing of the modification in the most expeditious manner to prevent delays in the project schedule.
- E. The minimum documentation required to formalize a contract modification is:
 - 1. A properly executed SAP Shopping Cart or requisition³
 - 2. A revised statement of work, scope of service, specification or drawings, as appropriate;
 - 3. The technical evaluation of a Contractor's proposal;
 - 4. A cost analysis or price analysis (see section 3.12 paragraph C6 above);
 - 5. An audit, if appropriate (use Request for Audit Services form¹), if available;
 - 6. An Independent Cost Estimate (ICE) form,¹
 - 7. A Contract Change Order form² or Modification Analysis form¹;
 - 8. A Summary of Procurement¹;
 - 9. A Memorandum of Negotiation¹
 - 10. Board of Directors' approval (if applicable, see Table 1 in Chapter 1);
 - 11. Sole Source Justification form¹ (if applicable, see Chapter 6).

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- F. The President & CEO may negotiate and execute all change orders, without regard to the maximum dollar value of the contract, not to exceed a cumulative increase in the original contract amount by 10%. Staff may also request that the Board approve an additional owner-controlled contingency up to 10% of the contract award if necessary.

The President & CEO may, with approval of the Chair of the Board of Directors, or in the event of the Chair's inaccessibility, the First Vice-Chair, negotiate and execute change orders to existing contracts that could impact the safety, schedules, or services of the Authority in the event of delayed execution as necessary, subject to the Board approved budget and with the concurrence of validity from Procurement, Finance, Legal, and various impacted departments, and in compliance with applicable state and federal laws.

All change orders that exceed \$100,000 shall be reported to the Board at the next regularly scheduled Board meeting.

3.15 TERMINATION

- A. When in the best interests of the Authority, METRO can terminate contracts for convenience, i.e., a reduced need or other circumstance deemed to be in the best interests of METRO; or terminate for default, i.e., when the Contractor has failed to perform in accordance with the contractual requirements. Such correspondence from METRO to the Contractor shall be in the form of a letter, on METRO letterhead stationery.
- B. Contract Administrators will deliver a 'Cure Notice' to the Contractor when sufficient time remains in the contract performance period and it is determined that the Contractor's lack of performance, progress or delinquency is endangering compliance with the contract delivery schedule, completion date or other contract articles.
- C. Contract Administrators will deliver a 'Show Cause Notice' to the Contractor.
- D. When the decision to terminate a contract is made, Contract Administrators shall issue a 'Notice of Termination,' as per the Termination/Default article(s) of the contract. Contract Administrators shall send the notice to the Contractor by certified mail with a return receipt request. The Notice of Termination shall specify the reason for the termination, the extent (in whole, or in part) to which the performance of work is being terminated, and the day when the termination becomes effective.
- E. After issuing a Notice of Termination, Contract Administrators shall process and finalize the settlement and closure of all claims and other relevant contract documentation as soon as possible to protect METRO interests and minimize METRO liability.

3.15.1 Termination for Convenience

- A. All federally funded contracts must contain provisions enabling METRO to terminate such contracts for the convenience of METRO. These provisions shall specify whether METRO is terminating the contract for convenience or default, and shall describe the basis for settlement of any outstanding bills/costs.
- B. METRO will terminate contracts for convenience only when determined to be in the best interests of METRO. Formal written notice to the Contractor is necessary to terminate a contract for convenience. Such notice will state that the contract termination pursuant to the termination for convenience provision of the contract, the effective date, the extent of termination, and instruct the Contractor to cease performance under the contract.

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- C. The Contract Administrators will negotiate a no-cost settlement with the Contractor if possible. Otherwise, the Contract Administrators will negotiate an appropriate settlement agreement with the Contractor pursuant to the provisions of the termination for convenience clause of the contract.

3.15.2 Termination for Default

- A. All federally funded contracts must contain provisions enabling METRO to terminate for cause if the Contractor defaults in one of more of the enumerated manners set forth in the contract.
- B. If METRO terminates a Contractor's right to proceed for default, METRO may take over and complete the work or cause it to be completed, and the Contractor and its sureties, if any, shall be liable to METRO for any increased costs caused thereby. In addition to increased costs in completing the work, the Contractor and its sureties shall be liable for liquidated damages, if the contract provides for liquidated damages, or for actual damages, if the contract does not provide for liquidated damages.
- C. If the Contract Administrator determines that the vendor's failure to perform arises from causes excusable under the terms of the contract, the Contract Administrator shall not terminate the vendor's right to proceed, nor shall he/she charge the vendor with damages because of any delays occasioned by such causes.
- D. Where a surety does not complete performance of the contract, the Contract Administrator may complete the performance of work by awarding a new contract based on the same plans and specifications. Such award may be the result of competitive bidding or negotiation, whichever procedure is most appropriate under the circumstances. The Contract Administrator must use reasonable diligence to obtain the lowest price available for completion.

3.16 CLOSEOUT OF CONTRACTS

- A. The Contract Administrator is responsible for completing all contract administration, for initiating close-out actions in a timely manner, for documenting the close-out actions and for completing the 'Contract Close-Out/Contractor Performance Evaluation' form¹. However, a completed contract must remain open while audit issues are open, or if litigation, dispute or pending claims are unsettled.
- B. Prior to the contract completion date, the Contract Administrator shall provide an email notice to the Project Manager, the Project Manager's Director and VP to confirm that a either subsequent effort or no further effort will be required by the Contractor after the specified contract completion date. Information will include requirements related to subsequent contracts, contract expiration or funding actions on assigned contracts.
- C. The Contract Administrator shall initiate these actions no less than 180 days prior to the specified completion date with notices provided each 30 days thereafter until either receiving a Shopping Cart for a subsequent action or receiving a memorandum stating that the contract can be closed and no subsequent effort is required. For large complex contracts, the Contract Administrator will send the first notice one (1) year in advance.
- D. The Contractor must complete the required closing documents, make final disposition of METRO property, and reach final agreement regarding the amount of final payment due before releasing retention of amounts withheld pursuant to the contract provisions to the Contractor. Withheld amounts shall be included in the final payment to the Contractor.

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- E. For cost-type contracts, the Contract Administrator may seek an Auditor's determination as to whether a final contract audit is required. The Contract Administrator will write and send a memorandum of status that outlines the contract particulars to the VP of Audit, requesting assistance in making the determination. If an audit is required, the Contract Administrator shall coordinate arrangements for the audit and assist the Auditor as necessary during the audit.
- F. The Project Manager will sign close out documentation as prepared by the Contract Administrator, after verifying that all work is satisfactorily completed.
- G. Final audit results will drive final negotiations of indirect rates and disputed costs, if required. The Summary of Procurement¹ or Memorandum of Negotiation shall contain the negotiated information.
- H. Upon completion of the Contract Close Out/Contractor Performance Evaluation form¹, the Contract Administrator shall review the contract file for completeness and organization.
- I. A contract is complete when:
 - 1. The Contractor has completed the required deliveries of supplies and METRO has inspected and accepted such supplies;
 - 2. The Contractor has performed all services and METRO has accepted such services;
 - 3. In the case of contracts with option provisions, the option has expired or was not exercised;
 - 4. Final payment against the contract has been made;
 - 5. METRO has issued a Notice of Termination for a complete contract to the Contractor;
 - 6. Notice of complete termination for rental, use and storage agreements has been issued or the contract period has expired;
 - 7. Contractor performance and evaluation have been documented by the appropriate parties; and
 - 8. METRO has received the Contractor's Release form (an exhibit in the contract document) that releases METRO from all claims and liens.
 - 9. The Contract Administrator has closed-out all electronic files for the contract.

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Standard Contract Close Out Timeframes

Contract Type	Duration After Date of Contract Physical Completion
Firm-Fixed Price	3 Calendar Months
Contracts Requiring Settlement of Overhead Rates or Other Reimbursement Factors	9 Calendar Months
Cost-Type Contracts	15 Calendar Months

These guidelines are the usual times required for closing the majority of contracts. However, delays beyond the above standards may occur (such as in the case of terminations, disputes, settlement of pending claims, litigation, audits and warranty issues.)

3.17 **VENDOR PERFORMANCE**

The vendor community has a responsibility to comply with the requirements of quotations, solicitations, Purchase Orders, contracts, etc. Performance will be indicated in the close out documentation, as noted in the section above. Failure to comply with the procurement process or contractual requirements may result in the following response, depending on the severity and number of the infraction(s):

1. First offense: Six month ban on awards (formal and informal)
2. Second offense: One year ban on awards (formal and informal)
3. Third offense: Five year ban on awards (formal and informal)

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4 PROCUREMENT BY COMPETITIVE SEALED BID

METRO will perform competitive sealed bidding as either required by statutory requirements, through a one-step traditional Invitation for Bid (IFB) process or through a two-step 'Request for Technical Proposal' (RFTP)/IFB process. Refer to Chapter 5 for more information on RFTP. All construction projects shall be procured by the Invitation for Bid Method. If an alternative method of procurement is used (Competitive Sealed proposal; Construction Manager at Risk, etc.) it must be approved by the Metro Board of Directors prior to soliciting. See Exhibit 4A located at the of Chapter 4.

For guidance, refer to Federal Transit Authority (FTA) Circular 4220.1F, or when using FTA assistance to support the acquisition, the FTA Best Practices Procurement Manual Chapter 4.

4.1 INVITATION FOR BIDS

- A. A Contract Administrator will use the IFB method to initiate competitive sealed bid procurements. The Contract Administrator should solicit bids from an adequate number of sources to encourage sufficient competition. If METRO receives a single bid in response to an IFB, the Contract Administrator may negotiate to ensure the price is fair and reasonable or may choose to re-advertise and issue a new solicitation.
- B. METRO may cancel IFBs prior to bid opening or after bid opening. METRO should make best efforts to avoid cancellation of IFBs after the opening of bids. The file shall contain reasons supporting the cancellation of an IFB or rejection of bids.
- C. Each IFB shall include the following:
 - 1. Instructions and information to Bidders concerning the bid submission requirements, including the following:
 - a. time and date set for receipt of the bids;
 - b. the address where bids are to be delivered (including the physical street address, zip code, the post office box number and respective zip code);
 - c. the pre-bid conference time, date and location, if applicable, as well as any other special information. NOTE: not all IFBs require a pre-bid conference;
 - 2. A Statement of Work, Scope of Service or Specification, and, if applicable, drawings or references to drawings or industry standards;
 - 3. A clear and accurate description of the technical requirements for the materials, products or services to be procured; and such descriptions shall not contain features, which restrict competition;
 - a. The requirement/descriptions are to be unambiguous, concise, yet detailed enough to make it clear exactly what item is to be procured;
 - b. The Project Manager, working with Contract Administrator, shall complete a Brand Name Justification form¹, if applicable, clearly identifying and describing specific salient features and components such that warranty is not compromised. The completed Brand Name Justification record shall be included as part of the official contract file;
 - 4. A delivery or performance schedule;

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5. Inspection and testing requirements to be performed prior to award, e.g., material, dimensions, quality or workmanship characteristics;
 6. Other examinations deemed necessary to determine whether the goods or services conform to technical requirements;
 7. Specific evaluation criteria used to determine product or service acceptability;
 8. Bonding requirements (if applicable);
 9. Warranty requirements (if applicable);
 10. Insurance requirements (if applicable);
 11. A completed Liquidated Damages form¹ (if applicable) showing how the amount was derived;
NOTE: The Contract Administrator must document and file how liquidated damages were determined; this cannot be punitive.
 12. The proposed contract.
- D. The IFB may cite documents for reference, if the IFB specifies the location of such documents for retrieval or review. The IFB shall require Bidders to acknowledge the receipt of all amendments issued. METRO will accept electronic submission of bids during times of emergencies, such as natural disasters, pandemics, etc. The IFB will state not to submit bid samples or descriptive literature unless expressly requested.
- E. The IFB shall set forth the evaluation criteria used in determining product or service acceptability. When qualified products or services are required, METRO will afford each Bidder sufficient opportunity to qualify their product or service during the solicitation phase. Such opportunity should not delay the time set for receipt of bids. All criteria considered in the evaluation for award shall be objectively measurable. METRO will not consider criteria in the bid evaluation if not specified in the IFB.
- F. As they are restrictive of competition, METRO must not:
1. Place unreasonable qualification requirements on potential bidders to qualify to do business;
 2. Require unnecessary experience and excessive bonding;
 3. Perform any arbitrary action in the procurement process;
 4. Engage in non-competitive pricing practices between firms or affiliated companies;
 5. Make non-competitive awards to any person or firm on a retainer contract; and
 6. Award a contract to a bidder with an organizational conflict of interest.

4.2 BIDDING TIME

Consistent with the appropriate timetable for obtaining the supplies or services, each IFB must allow sufficient bidding time (the period of time between the date of distribution of an IFB and the date set for the opening of bids) to permit prospective Bidders to prepare and submit bids.

1. Federally funded procurements for standard commercial items shall allow a customary thirty (30) days for preparation and submittal, to a minimum of twenty-one (21) calendar days. A shortened bidding time requires

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the written approval of the CPO, which may be indicated with the signature of the CPO on the solicitation approval routing documents.

2. Non-federally funded procurements for standard commercial items and services shall allow a customary thirty (30) days for preparation and submittal, to a minimum of fifteen (15) calendar days. A shortened bidding time requires the written approval of the CPO, which may be indicated with the signature of the CPO on the solicitation approval routing documents.
3. Procurements for other than standard commercial items, whether federally funded or not, may allow a minimum of thirty (30) calendar days for preparation and submittal.

4.3 CANCELLATIONS BEFORE BID OPENING

- A. The Chief Procurement Officer, in consultation with a using department, has the authority to cancel any procurement or reject any or all Bids.

However, METRO should not cancel an IFB unless cancellation is clearly in the public interest, such as when there is no longer a requirement for the supplies or services, or where amendments to the solicitation would be of such magnitude that a new solicitation is desirable.

- B. When a solicitation is canceled before bid opening and before the Contract Administrator opens the bids, the Contract Administrator will return all received bids to the Bidders. The Contract Administrator shall post a notice of cancellation on the Procurement website. The Contract Administrator will record in a memorandum the basis for the cancellation, the number of bids received and place the information in the official solicitation file. The Contract Administrator and respective Procurement Manager must sign the memorandum.
- C. Unless there is a compelling reason to reject all bids, Contract Administrators should not cancel the IFB after opening the bids because it jeopardizes the integrity of the competitive bidding system and compromises free and open competition.
- D. Contract Administrators may cancel an IFB under these circumstances:
1. Defective or ambiguous specifications;
 2. Specifications have been revised;
 3. The supplies or services being contracted for are no longer required;
 4. The invitation did not provide for consideration of all factors of cost to METRO;
 5. Bids received indicate that the needs of the Government can be satisfied by a less expensive article differing from that for which the bids were invited;
 6. All otherwise acceptable bids received are at unreasonable prices, or only one bid is received and the contracting officer cannot determine the reasonableness of the bid price;
 7. No responsive bids have been received from responsible bidders;

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8. For other reasons, such as severe inclement weather, wherein cancellation is clearly in the public's interest.
- E. Contract Administrators will post an amendment cancelling the IFB on METRO's website. Information will include the solicitation number, short title and subject matter, and a brief explanation for the cancellation.

4.4 RECEIPT OF BIDS

- A. Bidders shall submit sealed bids before the date and time set for receipt of bids specified in the solicitation itself, on METRO's website and in the Procurement Plan Room. The sealed bid package should be clearly marked by the submitter to state 1) the bid project title, 2) the date and time bid receipt deadline, and 3) the IFB or RFP number.
- B. The Procurement Department shall maintain separate Bid Receipt Logs by solicitation title and number to record receipt of all bids, late bids, and requests for withdrawal of bids. Logs are to be kept in the Procurement Plan Room.
- C. Upon receipt of a bid package by the Procurement Department, authorized Procurement staff shall date- and time-stamp each bid but not open it. Additionally, the receipt of the package shall be recorded on the Bid Receipt Log created for that particular solicitation.
- D. If the package was received without the bid title and number marked on it, an authorized Procurement staff member may open the package only to ascertain its contents, then reseal the package immediately.
- E. All activity relating to the receipt and handling of every bid package must be written on a Bid Receipt, which is affixed securely to the sealed bid or proposal envelope by the Procurement staff member. The Bid Receipt must display the following information:
 1. The date-and-time stamp, documenting the package's receipt
 2. The solicitation project title and number, if not already marked on the bid package;
 3. Written explanation(s) of receipt and handling activity of the package (e.g. why and when the bid package was opened, for example, because it was not marked as being a bid; or if it was logged-in erroneously, etc.);
 4. Signatures of the handling Procurement staff member and/or Contract Administrator.
- F. Personnel delivering hand-carried bids and modifications on behalf of the submitter are required to submit the sealed documents to the Procurement Plan Room. METRO can accept only completely sealed submissions from Bidders.
- G. METRO Plan Room personnel shall ensure that all bids received before the time and date set for the receipt of bids are kept secure.
- H. Only the Contract Administrators responsible for the procurement or a Procurement Manager are permitted to open bid envelopes, although authorized Procurement staff may assist if so requested.
- I. When submitting bid samples, the Contract Administrator shall handle them with sufficient care to prevent the disclosure of bid information before bid opening.

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- J. Contract Administrators will not consider any bid that has in any way been electronically transmitted, except during times of emergencies, as noted in 4.1D.
- K. The CA is responsible for reviewing the receipt log to:
 - 1. Ensure that a sufficient number of bids have been received to substantiate adequate competition;
 - 2. Determine if an incumbent who has expressed interest in submitting a bid has indeed done so; and
 - 3. Determine if other individuals or parties who have shown interest (and are so noted in solicitation Procurement Plan) have indeed done so. The Contract Administrator shall contact the parties or individuals who did not submit to find out why, and include that information in the solicitation file.

4.5 MODIFICATION OR WITHDRAWAL OF BIDS

- A. Bidders may modify or withdraw a bid by written notice, as long as the notice is received by the Procurement, Materials Management & Small Business Department before the exact time set for opening of bids. A Bidder or the Bidder's authorized representative may also withdraw a bid in person if the identity of the person(s) requesting withdrawal is established and the person(s) sign a receipt for the bid before the exact time set for opening of bids.
- B. Contract Administrators will not consider any modification to a bid that has in any way been electronically transmitted, except during times of emergencies, as noted in 4.1D.

4.6 LATE MODIFICATIONS OR WITHDRAWAL OF LATE BIDS

- A. Bids are deemed 'late bids' when they are received by Procurement & Materials Plan Room after the exact time and date set for receipt of bids.
 - 1. Contract Administrators will not consider a late bid. Contract Administrators shall confirm that late bids are not the fault of METRO. If truly late, the Contract Administrator shall document so in writing and place the unopened bid in the official contract folder.
 - 2. The only acceptable evidence to establish the time of receipt at METRO is the METRO time/date stamp on the Bid/Proposal Receipt¹ that is affixed to the bid wrapper, or other documentary evidence of receipt maintained by the Contract Administrator.
 - 3. The Procurement Plan Room may accept any bid prior to the time set for the bid opening.
- B. Late bids received by mail that are not considered for award shall be held unopened, unless already opened for identification purposes, until after award, and then retained with other unsuccessful bids in the official contract file.
- C. Contract Administrators will place unopened late bids, bid modifications or bid withdrawal requests delivered by Federal Express, DHL, United Parcel Service or the U.S. Postal Service with other unsuccessful bids. In all cases, Contract Administrators will record the time and date of receipt for all late documents.
- D. NOTE TO LATE BIDDERS: Contract Administrators shall promptly notify the Bidder when receipt of a bid, bid modification, or bid withdrawal is late and it is clear from available information that METRO cannot consider the bid.

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4.7 OPENING OF BIDS

- A. The Contract Administrators shall open bids and modifications publicly by the Contract, at the designated time, date, and place designated in the IFB.
- B. Contract Administrators shall read aloud or otherwise make available, the name of each Bidder, the bid price, and other information deemed appropriate, and record this information at the time of bid opening.
- C. The Contract Administrator responsible for the procurement shall:
 - 1. Decide when the time set for opening bids has arrived;
 - 2. Inform those present of that decision;
 - 3. In the presence of at least one witness, publicly open all bids received;
 - 4. Read aloud the name of each Bidder, bid price and other information deemed appropriate to the persons present;
 - 5. If it is impracticable to read the entire bid, such as when many items are involved, the official shall read only the total dollar amount of each bid.
- D. Contract Administrators shall not disclose proprietary information of one Bidder to another Bidder at bid opening.
- E. Bids shall remain in METRO Procurement possession at all times.

4.8 RECORDING OF BIDS

- A. Procurement Plan Room personnel shall record, in detail, all bid information on the METRO Abstract of Bids form as called for by the Contract Administrator. Both the Contract Administrator and the respective Procurement Manager shall certify the completed form for accuracy of content as soon after bid opening as practicable.
- B. Contract Administrators shall capture, at a minimum, the IFB number, bid opening date and time, general description of the procurement item, names of Bidders, bid prices, and other pertinent information at the time of bid reading.
- C. Where bid items are too numerous to warrant complete recording of all bids at the time of bid opening, what is read aloud and recorded at the bid opening may be limited to the total bid price of all items.
- D. Abstracts of bids shall be available for public inspection on the Procurement website as soon as they are completed and ready for release.

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³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

4.9 POSTPONEMENT OF BID OPENINGS

- A. METRO may postpone a bid opening prior to the time scheduled for bid opening when:
 - 1. The Contract Administrator has reason to believe that the bids of an important segment of Bidders have been delayed in the mail for causes beyond the control of Bidders without their fault or negligence, such as flood, fire, accident, weather conditions, or strikes;
 - 2. If emergency or unanticipated events interrupt normal processes so that the conduct of bid openings as scheduled is impractical;
 - 3. Any other reason deemed sufficient, such as if delaying receipt of bids will maximize competition.
- B. At the time of a determination to postpone a bid opening, Contract Administrators shall publicly post an announcement of the determination by way of Amendment in the Plan Room and to METRO website. If practical, Contract Administrators will communicate the postponement to prospective Bidders who are likely to attend the scheduled bid opening.

4.10 EVALUATION OF BIDS

- A. Contract Administrators evaluate bids for responsiveness and responsibility of the bidder who submits the lowest price bid. The IFB sets forth the criteria used by METRO to evaluate the bids. Criteria to determine acceptability (such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose) and the unit bid price and/or total price may also be stated and used in the pass/fail process. Bid evaluation may not include criteria not originally set forth in the IFB.
- B. Contract Administrators evaluate bids to determine that a Bidder's offering is acceptable; not to determine whether one Bidder's item is superior to another. Contract Administrators will reject as non-responsive any Bidder's offering that does not meet the acceptability requirements.
- C. Procurement will evaluate bids to determine which Bidder is responsible and responsive to the bid requirements.
- D. For consideration of award, a bid must be responsive and comply with all material aspects of the IFB. Such compliance enables all Bidders to stand on an equal footing and maintains the integrity of the competitive sealed bid system.
- E. Bidders are to complete and submit bids in accordance with the instructions in the issued invitation.
- F. Bidders shall submit bids on the METRO forms provided with the solicitation. If a Bidder uses its own bid form or a letter to submit a bid, Contract Administrators will reject the bid as non-responsive to the solicitation. A Bidder may reproduce METRO forms, if required.
- G. Generally, a bid is not responsive and not considered for award when it contains any material factor determined to be circumstantial as deficient, thereby affecting the price, quality or quantity of the articles or services to be furnished. Examples of non-responsive bids include the following:
 - 1. Failure to sign the bid; however, other bid documents which may establish a Bidder's intention to be committed by the bid should be considered, i.e., transmittal letter, bid bond;
 - 2. Failure to acknowledge receipt of a material amendment to the IFB;

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3. Bids containing any exception to, or any qualification of, any material requirement of the IFB;
 4. Bids imposing any condition or altering the rights of METRO, (e.g., conditioned on the occurrence of any event, the receipt of material or parts, "negotiation" of the warranty, or non-disclosure of information);
 5. Failure to submit items or information required with the bid;
 6. Bids that are indefinite, uncertain, or ambiguous (the consideration of which would give the Bidder an unfair competitive advantage); and
 7. Bids containing unsolicited descriptive literature if such literature creates any uncertainty as to whether the Bidder is offering to conform to the specifications.
- H. Contract Administrators may waive minor informalities in bids and consider the bids for award.
- I. The term 'responsible Bidder' refers to a Bidder's financial resources, technical ability and capacity to fulfill the requirements of the contract. The Contract Administrator or Evaluation Team makes the determination that the Bidder is a 'responsible Bidder'. The Procurement Manager approves the determination by signing the Summary of Procurement¹.
- J. Contract Administrators will conduct due diligence to support a determination that the proposed Contractor for an award of a contract is responsible. Members of the evaluation team will perform aspects of the due diligence because of their particular expertise. Due diligence should establish the following, although the Contract Administrator should also refer to the FAR for other points that may be applicable:
1. The ability, capacity and skill of the Bidder to perform the contract;
 2. The sufficiency of the Bidder's financial resources and financial ability to perform the contract;
 3. The Bidder's technical resources necessary to perform the contract, including skill and experience of Bidder's work force;
 4. The Bidder's record of past performance including quality of performance under previous contracts involving similar work;
 5. The character, integrity, reputation, judgment of the Bidder;
 6. The ability of the Bidder to fulfill warranty obligations after completion of the project and to provide continued maintenance after completion of the project, if applicable;
 7. The integrity of the prospective Contractor's plant, labor resources and business commitments or orders; Consider evaluation via visit to the plant;
 8. Whether the Bidder can complete the project within the time specified without undue delay or interference;
 9. The Bidder's prior compliance with the Small Business goals;
 10. Status as a manufacturer, regular dealer, regular provider of the service or construction Contractor;
 11. The bidder's compliance with current franchise and Harris County property taxes, and federal no debarment status. Contract Administrators shall visit the following websites (included in the list under the Procurement Intranet page 'Useful Links' tab) and print screen shots of the results found for inclusion in the procurement file:

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- a. Texas Franchise Taxes: <https://mycpa.cpa.state.tx.us/coa/Index.html>
 - b. Harris County Property Taxes: <http://www.tax.co.harris.tx.us/Property/PropertyTax>
 - c. Debarment status: <https://www.sam.gov/index.html/#1> (must have IE11 or higher, or Chrome, Firefox, Safari)
- K. If an evaluation team is formally appointed, the team shall evaluate the apparent low Bidder for responsibility and responsiveness. The evaluation team, tailored for the specific procurement, will consist of selected representatives from the following groups:
- 1. Contract Administrator;
 - 2. Project Manager and/or Technical Representative;
 - 3. Appropriate advisors or consultants, if needed.
- L. Project Manager/Technical Representatives will document the results of the evaluation to provide clear justification for contract award. The Project Manager/Technical Representative will also prepare a technical evaluation memorandum, including all support documentation, to determine whether the apparent low Bidder is technically responsive.
- M. If all bids received are for the same total amount or unit price, quality and service being equal, the tie bid shall be awarded by drawing lots at an open meeting with the tie bidders being offered the opportunity to be present. For clarity, the drawing of lots is construed to mean the drawing of a bidder's name from a container that conceals the names until drawn. The drawing shall be witnessed by two (2) METRO staff members who will also sign a memorandum documenting the results of the drawing. Such memorandum shall be attached to the bid abstract and will include the names of persons in attendance with the date and time of the drawing.

4.11 REJECTION OF INDIVIDUAL BIDS

- A. Contract Administrators shall reject any bid that does not conform to the applicable specifications or material requirements of an IFB unless the IFB authorizes the submission of alternate bids and the goods or services offered as alternates meet the requirements specified in the IFB.
- B. Contract Administrators shall notify a Bidder in writing when rejecting a bid and state the reasons for the rejection. Contract Administrators shall maintain the originals of all rejected bids and any written findings, in the form of memorandum, with respect to the rejections in the contract file.
- C. Contract Administrators shall reject a bid when the Bidder imposes conditions that would modify requirements of the invitation or limit the Bidder's liability to METRO, since to allow the Bidder to impose such conditions would be prejudicial to other Bidders.

For example, Contract Administrators should reject bids in which the Bidder:

- 1. Protects against future changes in conditions, such as increased costs, if total possible costs to METRO cannot be determined;
- 2. Fails to state a price or indicates that a price shall be 'the price in effect at time of delivery';
- 3. States a price but qualifies it as being subject to 'the price in effect at time of delivery';
- 4. When not authorized by the invitation, conditions or qualifies a bid by stipulating that it is to be considered only if the Bidder receives (or does not receive) a contract award under a separate solicitation, before date of award;

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5. Requires the Contract Administrator to determine that the Bidder's product meets applicable METRO specifications; or
 6. Limits the rights of METRO under any contract article.
- D. Contract Administrators shall reject a bid received from any Bidder who is suspended, debarred, or otherwise ineligible to receive a federal, state or METRO contract if the period of suspension, debarment, or ineligibility has not expired by the bid opening date.
 - E. Contract Administrators shall reject low bids received from Bidders deemed not responsible by the Contract Administrators. Similarly, METRO will reject low bids received from Bidders deemed non-responsive.
 - F. Contract Administrators shall reject bids when a bid guarantee is required and a Bidder fails to furnish the guarantee in accordance with the requirements of the IFB.
 - G. Contract Administrators may reject a responsive bid received from a responsible Bidder if the price is unreasonable or the bid does not conform to the delivery schedule or permissible alternatives stated in the IFB.
 - H. Contract Administrators may request a low bidder to delete objectionable conditions from a bid provided the conditions do not go to the substance, as distinguished from the form, of the bid. A condition goes to the substance of a bid when it affects price, quantity, quality or delivery of the items offered.
 - I. After submitting a bid, if the bidder transfers all assets, or the part of the assets related to the bid, during the period between the bid opening and the award, the transferee may not be able to take over the bid. Contract Administrators must consult General Counsel prior to making any decisions on this.

4.12 ERRORS IN BIDS – GENERAL

- A. Contract Administrators shall examine all bids for errors after opening of bids. The Contract Administrator will either confirm the bid as without error, or pursue the allegation of a mistake made by a bidder.
- B. The Contract Administrator will notify the bidder of a clerical mistake. The Contract Administrator will consider the unit price to be the intended price and correct the extended price. The Contract Administrator shall request the Bidder to provide and attach written verification of the mistake with the original bid as it was intended, calling attention to the suspected mistake, to confirm that the suspected clerical error is indeed an error.
- C. With concurrence from the Procurement Manager, the Contract Administrators will prepare a memorandum for any corrected errors and place it in the official contract file.
- D. Statements (sworn statements, if possible) and other pertinent supporting data shall accompany a Bidder's written request to modify or withdraw a bid. Such data includes the Bidder's file copy of the bid; the original worksheets and other data used in preparing the bid; subcontractor quotations, if any; published price lists; and any other evidence that establishes the existence of the error, the manner in which it occurred, and the bid actually intended.

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4.12.1 ERRORS IN BIDS BEFORE AWARD

- A. Clerical errors must be obvious or apparent on the face of the bid and include such errors as an obvious misplacement of a decimal point, a typographical, transposition or arithmetical error or an obvious mistake in the designation of a unit, obvious incorrect discounts, or obvious reversal of a price Freight on Board (FOB) destination and price FOB origin. Contract Administrators may correct such apparent errors before contract award and by reflecting the correction in the contract, not on the face of the bid.
- B. The Contract Administrator will put a Bidder on notice of suspected error if the bid is so much lower than the other bids or the METRO estimate that it indicates a possibility of error. The Contract Administrator may also put a Bidder on notice if there are important or unusual characteristics pertaining to specifications, if there are changes in requirements from previous purchases of similar items, or if other proper information disclosed in the bid causes suspicion of error.
- C. If the Bidder alleges a mistake in a bid, he or she shall submit a written request to withdraw or correct its bid, including all evidence to support the position it is taking. The Bidder must include clear and convincing evidence of the error and the original intent of the bid, as well as evidence that the corrected bid will not displace other, lower bids. If the Bidder cannot produce this information, The Contract Administrator may require a withdrawal of the bid.
- D. Upon approval by the Procurement Manager and concurrence from the Chief Procurement Officer, the Contract Administrator may permit a Bidder to withdraw a bid if it serves METRO's interests to do so, or protects the integrity of the competitive sealed bidding system, even though the bid meets the conditions set forth in this Manual. Other reasons to withdraw a bid are if evidence of an error is clear and convincing as to the mistake only, but not as to the intended bid; and, the evidence reasonably supports existence of an error, but not to a clear and convincing level. If the evidence does not warrant a determination to withdraw, the Contract Administrator may elect to neither correct nor withdraw the bid.
- E. The Contract Administrator or Bidder may only correct bids that are responsive as submitted. Contract Administrators cannot correct a nonresponsive bid to convert it into a responsive bid.
- F. The Contract Administrator shall consider a bid in its original format if the bidder verifies the bid. The Contract Administrator shall request the bidder to reconfirm the price in writing and place this in the contract file.
- G. Where the Bidder fails or refuses to furnish evidence in support of a suspected or alleged error, the Contract Administrator shall consider the bid, as submitted, unless:
 - 1. The amount of the bid is so far out of line with the amounts of other bids received, or with the amount estimated by the agency or determined by the Contract Administrator to be reasonable; or
 - 2. There are other indications of error so clear, as to reasonably justify the conclusion that acceptance of the bid would be unfair to the Bidder or to other bona fide Bidders. This could indicate an 'unbalanced bid'.
- H. The Contract Administrator shall fully document all evidence of attempts to obtain information regarding the suspected or alleged error in the bid, as well as any actions taken.

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4.12.2 ERRORS IN BIDS AFTER AWARD

- A. If a Contractor does not discover a mistake in the bid until after award, the Contracting Officer (the Contract Administrator becomes the Contracting Officer after bid award) should process the request for correction under the Contract Disputes Articles and the process outlined in Chapter 4. The Contracting Officer may correct the mistake if favorable to METRO and if the correction does not change the essential requirements of the specification. The Contracting Officer shall make one of the following determinations, after consultation with Chief Procurement Officer and General Counsel:
1. To rescind a contract;
 2. To modify the contract to delete the items involved in the mistake, or to increase the price if the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original IFB; or
 3. To decide to make no changes to the contract as awarded.
- B. The Contracting Officer will base determinations to rescind the award or modify the contract, only on clear and convincing evidence of a mistake in bid. It must be clear that the mistake was mutually made, or if unilaterally made by the Bidder, so apparent as to have given the Contracting Officer notice of the probability of the mistake.
- C. The contract file shall contain a record of each determination made in accordance with this section, all facts and evidence surrounding the mistake/alleged mistake, and the actions taken. The file shall also contain a memorandum with the following information included:
1. Description of the supplies or services involved;
 2. Specifics on how and when the mistake was alleged or disclosed;
 3. Summary of the evidence submitted by the contractor and any additional evidence considered pertinent;
 4. In cases where only one bid was received, quotes for the most recent contract price for the supplies or services involved, or in the absence of a recent comparable contract, the Contract Administrator's estimate of a fair price for the supplies or services and the basis for the estimate;
 5. The Contract Administrator's written explanation for why a vendor's bona fide mistake was made and not identified previously by METRO;
 6. The plan of action the Contract Administrator considers proper based on the evidence. If recommendation is for other than a change in contract price, the action plan by which the supplies or services will otherwise be acquired; and
 7. Status of performance and payments under the contract, including contemplated performance and payments.
- D. The contract file shall also contain the following information:
1. Written request from the Contractor to reform or rescind the contract, and copies of all other relevant correspondence between the Contract Administrator and the Contractor concerning the alleged mistake; and

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2. A copy of the contract and any related change orders or supplemental agreements.

4.13 CONTRACT AWARD

- A. METRO shall award contracts to the responsible and responsive Bidder(s) whose bid(s) meets the requirements set forth in the IFB, and is/are the lowest price based on the price-related factor(s) specified in the IFB.
- B. All competitively sealed bid contracts over \$250,000, except emergency procurements, require Board of Directors authorization to execute prior to actual execution on behalf of METRO.
- C. Contracts up to \$250,000, solicited under the provisions of Resolution 89-9 do not require Board of Directors authorization. The President & CEO or designee may execute these. This only applies to the 'standard-off-the-shelf' items.
- D. METRO shall not award a contract until after all required staff concurrence and approvals are collected. The Delegation of Authority, Table 1 in Chapter 1, establishes who shall sign which contracts.
 1. Required approvals prior to execution for all contracts include:
 - a. Manager in Procurement Department;
 - b. Director in Procurement Department;
 - c. Chief Procurement Officer;
 - d. Small Business (if applicable);
 - e. Legal Department;
 - f. Deputy CEO;
 - g. Director of Grant Programs when federal or state grant funds are involved.
 2. Required approvals to execute contracts include:
 - a. Manager in Procurement Department;
 - b. Director in Procurement Department;
 - c. Chief Procurement Officer;
 - e. General Counsel;
 - f. Executive Vice President, Finance & Administration;
 - g. Assistant Secretary (attests only).
 3. Discretionary concurrence for competitively sealed bid contracts includes the following:
 - a. Chief Operating Officer, and Vice Presidents or Directors if the Sr. Vice President has indicated a desire that one or the other should concur on the award of a particular contract;
 - b. The close working relationship between Contract Administrators and Project Managers or Technical Representatives normally eliminates the need for formal concurrence of the contract document itself by the requisitioning department's senior executive or Director;
 - c. Director of Grant Programs when federal or state grant funds are involved.
- E. The Contract Administrator shall notify unsuccessful Bidders promptly that their bids were not accepted, and shall return any bid guarantee furnished with the unsuccessful bids to the unsuccessful Bidders, if requested.

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- F. Contract Administrator must award the contract within the timeframe stipulated in the bid, whether that timeframe includes an extension or is the original timeframe.
- G. When more than one award results from any single IFB, separate contractual documents shall be numbered and executed.
- H. When METRO makes an award to a Bidder for less than the total items, and withholds the remaining items for subsequent award, the first award to that Bidder shall state that METRO may make subsequent awards on those additional items within the Bidder's bid acceptance period.

Contract Preparation and Reviews:

- A. After opening the bids, Contract Administrators will prepare the proposed contract and supporting documentation in a timely manner.
- B. The proposed contract and contract file including the Summary of Procurement¹, abstract of bids, due diligence documentation, Shopping Cart, Request for Board Action form² Exec Office, if applicable, and other documentation deemed appropriate (i.e. IFB or award criteria) will be submitted to the Procurement Manager for review and coordination.
- C. Contracting Officers shall obtain at least two duplicate, original contract signature pages from the Contractor.
- D. Upon execution of the contract by the Contractor, the Contracting Officer will submit the contract to appropriate METRO staff representatives for approval, execution and attestation, using the METRO Internal Routing Document: Review and Approval Sheet¹, as appropriate. The Contracting Officer will add the completed form to the contract file.
- E. Procurement will distribute electronic copies of the executed contract to the following:
 - 1. Contractor, with original signatures;
 - 2. Official Contract File, with original signatures;
 - 3. Accounting Division, with original signatures;
 - 4. Project Manager or Technical Representative;
 - 5. Grant Programs Office, if federal or state funding is involved;
 - 6. Project Controls, if capital funds are involved;
 - 7. Risk Management;
 - 8. Construction Management, for construction projects;
 - 9. **Office of Economic Business Opportunity.**
- F. The Contracting Officer will post the Notice of Awarded Contracts, together with the Contractor name and award amount on the Procurement website.
- G. The Contracting Officer will notify unsuccessful Bidders of the contract award, name of the Contractor and the dollar value as soon as possible after award of a contract.

4.14 ALTERNATIVE CONSTRUCTION METHODS OF PROCUREMENT

1. ALTERNATIVE DELIVERY METHODS FOR CONSTRUCTION SERVICES

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A Competitive Sealed Bid (or Invitation for Bid) is the standard method for procuring construction services. In addition to the Competitive Sealed Bid and Request for Proposal processes, METRO has adopted the following alternative construction delivery methods under Chapter 2269 of the Texas Government Code, *Contracting and Delivery Procedures for Construction Projects*. In the event of a conflict between the Procurement Manual and Chapter 2269 of the Texas Government Code, Chapter 2269 of the Texas Government Code shall control.

2. DELEGATION OF AUTHORITY

Procurement shall seek prior approval from the METRO Board of Directors for anticipated procurement projects using the alternative construction delivery methods prescribed in Chapter 2269 of the Texas Government Code in accordance with procedures implemented for Board Solicitation Review and Evaluation Committee as set forth in this Procurement Manual.

3. APPLICABILITY OF THIS SECTION

Alternative delivery methods may only be utilized for a public work contract which shall mean a contract for contracting, altering, or repairing a public building or carrying out or completing any public work. A facility shall mean an improvement to real property. A facility means an improvement to real property.

4. ELIGIBILITY

- A. Prior to utilization of the alternative construction delivery methods, the Chief Procurement Officer, must determine which alternative method provides the best value for METRO. The Chief Procurement Officer may consider factors such as size, scope, complexity, and timing in making this determination. The Chief Procurement Officer should also consider the type of funds that may apply to the project. Federal funds may not be used for the alternative construction delivery methods, unless METRO has received approval from the federal granting agency in writing or such method is authorized by federal law. Selection of a contractor shall be based on applicable criteria for the method chosen. See Form at the end of this chapter.
- B. METRO shall apply laws and rules related to the use of women, minority, small, or disadvantaged businesses in the evaluation process and historically underutilized businesses.
- C. Selections made under these methods must be documented and evaluations made public no later than seven days after the date the contract is awarded.
- D. METRO shall publish notice of the time and place for all bids, proposals, or request for qualifications in a manner prescribed by law.
- E. Architects or engineers required under these methods must comply with Texas Occupations Code Chapter 1051 and 1011 as applicable. Architects and engineers must be selected based on demonstrated competence and qualifications pursuant to Texas Gov't Code § 2254.004.
- F. METRO shall separately provide or contract for construction materials engineering,

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testing, and inspection services and the verification testing services necessary for final acceptance of the facility. Those services must be selected pursuant to Texas Gov't Code § 2254.004.

- G. All bids, proposal, or qualifications must be sealed before delivery.

5. EXCLUSION

Alternative delivery methods outlined in this section cannot be used for contracts entered into by the Texas Department of Transportation or a project that receives money from a state or federal highway fund.

6. CRITERIA TO CONSIDER

- A. In awarding a contract pursuant to an alternative construction delivery method, the following criteria may be utilized:
 - 1. Price
 - 2. Offeror's experience and reputation
 - 3. the quality of the offeror's goods or services
 - 4. the impact on the ability of METRO to comply with rules relating to historically underutilized businesses
 - 5. safety record
 - 6. proposed personnel
 - 7. whether financial capability is appropriate to the size and scope of the project; and
 - 8. any other relevant factor listed in the bid, proposal, or qualifications.

7. ALTERNATIVE CONSTRUCTION DELIVERY METHODS

A. Competitive Sealed Bidding (CSB)

- 1. CSB may be utilized for the construction, alteration, rehabilitation, or repair of a facility.
- 2. An architect or engineer must prepare the construction documents required for the CSB.
- 3. The contract should be awarded to the lowest responsible bidder.
- 4. The bid shall include construction documents, estimated budget, project scope, estimated project completion date, and other information that a contractor may require to submit a bid.
- 5. Offers shall be opened and read aloud.
- 6. The basis of selection shall be documented and made public no later than seven days after the contract is awarded.
- 7. The CSB process should otherwise be consistent with METRO bidding practice

B. Competitive Sealed Proposals (CSP)

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1. CSP may be utilized for the construction, alteration, rehabilitation, or repair of a facility.
2. An architect or engineer must prepare the construction documents required for the CSP.
3. The CSP must include construction documents, selection criteria and the weighted value for each criterion, estimated budget, project scope, estimated project completion date, and other information that a contractor may require to respond to the request.
4. Offers shall be opened, and any monetary proposals read aloud.
5. Evaluation and ranking must occur within 45 days from the date of proposal openings.
6. The selection must be the best value for METRO based upon:
 - a. The selection criteria in the request for proposal and the weighted value for those criteria; and
 - b. Its ranking evaluation.
7. METRO will negotiate with the highest ranked offeror and may discuss options for scope or time modifications and any price change associated with the modification.
8. If METRO is unable to negotiate a contract with the top ranked offeror, it will end negotiations in writing and proceed to the next offeror in order of ranking until a contract is reached or all proposals are rejected.

C. Construction Manager-Agent (CMA)

1. CMA may be utilized for the construction, alteration, rehabilitation, or repair of a facility.
2. A CMA is to provide consultation or administrative services during the design and construction phase and to manage multiple contracts with various construction prime contractors. The CMA represents METRO in a fiduciary capacity.
3. A CMA may provide:
 - a. Administrative personnel;
 - b. Equipment necessary to perform duties;
 - c. On-site management; and
 - d. Other services specified in the contract.
4. A CMA may not:
 - a. Self-perform any aspect of the construction, alteration, rehabilitation, or repair of the facility;
 - b. Be a party to a construction subcontractor for the construction, alteration, rehabilitation, or repair of the facility; or
 - c. Provide or be required to provide performance or payment bonds for the construction

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5. Prior to selection of a CMA, METRO shall select an architect or engineer for the project.
6. The CMA shall be procured in the same manner as an architect or engineer pursuant to Texas Government Code Section 2254, The Professional Services Procurement Act. The architect or engineer may not serve as the CMA unless so selected under a separate selection process. If the CMA services constitute the practice of architecture or engineering, it will require a licensed professional to provide those services.
7. The CMA shall maintain professional liability or errors and omissions insurance in the amount of at least \$1 million for each occurrence.
8. General or trade contractors utilized on projects with a CMA must be procured in accordance with applicable law and METRO procedures and provide required performance and payment bonds.

D. Construction Manager-at-Risk (CMAR)

1. The CMAR method may be utilized for any public work contract which includes the constructing, altering, or repairing a public building or carrying out or completing any public work.
2. The CMAR serves as the general contractor and provides consultation during the design and construction phase of a project.
3. METRO must select a separate architect or engineer for a construction project prior to selection of a CMAR.
4. METRO may utilize a one-step or two-step process.
5. A one-step procurement process solicitation should include a request for proposals, and a two-step should include an initial request for qualifications that includes:

Statement as to whether the selection process is a one or two-step process; general information on the project site, project scope, schedule, selection criteria and the weighted value for each criterion, and estimated budget and the time and place for receipt of the proposals or qualifications; and other information that may assist in the selection.

6. A one-step process should include a pricing and fees criteria that encompasses pre-construction as well as construction costs, including general conditions.
- If using a two-step process, fees are not included in the initial request for qualifications.
- An evaluation of the RFQs shall be conducted solely on the basis of qualifications. Up to

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five vendors may be selected and asked to submit additional information including proposed fees and prices for fulfilling the general conditions.

7. METRO shall open and read the names of the vendors and when applicable the fees and prices.
8. METRO shall select based on a best value determination.
9. METRO shall evaluate and rank each proposal submitted in relation to the criteria set forth in the request for proposals within 45 days after the date the proposals are opened.
10. If METRO is unable to negotiate a contract with the top ranked offeror, it will end negotiations in writing and proceed to the next offeror in order of ranking until a contract is reached or all proposals are rejected.
11. The selected CMAR must publicly procure services for the performance of all major elements of the work consistent with the requirements of Tex. Gov't Code 2269.256.
12. The CMAR may self-perform work only if it submits an independent bid in the same manner as other subcontractors and METRO determines that the CMAR's bid provides the best value
13. If a subcontractor defaults, the CMAR may self-perform the work or select a replacement subcontractor without advertising the work.

Prior to the establishment of a guaranteed maximum price, the CMAR must provide performance and payment bonds in an amount equal to the construction budget and such bonds must be delivered to METRO within 10 days of execution of the contract.

E. Design-Build (DB)

1. METRO may contract with a single entity to provide both design and construction services for the construction, rehabilitation, alteration, or repair of a building or an associated structure.
2. DB may not be utilized for any of the following:
 - a. A highway, road, street, bridge, underground utility, water supply project, water plant, wastewater plant, water and wastewater distribution or conveyance facility, wharf, dock, airport runway or taxiway, drainage project, or related type of project associated with civil engineering construction; or
 - a. A building structure that is incidental to a project that is primarily a civil engineering construction project.

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3. METRO shall designate an independent architect or engineer to act as its representative during the project.
4. The RFQ shall include general information on the project site, project scope, budget, special systems, selection criteria and the weighted value for each criterion, and other information that may assist potential design-build firms in submitting proposals. A designcriteria package should also be prepared that includes a set of documents with sufficientinformation for vendors to prepare a response to the RFQ. METRO may not require the submittal of architectural or engineering designs as part of the proposal or qualification process.
5. The evaluation criteria shall include the vendor's experience, technical competence, capability to perform, past performance of the vendor and members of the vendor's firm, and other appropriate factors except that cost-related or price-related factors are prohibited. The vendor must certify that an architect or engineer is a member of the firm.
6. A maximum of five responders shall be qualified and at METRO's option interviewed for final selection and asked to submit proposals that contain additional information. The additional information may include demonstrated competence and qualifications, considerations of the safety and long-term durability of the project, the feasibility of implementing the project as proposed, the ability of the vendor to meet schedules, or costing methodology. Costing methodology means the vendor's policies on subcontractormarkup, definition of general conditions, range of cost for general conditions, policies onretainage, policies on contingencies, discount for prompt payment, and expected staffingfor administrative duties. Costing methodology does not include a guaranteed maximumprice or bid for overall design or construction.
7. The vendors should be ranked and evaluated on the best value for METRO on the basis ofthe published criteria and ranking evaluations.
8. METRO shall negotiate with the top ranked vendor and if they cannot negotiate a contractshall terminate negotiations in writing and may negotiate with the next ranked vendor.
9. METRO shall make the rankings public no later than seven (7) days after the contract is awarded.
10. After selection, the selected vendor shall submit all design elements for review and determination of scope compliance to METRO before construction.

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11. The vendor shall supply a set of construction documents for the completed project reflecting all changes made during construction to METRO at the conclusion of construction and must note all changes made during construction.
12. Payment or performance bonds are not required for the design portion of the contract. If a fixed contract amount or guaranteed maximum price is not established at the time of contract award, the penal sums of the performance and payments bonds must be in an amount equal to the construction budget specified in the design package.
13. Bonds must be delivered by the vendor no later than 10 days after the design-build contract is executed.

F. Design-Build for Certain Civil Works Projects

1. METRO may utilize the following DB-CW method for certain civil works projects including roads, streets, bridges; projects or facilities related to roads, streets, or bridges; and buildings or structures incidental to such projects.
2. A DB-CW contract may cover only a single integrated project and may not be for aggregated projects at multiple locations. A linear transit project that involves multiple stops along a route is a single integrated project.
3. Before utilizing the DB-CW method, METRO must determine if it is the appropriate delivery method for the project. In making this determination it must consider:
 - a. The extent to which METRO can adequately define the project requirements;
 - b. The time constraints for the delivery of the project;
 - c. The ability to ensure that a competitive procurement can be held; and
 - d. The capability of the entity to manage and oversee the project, including the availability of experienced personnel or outside consultants who are familiar with the design-build method.
4. METRO may not have more than six DB-CW projects in any fiscal year.
5. METRO shall select an independent architect or engineer to act as its representative for the procurement and DB process. The selection shall be made pursuant to Tex. Gov't Code 2254.004.
6. METRO shall independently contract for the following services:
 - a. Inspection services;
 - b. Construction materials engineering and testing;
 - c. Verification testing services.
7. METRO shall utilize a request for qualifications that includes:
 - a. Information on the civil works project site;
 - b. Project scope;

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- c. Project budget
 - d. Project schedule;
 - e. Criteria for selection and weights; and
 - f. Other information that may assist in submitting proposals.
8. METRO must also include a design criteria package that includes the following:
- a. Budget or cost estimates;
 - b. Information on the site;
 - c. Performance criteria;
 - d. Special material requirements;
 - e. Initial design calculations;
 - f. Known utilities;
 - g. Capacity requirements;
 - h. Quality assurance and quality control requirements;
 - i. The type, size and location of structures; and
 - j. Notice of any ordinances, rules or goals adopted by the governmental entity relating to awarding contracts to historically underutilized businesses.
9. Proposals shall be evaluated based upon experience, technical competence, capability to perform, past performance, and other appropriate factors. Cost or price related items are not to be considered in the first phase of evaluations.
10. Vendors must designate an engineer as part of the proposal team and certify that he/she was selected pursuant to Tex. Gov't Code 2254.004.
11. METRO shall qualify vendors to submit additional information and may interview for final selection.
12. METRO shall provide qualified vendors with a request for proposal that includes:
- a. Design criteria package;
 - b. If the project site is identified, a geotechnical baseline report or other information that provides minimum geotechnical design parameters;
 - c. Detailed instruction for preparing the technical proposal and the items to be included, including a description of the form and level of completeness of drawings expected; and
 - d. The relative weighting of the technical and price proposals and the formula by which the proposals will be evaluated and ranked.
13. Vendor's proposals must include a sealed technical proposal and a separate sealed cost proposal. The technical proposal must include:
- a. Project approach

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- b. Anticipated problems;
 - c. Proposed solutions to anticipated problems;
 - d. Ability to meet schedules;
 - e. Conceptual engineering design; and
 - f. Other information requested by METRO.
14. The technical proposal shall be opened, evaluated and scored first.
 15. Cost proposals submitted by vendors with responsive technical proposals shall be subsequently opened, evaluated, and scored.
 16. Selection of the winning DB-CW vendor will be based upon the formula provided by METRO in the request for proposals.
 17. METRO may require a vendor to identify team members that will:
 - a. Fill key project roles, including project management, lead design firm, quality control management, and quality assurance management; and
 - b. Serve as key task leaders for geotechnical hydraulics and hydrology, structural, environmental, utility, and right of way issues.
 - c. Team member companies may not be replaced unless the company:
 - i. Is no longer in business, is unable to fulfill its legal, financial, or business obligations, or can no longer meet the terms of the teaming agreement;
 - ii. Voluntarily removes itself;
 - iii. Fails to provide sufficient qualified personnel to fulfill the duties;
 - iv. Fails to negotiate in good faith.
 - v. Any changes made in violation of these requirements and that results in cost savings shall benefit METRO. No cost-savings shall be given to the vendor.
 18. METRO shall select the highest ranked firm and attempt to negotiate a contract. If METRO is unable to negotiate a contract it shall end negotiations in writing and proceed to negotiate with the next firm in order of selection ranking until a contract is reached.
 19. METRO shall assume the risks and cost associated with:
 - a. Scope changes and modifications as requested by METRO;
 - b. Unknown site conditions unless otherwise provided by METRO in the request for proposals and contract;
 - c. Regulatory permitting if METRO is responsible by law or contracts; and
 - d. Natural disasters and other force majeure unless otherwise provided for in the request for proposals and final contract; and
 - e. Property acquisition.
 20. Unless METRO provides stipend, the vendors shall retain the rights to the

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work product submitted in a proposal and METRO shall not release or use that work product other than that in the winning bidder. METRO may offer an unsuccessful vendor a stipend for preliminary engineering costs in order to make use of any work product. Work product shall be treated as confidential by METRO.

21. Following selection, the vendor's engineers shall submit all design elements to METRO for scope compliance. Construction documents must be signed and sealed by licensed design professional before release for construction.
22. The DB-CW vendor shall supply a set of construction documents to METRO at the completion of construction pursuant to Tex. Occupations Code Chapter 1001.
23. Performance and payment bonds are not required for the portion of the contract related to design services only.
24. If a fixed contract amount or guaranteed maximum price has not been determined at the time of contract award, the vendor must provide a performance and payment bond in the amount of the construction budget or as otherwise provided in the request for proposal. The bonds must be delivered within 10 days from execution of the contract.

G. Job-Order-Contracting (JOC) -competitive sealed proposal

1. The JOC method may be utilized for maintenance, repair, alteration, renovation, remediation, or minor construction of a facility when the work is of a recurring nature, but the delivery times, type, and quantities of work required are indefinite. It applies only to a facility that is a building such to building codes or structure of land associated with buildings.
2. A Competitive Sealed Proposal Method may be utilized to solicit a JOC vendor.
3. A maximum aggregate contract price must be established and included in the solicitation.
4. The solicitation may establish contractual unit prices for a JOC by:
 - a. Specifying one or more published construction unit price books and the applicable divisions or line items; or
 - b. Providing a list of work items and requiring the bidder to propose one or more coefficients or multipliers to be applied to the price book or pre-priced work items as the price proposal.
5. The solicitation may also request additional information including

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experience, past performance, and proposed personnel and methodology.

6. Multiple job order contractors may be selected in connection with a solicitation.
7. The term of the JOC may not exceed two years with three one-year renewals.
8. Job orders greater than \$500,000 must be approved by the METRO Board.
9. Individual job orders may be:
 - a. A fixed price, lump-sum contract based substantially on contractual unit pricing applied to estimated quantities; or
 - b. A unit price order based on the quantities and line items delivered.
 - c. Must be signed by the vendor and a METRO representative.
10. If a job order requires the use of an architect or engineer, METRO shall select one to prepare the construction documents for the project.
11. The job order contract base term may not exceed two years. METRO may renew the contract annually for no more than three additional years.
12. Performance and payment bonds must be provided by the vendor if required based on the amount of the job order.

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ALTERNATIVE CONSTRUCTION DELIVERY METHOD

Verification Form

The Invitation to Bid procurement process is the standard method for procuring construction services. METRO has adopted alternative construction delivery methods under Chapter 2269 of the Texas Government Code as outlined in Procurement Manual 4.14 that may be utilized for certain qualifying projects. Utilization of alternative construction delivery methods has additional requirements that must be verified and submitted prior to issuance of procurement.

Please complete this form and submit it, along with all required attachments, to _____ at _____ or to the procurement specialist assigned to the project. **This verification is to be completed by the requesting and/or using department.**

Project: _____

Requestor: _____

Procurement Specialist: _____

Signature: _____

Date: _____

Verify the following:

- ☐ **1.** Confirm the project is a public work contract. A public work contract means a contract for constructing, altering, or repairing a public building or carrying out or completing any public work. A facility shall mean an improvement to real property. If so, alternative construction methods may be used.
- ☐ **2.** The project is **not** funded by the Texas Department of Transportation or state or federal highway fund.
- ☐ **3.** The METRO Board of Directors approved alternative construction method for the project, or otherwise delegated authority to do so. Date of Board Action: _____.
- ☐ **4.** Selected Procurement Method:

☐ a. Competitive Sealed Proposal (CSP)

The scope shall not include construction materials testing, engineering, inspection and verification testing services necessary for the acceptance of the facility.

Is this a civil works project as defined by Texas Government Code 2269.351 which includes a transit project and associated civil engineering construction. If yes, is the price weighted less than 50% of criteria? If so, provide justification: _____

_____.

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☐ b. Construction-Manager Agent (CMA)

The scope shall not include any self-performance of any aspect of the construction; CMA may not be a party to a construction subcontract; and CMA may not provide performance and payment bonds.

Identify architect/engineer for project: _____.

☐ c. Construction-Manager-At-Risk (CMAR)

Identify architect/engineer for project: _____.

Identify one-step or two-step procurement process: _____.

☐ d. Job Order Contracting

☐ 5. Best Value: Provide basis for determining Selected Method provides best value to METRO:

☐ a. Size: _____

☐ b. Scope: _____

☐ c. Complexity: _____

☐ d. Timing: _____

☐ e. Other Factors: _____

☐ 6. Selection Criteria and Weights:

Identify the criteria and weight to be used in the procurement documents:

☐ a. Price. _____%

☐ b. Experience and Reputation _____%

☐ c. Quality of goods or services _____%

☐ d. Impact on compliance with historically underutilized businesses _____%

☐ e. Financial capability appropriate to project _____%

☐ f. Other factors: _____.

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5.1 NEGOTIATED CONTRACTS

- A. This chapter discusses the requirements and procedures for conducting negotiated procurements for personal and non-personal services, and statutory professional services, which include architect engineer (AE) services. It provides information about and procedures for the various committees involved in technical evaluation and selection of proposers. Please refer to Chapter II Section 2b of 4220.1F for guidance when using FTA assistance to support an acquisition.
- B. Negotiated procurements do not follow the competitive sealed bid process. Negotiation includes the receipt of proposals from offerors (individuals or firms), permits negotiation, and usually affords offerors the opportunity to revise their offers up until just prior to contract award. Negotiation may apply to price, schedule, technical requirements and quality, type of contract, or other terms of a proposed contract and specifications. Negotiated procurements at METRO often involve technical criteria and evaluation by committees.
- C. Negotiated contracts exceeding \$250,000 require Board authorization to execute prior to actual execution. METRO will negotiate contracts at a value of \$250,000 or less, in accordance with the Delegation of Authority Chart.
- D. All solicitations for services, other than approved sole source acquisitions, (refer to Chapter 6 of this Manual), must be conducted in a manner to provide maximum open and free competition.
- E. METRO shall only enter into contracts that have:
 - 1. Resulted from negotiation as authorized by statutory law, as described in Chapter 1 of this Manual;
 - 2. An approved and processed Requisition⁴;
 - 3. A complete Procurement Plan¹ that outlines the proposed course of action;
 - 4. A completed and approved cost/price analysis, as per procedures noted in Chapter 3 of this Manual.

5.2 COMPETITIVE NEGOTIATION

- A. Negotiations may be either non-competitive or competitive. Non-competitive negotiations occur when METRO conducts solicitations, referred to as sole source procurements, with a single offeror. Competitive negotiation, on the other hand, includes multiple procurement sources. Through negotiation, the negotiating parties strive to reach agreement on the technical quality, price, and other terms of the proposed contract and specifications, thereby allowing flexibility in the content of an offer and pricing. METRO awards negotiated contracts on a competitive basis to the maximum practical extent. The type of service being acquired dictates if competitive negotiation is optional or mandatory.
- B. Texas State law, Government Code, Title 10, Chapter 2254 'Professional Services Procurement Act', Section 2254.004, Vernon Texas Codes Annotated, categorizes services into three types. Chapter 1, Procurement Policies and Standards, of this Manual also excerpts this code.

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5.3 TYPES OF SERVICES: NON-PERSONAL, PERSONAL, PROFESSIONAL

A. The three service types defined in Chapter 2254.002 are:

1. Non-Personal: negotiated procurement permitted but not mandatory;
2. Personal: negotiated procurement permitted but not mandatory. Personal services must be performed by a named individual(s) within the firm or organization or contracted directly through a personal services agreement (PSA); and
3. Professional services, which includes the following:
 - Accounting
 - Architecture
 - Landscape Architecture
 - Land Surveying
 - Medicine
 - Optometry
 - Professional Engineering
 - Real Estate Appraising
 - Professional Nursing

B. Chapter 2254.002 mandates that procurements for professional services, including architect engineering (AE), are conducted by competitive negotiation. Accordingly, METRO follows the Qualifications-Based Selection (QBS) process for procurement of professional and AE services. Refer to section 5.6 below for a detailed description of QBS process.

5.4 OVERVIEW OF SOLICITATION METHODS FOR PROCUREMENT OF SERVICES

METRO uses a variety of procurement methods to solicit and select qualified firms, depending on the project for which the services are needed and the nature of the solicitation. To determine which method of procurement is suitable, and to document the rationale for the method selected, the Contract Administrator shall complete the Procurement Plan¹ form.

1. METRO typically uses the Request for Proposals (RFP) procurement method to solicit proposals from individuals or firms to perform a specific project or to provide specific personal or non-personal services. (METRO may also purchase non-personal services through the IFB process discussed in Chapter 4 of this Manual).
2. For professional and AE services, METRO typically issues a Request for Qualifications (RFQ), wherein METRO seeks only qualifications information, not price.
4. Occasionally, a need will arise to obtain information in advance of procurement. METRO authorizes personnel outside of the Procurement Department to gather such information. Only Contract Administrators may issue formal Requests for Information/Interest (RFIs). Information sought usually includes order of magnitude pricing, methodology, etc., and most frequently deals with systems that incorporate advanced technologies. Requests for Interest determine what sources are interested in participating in a certain solicitation. The Contract Administrator can determine the complexities and ramifications of a potential procurement without having to proceed through the procurement process itself. The Contract Administrator shall process the RFI in a manner most advantageous to METRO.

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5.5 **PERSONAL AND NON-PERSONAL SERVICES: REQUEST FOR PROPOSAL**

- A. The RFP details the scope, specifications, and terms and conditions of the proposed contract. METRO shall provide mechanisms for the technical evaluation of the proposals received, determination of responsible offerors for the purpose of written or oral discussions, and selection for contract award.
1. **Technically Qualified /Lowest Priced Proposal:** Under this method of RFP selection, METRO can purchase personal services and non-personal services (professional services excluded) by obtaining technical and price proposals from multiple sources, and establishing pass/fail criteria for technical acceptance. The contract award is to that firm which is technically qualified with the lowest price.
 2. **Best Value:** This RFP method provides for trade-offs between technical expertise and cost and allows METRO to accept other than the lowest price proposal. The perceived benefits of the higher price proposal shall merit the additional cost. Under this method of selection, Proposers submit proposals for personal and non-personal services (professional services excluded) for evaluation. The submission includes technical data and pricing information.
Note: The adjectival method is an alternative to point scoring, using word categories such as ‘most important,’ ‘very important,’ ‘important,’ etc., to indicate evaluation judgments. This method is not currently in use by METRO.
 3. **Two-Step Procurements:** In this procurement method, METRO solicits un-priced technical proposals by issuing RFPs. In selected instances, the Contract Administrator may determine it is in METRO’s best interests to have cost/price information physically separated so that the technical evaluation can be performed separately from price evaluation and thereby not allow for cost/price to influence the pure technical evaluation. The Contract Administrator evaluates the proposals to determine those Contractors who demonstrate a technically satisfactory approach and have satisfactory qualifications. The Contract Administrator then invites, in writing, those technical proposers deemed acceptable to participate in the next procurement step, which is price evaluation and negotiation.
- B. The Contract Administrator conducts separate negotiations with each RFP proposer whose offer falls within the competitive range. The process concludes with the award of contract to the responsible and responsive proposer whose proposal will be most advantageous to METRO. The Contract Administrator shall notify unsuccessful offerors promptly.
- C. METRO will accept electronic submission of RFP submissions during times of emergencies, such as natural disasters, pandemics, etc.

5.6 **AE AND PROFESSIONAL SERVICES: REQUEST FOR QUALIFICATIONS AND QUALIFICATIONS-BASED SELECTION METHOD**

RFQs and RFPs are fundamentally similar, but with RFQs, the Contract Administrator does not consider price until after an offeror is selected based on stated evaluation criteria that excludes price or cost. This form of procurement naturally follows a two-step process.

- A. As noted in section 5.3, METRO follows the Qualifications-Based Selection (QBS) process to procure professional and AE services through negotiated competition, as mandated by Chapter 2254.002 of the Texas State Code. QBS is the process established by the United States Congress as a part of the Brooks Act, and detailed in Title 40, sections 1101-1004 of the United States Code (USC) and Subpart 36.6 of the Federal Acquisition Regulation (FAR).

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- B. The QBS method considers that technical expertise, capability, team makeup and possibly ingenuity or creativeness in carrying out the project is paramount. Evaluation does not include cost or price. METRO solicits statements of qualifications; evaluates submittals; may establish a competitive range; and may conduct oral presentations before selecting the most highly qualified offeror(s). Because METRO considers qualifications and price separately, this method is also referred to as a two-part solicitation.
- C. The QBS process involves an initial review and recommendation by a Technical Evaluation Committee (TEC). Subsequent reviews and recommendations, including an oral Presentations Committee (OPC), an Executive Selection Committee (ESC), and/or a Board Selection Committee (BSC) may follow the TEC. Any contract over \$250,000 requires Board of Directors approval.
- D. Prior to Board approval, METRO will negotiate a contract with the firm who is deemed the “Most Qualified” by the respective evaluation committee. The Contract Administrator working with Audit, shall determine the firm’s price is fair and reasonable. In determining fair and reasonable compensation, the Contract Administrator shall consider the scope, complexity, professional nature, and estimate value of the services procured. The Contract Administrator will not conduct negotiations with other firms unless METRO staff and the firm cannot mutually agree on a satisfactory contract, in which negotiations will officially end. The Contract Administrator shall then begin negotiations with the next “Most Qualified” firm.
- E. METRO will accept electronic submission of RFQ submissions during times of emergencies, such as natural disasters, pandemics, etc.

5.7 RFP/RFQ CONTENT REQUIREMENTS

- A. Contract Administrators shall base all RFPs/RFQs on a clear and accurate description of the technical requirements for the material, product or service procured. Such requirements shall not contain features, which unduly restrict competition.
- B. The RFP/RFQ should contain, at minimum, the following information:
 - 1. The type of services required;
 - 2. Description of the work involved;
 - 3. An estimate of when and for how long the services will be required;
 - 4. Required or desired delivery or performance schedule;
 - 5. The type of contract used;
 - 6. A time and date by which proposals are due;
 - 7. Pre-proposal conference time, date and location, for anticipated conferences;
 - 8. A statement that the proposals shall be in writing;
 - 9. Progress reporting requirements, if applicable;
 - 10. Factors used in the evaluation and selection process and their relative importance, in descending order of priority, or note that all factors are considered to be of equal importance;
 - 11. Submission of cost or pricing data (not considered in evaluation of RFQs);
 - 12. Pre-established weights or values for the areas and factors must be set out in the RFP/RFQ evaluation criteria;
 - 13. Bonding requirements, if any;
 - 14. Inspection and acceptance requirements if not included in the technical specifications, statement of work or scope of services;
 - 15. Proposed model contract including the articles (terms and conditions) (non AE); and
 - 16. Instructions and information to proposers concerning the proposal submission requirements.

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- B. The RFP/RFQ may incorporate documents by reference if the RFP/RFQ specifies the location of such documents and the documents are accessible for review.

5.8 **IDENTIFYING SOURCES FOR SELECTION**

- 8. It is the responsibility of the interested party to monitor the METRO website to obtain solicitations and view award information. METRO is not obligated to provide notice directly to any particular individual/firm.
- B. In competitively negotiated procurements, the Contract Administrator should furnish an RFP/RFQ to a sufficient quantity of prospective proposers to ensure maximum open and free competition. The Contract Administrator may identify potential sources from the following:
 - 1. Project Managers;
 - 2. Request for Qualifications responses for professional services;
 - 3. Public notice responses;
 - 4. Procurement source lists;
 - 5. Responses to advertisements;
 - 6. Responses to web site postings; and
- C. The Procurement, Materials Management & Small Business Department is responsible for maintaining a file of registered firms who have requested consideration for future procurements that would require their qualifications.
- D. The Department is also responsible for documenting performance of firms and placing into the contract file. (Note: The **Office of Economic Business Opportunity** is responsible for keeping on file the prime Contractor record of their small business development efforts as well as the activities of the subcontractors. This information may be useful when evaluating proposals.)
- E. The Contract Administrator should determine that an announcement resulted in a sufficient number of responses, thus ensuring satisfaction of competitive requirements.

5.9 **PREPARATION TIME FOR PROPOSALS OR QUALIFICATIONS**

- A. Consistent with the need for obtaining the services, all RFPs/RFQs must allow sufficient proposal preparation time (i.e., the timeframe between the release date of an RFP and the proposal due date).
- B. As a general rule, proposal preparation time will be not less than thirty (30) calendar days when procuring standard (commonly or repeatedly performed) services, sole source goods or complex services (e.g. new starts, involved technical requirements, infrequently provided services or uncommon services tailored to a particular or special requirement). This rule is unnecessary in special circumstances, where the urgency of the need for the goods or services does not permit such delay. In competitive negotiated procurements, the minimum proposal preparation period shall be sufficient to provide maximum open and free competition, but in no instance less than fifteen (15) days.

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5.10 DETERMINING EVALUATION CRITERIA FOR RFPs AND RFQs

- A. When determining evaluation factors, the Contract Administrator may choose a relatively simple process or a complex system of committee-averaged, weighted scores, or pass/fail criteria. However, planning and documenting the process in advance is necessary to ensure confidence that the procurement process is objective, and that the proposers know the criteria, and so cannot credibly allege that the Contract Administrator created the process to achieve a specific result. The Contract Administrator working with the Project Manager will determine the weights or values assigned to each area and factor within the respective area prior to release of the RFP or RFQ. For example, technical = most important; management = very important; cost, if evaluated, = important; other factors = important.
- B. The Contract Administrator will identify any factors, including price, which will be major considerations in awarding the contract for procurements using the Best Value RFP method (see Chapter 5.5 of this Manual). When METRO requests technical proposals and bases the award on technical and other factors, the solicitation shall specify the significant evaluation factors and the relative importance placed on each evaluation factor. (Price is not a consideration when evaluating RFQs.)
- C. The evaluation factors that apply to an acquisition and the relative importance of those factors are within broad discretion. When appropriate, price or cost shall be included as an evaluation factor in competitive negotiated source selections. (Price is not a consideration when evaluating RFQs.)
- D. Contract Administrators are required to disclose evaluation weights, if used, in solicitations. The solicitation shall inform offerors of minimum requirements that apply to particular evaluation factors.
- E. METRO shall evaluate proposals only on evaluation factors stated in the RFP or RFQ, and tailor the factors considered in evaluating proposals to each acquisition.
- F. The following factors are appropriate for evaluating most technical proposals. The relative importance of these and other factors will vary according to the type of services procured.
 - 1. Technical data (when applicable) that provides or demonstrates:
 - a. An understanding of the technical requirements of the solicitation;
 - b. Technical excellence or expertise demonstrating intended accomplishment of the technical requirements;
 - c. The technical approach or methodology, which may include creativity, to solving or satisfying the technical requirements;
 - d. Comprehension of study requirements and important characteristics of the approach;
 - e. Experience on similar projects;
 - f. Small Business participation plan.
 - 2. A management plan giving as much detail as is practical explaining how the offeror will perform the required services. The Contract Administrator should consider the following:

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- a. Ability to perform the services as reflected by technical training and education, general experience, specific experience in providing the required services, and the qualifications and abilities of personnel proposed to be assigned to perform the services;
 - b. The equipment, and facilities to perform the services currently available or demonstrated to be made available at the time of contracting;
 - c. Experience in related work and record of previous experience;
 - d. Ideas for coordinating work with other related and concurrent work; and
 - e. A listing of other contracts under which the offeror performed or undertook services similar in scope, size, or discipline to the currently required services within a previous timeframe, as specified in the RFP.
3. Analysis of cost or price proposals and appropriate financial data.

5.11 ADDITIONAL EVALUATION CRITERIA FOR RFQs

- A. The Contract Administrator and Project Manager will develop a set of evaluation criteria with relative weighting factors appropriate for the particular solicitation and communicate this via the RFQ or advertisement for the procurement. The intent is to identify fully qualified firms from the letters of interest and qualifications statements. Typical examples include the following:
 1. Qualifications necessary for all segments of project requirements and the ability to perform all the required services satisfactorily;
 2. Specialized experience as a firm and technical competence of proposed key personnel in the type of work required;
 3. Capacity to accomplish the work in the required time from resources within the individual firm or through a subcontract relationship (this includes an assessment of current and previous workloads);
 4. Potential conflicts with current METRO work by the individual firm, subcontractors or sub-Consultants on a case-by-case basis;
 5. Past experience and satisfactory performance on contracts with METRO and or public agencies, approval authorities, and private industry in terms of cost control, quality of work, and compliance with performance schedules;
 6. Knowledge of local permitting processes and permitting requirements;
 7. Level of effort, fiscal capacity and revenue considerations (if applicable);
 8. Risk mitigation and sharing considerations (if applicable);
 9. Past performance under other appropriate project specific evaluation criteria.

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- B. The Contract Administrator may modify this general list of evaluation criteria, for certain specialized professional services, such as planning, environmental, material testing, surveying, value engineering, accounting, medical, real estate appraisals, etc.

5.12 COMPETITIVE RANGE/ SHORT-LISTED PROPOSERS

- A. Only those Proposals deemed most advantageous (RFP), highly qualified (RFQ), and having a reasonable chance of contract award (or capable of being made acceptable with minor proposal modification) fall into the 'competitive range' of responses. The Contract Administrator determines the competitive range.
- B. METRO conducts written and/or oral discussions with firms within the competitive range. Discussions may not be required when it can be clearly demonstrated that acceptance of the most favorable initial proposal would result in the lowest overall cost to METRO. Should this situation occur, notice shall be included in the solicitation.
- C. Some proposals may fall outside the competitive range. For example, the Contract Administrator may deem certain proposals so inferior to other proposals for price or other reasons, that the possibility of accepting a subsequent offer from such firms is so remote that negotiations are unnecessary. Alternatively, there may be a sufficient number of proposals in the competitive to warrant negotiation with only with several proposers to ensure the best procurement. Negotiating with a greater number of proposers may be wasteful of METRO's and the marginal proposers' resources.
- D. The Contract Administrator will establish a meeting time, date and location and invite in writing all firms whose proposals are determined to be within the competitive range to participate in oral or written discussions, if so determined by the Board Committee prior to solicitation.

5.13 RECEIPT AND HANDLING OF PROPOSALS AND QUALIFICATIONS

- A. Proposals, qualifications and modifications shall be time and date stamped upon receipt and held secure until the established due date for receipt of responses by METRO.
- B. Personnel delivering hand-carried proposals and modifications on behalf of the submitter are required to submit the sealed documents to the Procurement Plan Room. METRO can accept only completely sealed submissions from Proposers.
- C. The Procurement Department shall receive proposals and qualifications, but shall not open them publicly. The contents of proposals or qualifications may be available for public inspection only after award of the contract.
- D. METRO Plan Room personnel shall ensure that all proposals received before the time and date set for the receipt of proposals are kept secure.
- E. A record of proposals and qualifications shall be established which shall include the name of each offeror, the number of copies of proposals, the number of amendments received, if any, and a description sufficient to identify the services offered. The record shall contain a space for the Contract Administrator to sign for receipt of the proposals or qualifications and a space for the person witnessing the opening of proposals or qualifications to sign.
- F. The Contract Administrator will retain an original signed copy of each proposal or qualification in the Procurement Control Room or official archives until destroyed in accordance with METRO's records retention guidelines.

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G. The Contract Administrator is responsible for reviewing the receipt records to:

1. Ensure that a sufficient number of proposals have been received to substantiate adequate competition;
2. Determine if an incumbent who has expressed interest in submitting a proposal has indeed done so; and
3. Determine if other individuals or parties who have shown interest (and are so noted in solicitation Procurement Plan) have indeed done so. The Contract Administrator shall contact the parties or individuals who did not submit to find out why, and include that information in the solicitation file.

5.14 REQUESTS FOR BOARD ACTION

- A. METRO shall use the 'Request for Board Action' (RBA)² Executive form to execute and deliver proposed contracts that require Board approval.
- B. The Project Manager is responsible for preparing, obtaining approvals and submitting the RBA. The Contract Administrator is responsible for providing the Summary of Procurement and related supporting documentation (abstract information) to the RBA.

5.15 BOARD SOLICITATION REVIEW AND EVALUATION COMMITTEES

- A. METRO's Board of Directors reviews a list of anticipated procurement projects (alternative methods of construction procurement such as; joint development projects, competitive sealed proposals, construction manager at risk, construction manager agent, design build etc., as defined in Chapter 14.4) expected to exceed \$50,000 at each of the various Board Committee monthly meetings. See Table 2, Anticipated Procurement Projects Sample Page, below. The board committee may require additional information from this report (i.e., evaluation criteria and evaluation team membership). See Table 3, Solicitation Evaluation Committees Form, below.
- B. If an initially appointed member of a committee is unable to attend a scheduled meeting, the CPO shall appoint a substitute member to serve in the place of the absent member. The substituting member shall replace the initial appointee in as many committee meetings as are called in order for the committee to accomplish its evaluation.
- C. If a Board Committee approves (concurs with) a solicitation, Procurement proceeds with the procurement process without further Board interaction. Procurement will indicate concurrence of a solicitation by placing a 'Y' on the report in the far right column.
- D. The Chief Procurement Officer will select the Technical Evaluation Committee (TEC) members with concurrence from the originating VP. There shall be no supervisor-subordinate relationships on any of the committees.
- E. Following Board Committee approval of a solicitation exceeding \$50,000, the President & CEO and the Board Chairman slate it for approval and then the Contract Administrator publicly advertises it.

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Table 2, Anticipated Procurement Projects Sample Page

FY2023
ANTICIPATED PROCUREMENT REPORT
Solicitations over \$50K
May Consent List (Board)
Q3

NO.	PROJECT NAME	PROCUREMENT METHOD (RFP, RFQ, IFB)	ANTICIPATED SMALL BUSINESS GOAL	ANTICIPATED ADVERTISEMENT MONTH	PROJECT DESCRIPTION	BOARD COMMITTEE	CONCUR Y
1	Addicks Park & Ride Joint Development Project	RFP	N/A	June	Addicks Joint Development Project	Joint Development & Land Use	

- F. If a Committee requests additional information about a solicitation, the Contract Administrator will gather the information for further discussion of the solicitation at a future committee meeting.
- G. The following committees may supplement the TEC, subject to Board Approval: an oral Presentation Committee (OPC), an Executive Selection Committee (ESC), and a Board Selection Committee (BSC) prior to advertisement. The Board Committee may determine if OPCs and ESCs will be required.
- H. The Contract Administrator will schedule and attend all committee evaluation meetings.
- I. The Contract Administrator is responsible for ensuring that all evaluation committees conduct the evaluation process according to all rules and policies, and for collecting all committee working documentation, and for compiling summary reports and recommendations.

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Table 3, Solicitation Evaluation Committees Form

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SOLICITATION EVALUATION

COMMITTEES

Request for Proposals ☐

Request for Qualifications ☐

PROJECT NAME:

SCOPE IS ATTACHED

Board Committee:

Solicitation Date:

of Anticipated Contract(s):



☐ Approve As Is ☐ Modify

Technical Evaluation Committee (TEC):

-
-
-
-
-



☐ Approve As Is ☐ Modify

Evaluation Criteria:

-
-
-
-
-



☐ Approve As Is ☐ Modify

SBE Goal: ____ %



☐ Approve As Is ☐ Modify

Oral Presentations Committee (OPC):
Yes / No

-
-
-
-



☐ Approve As Is ☐ Modify

Executive Selection Committee (ESC) *:
Yes / No

-
-
-
-



☐ Approve As Is ☐ Modify

Board Selection Committee (BSC) *:
Yes / No

-
-
-
-



☐ Approve As Is ☐ Modify

*An ESC or BSC may be assigned by the President & CEO or Chairman of the Board per METRO's procurement guidelines

Approved: _____
Chair Person

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5.16 **PROHIBITED BEHAVIOR - METRO REPRESENTATIVES AND VENDORS**

- A. No member of any METRO procurement selection committee shall engage in:
1. Technical leveling, which includes helping an offeror bring its proposal up to the level of other proposals through successive rounds of discussion, by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or applying inventiveness in preparing the proposal;
 2. Technical transfusion, which includes disclosure by METRO of technical information pertaining to another proposal that results in improvement of a competing proposal);
 3. Auction techniques, such as:
 - a. Indicating to an offeror a cost or price that it must meet to obtain further consideration;
 - b. Advising an offeror of its price standing relative to another offeror (although it is permissible to inform an offeror that its cost or price is considered to be too high or unrealistic);
 - c. Otherwise furnishing information about other offerors proposals.
- B. Firms and/or their representatives shall not contact, attempt to contact, or influence any member of an evaluation committee(s), METRO employees, and METRO Board members. Disqualification of an offending firm may result. Any person who is aware of such contact regarding the proceedings should report immediately to Chief Procurement Officer or the President & CEO.
- C. All members of all committees are required to sign a confidentiality statement and a conflict of interest questionnaire to ensure that no real or apparent conflict exists between the member of the committee and any proposer. As indicated in the statement, committee deliberations are confidential. Committee members shall not communicate with anyone outside the committee regarding the procurement. Evaluators are encouraged to communicate amongst themselves to glean all information that will assist in ranking the offers and making a selection. See the 'Certifications of Confidentiality and No Conflict of Interest' form¹.
- D. Committee members shall not disclose any information contained in or derived from proposals submitted by other offerors until after award of the proposed contract.

Note to METRO representatives and vendors:

The communications blackout period shall commence from the issue of a solicitation through contract award. The Contract Administrator is the only METRO representative authorized to communicate with firms or their representatives regarding a particular solicitation **during the blackout period. Note: This prohibition applies to METRO representatives and vendors.**

5.17 **COMMITTEE EVALUATION METHODS**

There are two methods of evaluating proposals: the numerical, and the consensus /narrative method of scoring.

1. Numerical scoring definition:

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The numerical scoring method is a process that quantifies rather than qualifies committee evaluations, wherein the Board Committee has determined in advance the maximum number of points for each criterion. Individually, every voting committee member assigns points to each criterion for the proposal or qualification evaluated.

Note: When an individual score varies 25% or more from the total average score, for any evaluation criterion, the Contract Administrator shall challenge the score and the committee shall commence further discussion to clarify the reasons for the disparate score. The Contract Administrator will report the disparity to the Procurement Manager/Director, document the challenge and retain it in the contract file.

2. Consensus/narrative definition:

The consensus/narrative method is a process wherein the committee as a whole arrives at a common understanding as to the ranking of offers. It usually does not involve numerical scoring, but instead uses narrative appraisals of the significant strengths, weaknesses and risks of each proposal or qualification. An adjectival approach (such as poor, fair, excellent, or most important, very important, important) may be used. The committee confirms the consensus by vote and in writing.

Note: The ESC and/or BSC may use the consensus method to select the firm or individual recommended for award to the full Board.

5.18 TECHNICAL EVALUATION COMMITTEE (TEC)

- A. The TEC's function is to assess the technical competency of solicitation responders.
- B. Committee size will be based on the estimated contract value, with a minimum of three (3) voting members who have experience in the technical area being evaluated and will determine technical competency and ranking. The committee, whenever possible, should consist of an odd number of members, including the chairperson. Membership may be comprised of Board members, technical, financial or management experts, and third parties external to METRO, if so designated by the Board Committee. Membership should include, at minimum:
 - 1. At least two (2) representatives with knowledge and expertise in the disciplines related to the project;
 - 2. One (1) senior level representative from the originating department, who will serve as committee chairperson;
 - 3. A non-voting Procurement representative will facilitate the evaluation process. Typically, this person is the Contract Administrator;
 - 4. A representative from the **Office of Economic Business Opportunity**, who will not vote on the technical competency of firms, but will vote on a firm or teams' ability in meeting or exceeding the small business goal.
 - 5. A member of the Audit Department may observe as a non-voting member.

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C. TEC Evaluation Procedures:

Evaluators are encouraged to communicate amongst themselves to glean all information that will assist in ranking the offers and making a selection.

1. When the Contract Administrator determines that the quality and number of responses to an RFP or RFQ represent adequate competition, the Contract Administrator will distribute response packets to committee members. The packets will also contain scoring methodology instructions, the evaluation criteria and weighting factor (if any) for each criterion. The Committee members may use only the submissions received on which to base their evaluations.
2. Any committee member may present any information or superior personal knowledge they may have about any of the submissions at the initial committee meeting. Technical members may nominate firms for removal if they think the firms do not meet the minimum technical requirements for the selection. If other technical members agree, these firm(s) may be withdrawn from consideration.
3. The Contract Administrator (or other Procurement representative) has the ability, with concurrence of the Chief Procurement Officer, to reject a firm that is not responsive or responsible. With concurrence from the Chief Procurement Officer, the Contract Administrator may choose not to award a contract for other business reasons, or for violations of the evaluation process.
4. The Small Business representative may recommend removing a submitter from further consideration, if the firm has not demonstrated a commitment toward achieving its small business goals. This recommendation may also include firms with a history of not achieving their small business goals, or **firms** who have otherwise demonstrated non-compliance with METRO's Small Business and Disadvantaged Business Programs.
5. The committee shall evaluate and rank proposals and qualifications solely on criteria contained in the solicitation.
6. Generally, emphasis is on the technical expertise of the firm and while price is a consideration, it is not normally the determining factor. The objective is to select the firm or individual that can best provide the services, considering technical ability, price and other factors. Note: The committee evaluates RFQs solely on qualifications criteria. Price is not considered.
7. The committee will reconvene (usually on another day) after the Contract Administrator has compiled all scores and comments. The committee will discuss any obvious scoring anomalies to resolve the disparity.
8. If there is no final RFP selection, the TEC will develop a short-list of qualified firms. The Contract Administrator will notify the firms, and convene an OPC or ESC, as per Board Committee determination.
9. As allowable by state law, for RFQ procurement of AE and professional services, the TEC will review qualifications to short-list the most qualified firms within the competitive range. An OPC will convene to make the final selection.
10. For RFP solicitations, the Contract Administrator will prepare a written recommendation to the Board Committee to either short-list or select a firm(s). The recommendation will include a record of the final scoring and comments by the TEC, a historical summary prepared by the **Office of Economic Business Opportunity**, and any other assessment documentation deemed necessary.

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D. Tabulating Scoring Results

1. The committee completes its evaluations and submits them to the Contract Administrator.
2. The Contract Administrator sums the points awarded per proposal by each committee member (if individual evaluations conducted) and/or by the group as a whole to calculate the final score for presentation to the full Board of Directors.
3. Committee members are to use individual score sheets, which the Contract Administrator prepares and provides to the members. As noted in Procurement Bulletin 47, the preferred version for use is the 'TEC Scoring Workbook Template'¹. Procurement staff can help other employees not in the department access this document.
4. When using the numerical scoring method, the Contract Administrator will prepare scoring summary matrixes that are compiled from the committee's individual score sheets and comments. The preferred worksheet version is the 'TEC Scoring Workbook Template'¹.

Other scoring and summary templates may be available and appropriate in some circumstances. Discuss with Procurement, Materials Department management to determine which is most appropriate for a given solicitation.

If utilizing the consensus method, the Contract Administrator will prepare a committee consensus report that identifies the strengths, weaknesses and risks of each proposal or qualification.

5. All notes and evaluation documentation used by committees to evaluate proposals and qualifications must be included in the official contract file.

5.19 ORAL PRESENTATIONS COMMITTEE (OPC)

- A. The OPC's function is to clarify each short-listed offeror's qualifications, the scope and nature of the required services, the offeror's proposed method of performance, and the relative utility of alternative methods of approach.
- B. Although not mandatory, the OPC conducts oral presentations with short-listed firms during the formal evaluation process, and considers the results in the final evaluation. The committee may waive oral presentations if, in the committee's opinion, no useful purpose is served by conducting orals.
- C. OPC membership may be the same as the TEC for a particular solicitation, or the Board Committee may choose to modify it. Other membership guidelines are the same as for the TEC.
- D. Regardless of whether an OPC is comprised of members who also served on the TEC for the project or has members who did not participate in technical evaluation earlier in the process, the committee should use the consensus ranking approach to grade the proposers after the committee has heard all oral presentations. If the post-oral ranking changes from the pre-oral ranking, the Contract Administrator shall work with the OPC chairman to a written summary of and rationale for the modified rankings.

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E. OPC Evaluation Procedures:

1. The TEC/OPC (or ESC, if convened) will conduct oral presentations with offerors in the competitive range, at its discretion. If utilizing the Best Value selection method to evaluate an RFP, oral presentations are especially important. Board policy states that METRO shall conduct the selection of qualified firms in a manner to provide maximum open and free competition.
2. All attendees at oral presentation meetings shall be required to sign in. The Contract Administrator will retain sign-in logs in the related contract file. The Contract Administrator will ensure that the oral interviews are audio recorded and electronically preserved. If it is not possible to record the presentation audibly, the Contract Administrator shall ensure that written notes are included in the contract file.
3. The OPC should address the following issues, basing the content and extent of the discussions on the particular facts of each acquisition:
 - a. Making certain that the offeror has a clear understanding of the scope of the work, *specifically the essential requirements involved in providing the required services*;
 - b. Advising the offeror of weaknesses in its proposal and give an opportunity to conform the proposal to METRO's requirements;
 - c. Determining that the offeror will make available the necessary personnel and facilities to perform the services within the required time;
 - d. Reviewing compensation to determine fair and reasonable pricing, taking into account the estimated value of the required services and the scope, complexity, and nature of such services. Evaluations of RFQs by the OPC do not include price as a consideration.
 - e. Resolving any uncertainties concerning the technical proposal and other terms and conditions of the proposal;
 - f. Calling suspected proposal mistakes to the offeror's attention being specific as possible without disclosing information concerning other offeror's proposals or the evaluation process;
 - g. Providing offerors a reasonable opportunity to submit any cost or price, technical, or other revisions to their proposals that may result from the discussions;
4. If the OPC determines that a proposal no longer has a reasonable chance of selection for contract award, it will not consider the proposal for selection.
5. At the conclusion of oral interviews, the OPC will determine by consensus the ranking of the presenting entities as per paragraph 5.19D above.
6. The OPC will present its recommendation to the full Board upon determination that an ESC is not required. Only a summary of the OPC consensus decision and recommendation will be included in the Board documentation package.

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5.20 EXECUTIVE SELECTION COMMITTEE (ESC)

- A. A Board Committee or the President & CEO (with concurrence from the Board Chairman) may initiate an ESC and select its voting membership. Voting members may include internal staff members, external consultants*, Board members, and/or members of the community*. ESC rosters shall include the Vice President of Audit or designee, and the Chief Procurement Officer or designee as non-voting members. The Contract Administrator shall facilitate committee meetings. * External consultants and members of the community may be added as non-voting members to serve as additional resources based on their unique skill sets that may be beneficial to the committee. They must also sign the necessary conflict of interest and confidentiality forms.
- B. The ESC will review and validate TEC findings, conduct interviews with TEC, request additional information and/or conduct additional oral presentations, if required. The ESC after completion of these reviews, will recommend a firm(s) for board approval.
- C. ESC Documentation

Documentation for the official file shall include a written explanation of the committee's rationale for the decision. All committee members will sign the document, which will also contain the scoring summaries of the TEC and OPC. The same documentation requirement applies if the solicitation is an RFQ, and the ESC recommendation of the most qualified offeror differs from previous committees.

5.21 BOARD SELECTION COMMITTEE

Board Selection Committee (BSC) may be invoked by the chairman of the board at any time during the process. The BSC shall evaluate based on criteria and method established in the solicitation.

5.22 CONTRACT NEGOTIATION AFTER SELECTION OF OFFEROR / PROPOSER

The Contract Administrator, working with the Project Manager and other METRO staff as required, is responsible for conducting negotiations with selected firm(s).

- A. The Contract Administrator shall negotiate a contract with the most advantageous/highly qualified offeror for the required services at compensation determined in writing to be fair and reasonable. If compensation, contract requirements, and contract documents are agreeable with the most advantageous/highly qualified offeror. Board authorization may be required.
- B. Contract negotiations shall ensure the following:
 - 1. Confirmation that the offeror has a clear understanding of the scope and essential requirements of the project;
 - 2. Determination that the offeror will make available the necessary personnel and facilities to perform the services within the required timeframe; and
 - 3. Agreement on fair and reasonable compensation, taking into account the estimated value of the required services and the scope, complexity, and nature of the services.
- C. If the Contract Administrator and the most advantageous/highly qualified offeror cannot agree on compensation, contract requirements, or contract documents, the Contract Administrator shall document in writing the reasons for the failed negotiation and include the report in the contract file. The Contract Administrator shall advise the offeror in writing that negotiations are terminated (with copy to file), and

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- D. begin negotiations with the next most advantageous/highly qualified offeror upon senior management/board approval. The Contract Administrator will repeat the cycle until reaching acceptance with a qualified offeror.
- D. When the committee chooses qualifications as the primary criteria for the selection, as with RFQ two-step procurements, the committee shall select the individual(s) or firm(s), in the order of their respective qualification ranking, deemed to be the most highly qualified to provide the required services. The committee submits a report, prepared by the Contract Administrator, recommending the selected proposer(s) to the full Board of Directors.
- E. After Board approval, the Contract Administrator may execute a 'Limited Notice to Proceed', with concurrence from General Counsel, to the selected Contractor, based on provisional rates until contract negotiations are complete.

5.23 BEST AND FINAL OFFERS – RFP SOLICITATIONS

- A. Upon completion of discussions and negotiations of RFP solicitations, the Contract Administrator shall issue to all offerors still within the competitive range a request for best and final offers (BAFOs). The Contract Administrator shall confirm oral requests in writing. The request shall include:
 - 1. Notice that discussions are concluded;
 - 2. Notice that this is the opportunity to submit a best and final offer;
 - 3. A common cutoff date and time that allows a reasonable opportunity for submission of written BAFOs; and
 - 4. Notice that the Contract Administrator must receive all submitted modifications by the date and time specified, and that all received modifications are subject to the 'Late Submissions, Modifications, and Withdrawals of Proposals' provision of the solicitation.
- B. After receipt of BAFOs, the committees should not reopen discussions unless it is clearly in METRO's interests to do so, such as when it is apparent that information in the BAFOs received is inadequate to justify Contractor selection and award. If the committee does reopen discussions, the Contract Administrator shall issue an additional request for BAFOs to all offerors still within the competitive range.
- C. Following evaluation of the BAFOs, the committee shall recommend that source whose BAFO is most advantageous to METRO, consistent with the established evaluation factors.
- D. While the lowest price or lowest total cost to METRO is the deciding factor in many Contractor selections, in certain acquisitions METRO may select the proposer whose proposal offers the greatest value to METRO in terms of performance and other factors. In some cases, the greatest value may be a matter of qualifications, and not necessarily the lowest price. This may be true, for example, in the acquisition of professional or personal services, such as security guard services, or when anticipating cost-reimbursement contracting.

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5.24 **BOARD APPROVAL AND AWARD**

- A. When a committee has made a final selection decision on solicitations of more than \$250,000, the Contract Administrator shall prepare a solicitation documentation package for presentation to the President & CEO, Board Chairman and full Board for review and approval. The package consists of a Request for Board Action (RBA) form^{2 Executive}, a Summary of Procurement¹ (SOP), a summary of final scores and rankings¹, and a summary of the small business plan. The Contract Administrator will prepare the SOP and summaries of final committee scores and rankings. The small business representative will prepare the summary of the small business plan. The Project Manager will request that the item be placed on the Board agenda, prepare the RBA form², and circulate the package for approval.
- B. The President & CEO, Board Chairman, or full Board, upon review, may return a solicitation to the committee process. For example, if the parties named do not accept a decision rendered by the TEC, an ESC may convene and may schedule oral presentations, if not already conducted.

5.25 **CONTRACT PREPARATION AND DOCUMENTATION**

- A. The Contract Administrator will retain all back-up documentation necessary to substantiate the evaluation and recommendation in the official files.
- B. Contract files will be available for review by authorized persons, including those external to METRO, under appropriate circumstances.
- C. Preparing the contract documents, ensuring necessary reviews, and routing for appropriate concurrence and approvals follows the same requirements as for competitively bid contracts, with the addition of including the auditor's concurrence on proposed contracts in accordance with Chapter 11, Requirements for Audit Department Review.
- D. The Contract Administrator is responsible for documenting the contract file for all actions taken in the acquisition process, as outlined in Chapter 3.12. Most of the file documentation required for competitively bid contracts is also required for negotiated contracts.

Documentation pertinent only to negotiated contracts includes (also refer to Chapter 3, section 12, C 14):

A Memorandum of Negotiation: The Contract Administrator prepares and signs this memo for each procurement requiring Board approval (refer to Chapter 1, Table 1). The memo is to include input and concurrence by the Project Manager, the Director in the requesting department, and approval by the Manager of Contracts. The Memorandum of Negotiation should include a summary of METRO's pre-negotiation position, unless Procurement management requests that a separate document be prepared.

- E. Other required documentation for negotiated procurements includes the following:
 - 1. Summary of Procurement (SOP)¹ prepared by the Contract Administrator for each procurement that is more than \$50,000 in value, approved and signed by the Contract Administrator, Project Manager, Director of Contracts, and Manager of Procurement.
 - 2. Request for Board Action (RBA) form^{2 Executive} if applicable.

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5.26 DEBRIEFING UNSUCCESSFUL OFFERORS

- A. The primary purpose of a debriefing is to provide information to unsuccessful offerors to improve their chances of selection in potential similar procurements. Committee report(s) and documentation of the scoring process or the narrative appraisal(s) are the basis for the debriefing discussion.
- B. The Contract Administrator shall conduct debriefings for contract requirements, in the presence of the Project Manager and, if warranted, a representative from METRO's Legal department. The Contract Administrator shall not make comparisons with other unsuccessful proposals.
- C. At the onset of the debriefing, the Contract Administrator shall confirm with the debriefed firm that he/she shall not discuss any other offeror's proposals, nor shall he/she discuss the present firm's proposal with any other offerors. The debriefing shall then deal in specifics related to the debriefed firm. Normally, the Contract Administrator will not disclose individual committee member scores during debriefings.

5.27 CANCELLATION OF PROJECTS

- A. Solicitations are subject to cancellation if they prove not to be feasible for reasons such as, but not limited to, the following:
 - 1. The project is not considered cost effective;
 - 2. Public opposition to the project;
 - 3. The project gets superseded by a higher priority project;
 - 4. Environmental considerations override the benefits;
 - 5. Negotiations do not result in a fair and reasonable contract.
 - 6. The project does not align with METRO's vision or goals
- B. Upon cancellation of a project, the Contract Administrator shall perform the following:
 - 1. If canceled before the due date for receipt of proposals or qualifications, letters of interest or qualification statements, the Contract Administrator shall place an advertisement in the same publications in which the original advertisement appeared, cancelling the project.
 - 2. If the project is canceled in the following situations, the Contract Administrator shall mail a letter to all firms who indicated an interest, advising them of the cancellation of the project:
 - a. Letters of interest and qualification statements have been received, but short-listed firms have not been announced; or
 - b. Oral presentations are complete, but the Board has not yet approved negotiations to begin.
 - 3. If the project is canceled in the following situations, the Contract Administrator will notify affected firms by e-mail, fax, telephone, or courier:
 - a. Short-listed firms have been identified, but have not yet made their oral presentations;
 - b. The Board has approved project negotiation for AE projects, but negotiations are not yet complete.
- C. If a project is canceled after contract award, the Contract Administrator will follow normal 'contract termination for convenience' procedures. (Refer to Chapter 3.12).

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5 **NON-COMPETITIVE PROCUREMENTS**

6.1 **SOLE SOURCE JUSTIFICATION**

Open competition is the preferred method of procurement whenever possible; however, METRO may purchase equipment, supplies, materials or services through non-competitive negotiation (sole source) when the award of a contract is not feasible under small purchase or competitive sealed bid requirements.

- A. METRO must negotiate Sole Source Contracts.
- B. METRO authorizes procurement of construction, goods and/or services without competition under limited conditions, subject to written justification documenting the conditions that preclude competition. See the (Sole Source/Non-Competitive Justification form¹, and Brand Name Justification¹ form.
- C. A cost analysis is required to evaluate and verify the projected cost and profit elements. Cost analyses are typically done by the Audit Department. Use the Audit Services Request form¹ to request that a cost analysis be performed.
- D. A contract amendment or change order that is not within the original scope is a sole source procurement that must be justified in writing.
- E. METRO may obtain contracts for Professional and Personal Services, which are \$250,000, or less, through non-competitive negotiation. The President & CEO or designee may procure such services through the solicitation of a proposal from only one source. For sole source procurement of services that exceed \$50,000, the President & CEO must approve the request prior to the commencement of any procurement action. Sole Source Contracts exceeding \$250,000, either locally or federally funded require Board of Directors approval.
- F. METRO may not award a non-competitively procured Sole Source contract exceeding \$50,000 unless an announcement that a contract is being considered is posted on the METRO Website and in a prominent place in the Procurement Planning Room for at least 14 days before METRO awards the Contract. It may be removed on the 15th day and contract awarded on the 16th day.
- G. Contract Administrators are not required to enact a competitive procurement under the following circumstances:
 - 1. The goods or services, including construction, needed by METRO are available from only one responsible source and no other type of goods or services will satisfy the needs of the METRO; or
 - 2. METRO determines that an emergency for the requirement will not permit a delay resulting from competitive procedures as set forth in Chapter 4; or
 - 3. When after solicitation of a number of sources, competition is determined inadequate. Contract Administrators may make this determination based upon industry research, and the formal or informal solicitation of potential sources. The file must reflect a documented finding that adequate competition cannot be obtained in the time frame necessary to meet the needs of the METRO; or
 - 4. The FTA authorizes noncompetitive negotiations; or
 - 5. To exercise an option that was not awarded as part of the base contract award (See Section 3.3, Use of Options);

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6. When the replacing item is an associated capital maintenance item as defined in 49U.S.C.5307 (a) (1), procured directly from the original manufacturer or supplier of the item for replacement. The grantee must certify in writing to the FTA that:
 - a. such manufacturer or supplier is the only source for such item; and
 - b. the price of such item is no higher than the price paid for such item by like customers.
- H. The Contract Administrators may determine that competition is adequate even if METRO receives only a single Bid or Proposal in response to the solicitation, if after review:
 1. The Contract Administrators determine that the specifications were not restrictive; and
 2. The other identified sources unilaterally chose not to submit a Bid or proposal. If METRO receives a single Bid under these circumstances, the Contract Administrators may negotiate the price. The Contract Administrators will be responsible for determining price reasonableness.

6.2 **BRAND NAME ONLY JUSTIFICATION**

- A. Use of Brand Name purchase description is one of many ways to describe or specify a particular item for purchase by specifying a particular manufacturer's name and identifying number.
- B. Brand Name purchase descriptions are restrictive of competition, and METRO shall only use this method after careful consideration. The using department's Vice President must approve and submit written justification to the Procurement & Materials Dept., using the Brand Name Justification form¹ to cite the reasons that a particular name brand product is required. Brand Name purchase descriptions may or may not be sole source i.e.:
 1. Battery, Delco Model No. 1150 - This is a Brand Name description but not considered sole source since there are many Delco distributors who can equally compete for sale of this battery. It does, however restrict competition to only Delco distributors and therefore, requires VP of Procurement & Materials approval.
 2. Radiator, Masabit P/N 43998 - This also is a Brand Name purchase description and is also a Sole Source purchase, because this radiator is available from only one source, L & M Radiator, and is completely absent of any competition.
- C. If METRO decides to pursue a brand name purchases, the requisitioner should then decide if it is also a sole source. If it is a sole source, then the requisitioner shall complete a Sole Source/Non-Competitive Justification form¹ instead of a Brand Name Justification¹ form.

6.3 **EMERGENCY and URGENT PROCUREMENTS**

- A. An emergency is a condition that creates a threat to METRO employees, property or operations, or to public health, welfare or safety, arising from natural forces (e.g., fire, wind, flood, storm, earthquake, epidemic or other natural disaster); from riot, unlawful assembly or mob violence; or from hostile acts of a public enemy. Emergency also means any condition that requires immediate action to protect life or METRO property or to correct a condition that places the Agency's mission in imminent danger.

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The existence of such a condition creates an immediate and serious need for goods, services, or construction unachievable through normal procurement methods, and delay of the requirement and the lack of goods and services would seriously threaten:

1. The functioning of METRO operations;
 2. The preservation or protection of property; or
 3. The health or safety of any person.
- B. An urgent condition is a situation that severely affects a requesting department's ability to carry out its assigned mission, if procurement of the desired goods, services or construction is not expeditious. As a rule, the Procurement Department will not treat preventable situations as urgent.

6.3.1 Responsibility and Authority for Emergency Procurements

- A. The President & CEO, alone, may declare the existence of an emergency and deem competitive bidding inappropriate for a procurement valued over \$50,000. Although competitive bidding is not required for procurements valued under \$50,000, the President & CEO must declare the existence of an emergency in order to waive the requirements set forth in this Procurement Manual. The Declaration is subject to ratification by the Board of Directors at the next Board meeting.
- B. The Delegation of Authority table (Chapter 1, Table 1) establishes authority levels and identifies those METRO employees authorized to requisition and procure goods, services and construction. The President & CEO governs the procurement process and may delegate authority and responsibility in writing.
- C. The METRO Safety or other using department shall request immediate action to rectify a condition that poses an immediate danger to life, property or transit services.
- D. Capturing the data pertinent to the transaction is the responsibility of the VP of the requesting department. Control and oversight of the transaction is the responsibility of the Chief Procurement Officer

6.3.2 Procedure for Processing Emergency Procurements

- A. The SAP procurement system does not currently allow for the electronic processing of procurements in emergency situations. In such cases, the requestor shall prepare a written request, approved by the requesting department VP, and submit to the Chief Procurement Officer so that the procurement can be expedited manually. The request shall reference the Shopping Cart number and include the basis for, or condition causing the emergency; the goods, services or construction required; and the names of recommended vendors or contractors. Under unusual circumstances, the requestor may submit an oral request, and follow up with the request, in writing, within twenty-four (24) hours.
- B. The Chief Procurement Officer will forward the request to the President & CEO. Only the President & CEO can approve a request for an emergency procurement. If the procurement generated by the emergency request would have normally required Board approval, the President & CEO shall be responsible for reporting such items to the Board at its next regularly scheduled meeting.
- C. Upon receipt of an approved request for an emergency procurement, the Procurement, Materials Management & Small Business Department shall ascertain whether the same type of goods, services or construction requested is currently under contract because of a competitive procurement. If a contract for the item or services is already in place, the Procurement, Materials Management & Small Business

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Department will contact the vendor or Contractor to ascertain adjustments in quantities, delivery schedule, or other performance requirements to accommodate the emergency. The Contracting Officer will then modify the contract to accommodate the emergency request.

If the item or service is not under contract, then the Procurement, Materials Management & Small Business Department shall take immediate action to resolve the emergency condition, using good judgment to select sources.

- D. Under an unusual circumstance, when the requesting department cannot reach either the Procurement, Materials Management & Small Business Department or the President & CEO, the requestor shall take corrective measures to mitigate or resolve the emergency condition. The requesting department shall then prepare a justification memo, detailing the emergency condition and the actions taken. The requesting department will immediately submit the justification memo, accompanied by the properly authorized Shopping Cart to the Procurement, Materials Management & Small Business Department. Department staff will review the justification and forward to the President & CEO for approval.

6.3.3 Procedure for Processing Urgent Procurements

- A. The SAP procurement system does not currently allow for the electronic processing of procurements in urgent situations. In instances when the normal time for delivery is not satisfactory, the requestor shall follow the steps below so that the procurement can be expedited manually.
- B. This procedure is to be followed for both inventory and non-inventory items.
 - 1. The authorized employee in the user department shall enter an approved Shopping Cart into the SAP system.
 - 2. Concurrently, the authorized employee is to submit a written request, approved by the requesting department VP, to the appropriate Procurement Manager. The request shall reference the Shopping Cart number and explain why the procurement is of an urgent nature.
 - 3. If the urgency is confirmed by Procurement, the Procurement Manager shall assign the request to a Contract Administrator or Buyer who will prioritize and process the urgent procurement expeditiously, in accordance with federal, state and METRO guidelines.
 - 4. The designated Contract Administrator will review each urgent requisition to ensure completion (i.e., purchase description, specification or statement of work, required attachments or exhibits, sole source justification, etc.). The Procurement Manager shall be responsible for obtaining a complete and properly documented requisition.
 - 5. After placing the order, the Contract Administrator will confirm delivery date with the requestor.

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7 **USE OF OPTIONS**

- A. An option is a unilateral right in a contract that entitles METRO, for a specified time, to elect to purchase additional equipment, supplies, or services called for by the contract, or to extend the term of the contract. However, METRO may only extend a contract term when exercising the option and actually purchasing the items stated in the option. Options may be included in contracts if services specified in the service contracts are vital to METRO's continuity of operations; or if there is an anticipated need for such services beyond the contract period, which if disrupted, could cost more to reinstate than to extend. The acceptance of the option shall be unconditional and in strict accordance with the terms of the contract being renewed. An event or specific date may trigger the deadline for exercising the option. METRO has the unilateral right to exercise an option in accordance with the terms of the contract, but is under no obligation to exercise any or all options.
- B. Options shall not be included in contracts in the following circumstances:
1. The foreseeable requirements involve minimum economic quantities (i.e., the required quantities are large enough to permit the recovery of startup costs and the production of the required supplies at a reasonable price) and delivery requirements are far enough into the future to allow time for competitive acquisition, production, and delivery;
 2. The Contractor will incur undue risks; for example, the market price or availability of necessary materials or labor are not reasonably predictable, or are likely to change substantially;
 3. An Indefinite Quantity or Requirements contract is appropriate. (If necessary, METRO may extend the period of performance or contract term through a contract modification.)
 4. The option represents known, fixed requirements for which funds are available.
- C. Exercise of an option after its acceptance period has expired is sole source procurement and must be justified in writing.
- D. Contract evaluations to determine the lowest bidder for an award may or may not include consideration of an option or its prices.
1. To consider an option as part of an initial contract evaluation and include it in the contract award, the solicitation evaluation criteria must state this stipulation, and clearly set forth how METRO will evaluate the option prices for the award.
 2. When METRO has not evaluated an option as part of a contract award, METRO will consider exercise of the option a sole source procurement, which must be justified in writing, except as noted in this section, paragraph E.
 3. Contract Administrators must evaluate option prices for all federally funded contracts at Bid Opening to deem them fair and reasonable.
 4. Evaluation criteria must clearly state that an option is not considered for award as part of the contract evaluation, and that the option prices must be assessed to determine their reasonableness.

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E. An option that was not included in the initial evaluation of a contract award may be exercised only when the option prices have been determined to be better than prices available in the market or that the option is the more advantageous offer at the time it is exercised.

F. Contracts Awarded with Options

1. Contracts awarded with options shall limit option quantities for additional equipment and supplies to not more than one hundred (100%) percent of the initial quantity of the same contract line item.
2. The time duration for rolling stock, from the original date of a contract plus any option periods, shall not exceed five (5) years for buses and seven (7) years for rail cars. (MAP-21 amended 49 U.S.C. Section 5325 (e) (1) (A) and (B) and 4220.1F Rev 4, Section IV).
3. If an option provides in excess of the amounts or periods set forth above, rationale must be provided to and approval obtained from the FTA before solicitations for federally funded procurements can be issued. The Contract Administrator must explain the need for the option and why approval of the excess quantities, and or timeframes, will benefit both METRO and the FTA.

G. A Contract Administrator may exercise an option only after the Contract Administrator has determined in writing that exercise of the option is the most advantageous method of fulfilling METRO's need, considering price and other factors. The Contract Administrator must sign the written justification and obtain approval by the Procurement Manager before placing the justification in the contract file.

Exercise of an option is justified under the following circumstances:

1. A new solicitation fails to produce a better price or a more advantageous offer than that offered by the option.
2. An analysis of prices or an examination of the market indicates that the option price is better than prices available in the market or that the option is the more advantageous offer. NOTE: The Producer's Price Index ('PPI') or any other indicator cannot be the sole determining factor used to evaluate the option price.
3. The time between the award of the contract containing the option and the exercise of the option is so short that it indicates the option price may be the lowest price obtainable or the more advantageous offer. Under these circumstances, the Contract Administrator shall consider such factors as market stability and how the option price at hand compares with the price of an award made most recently for such supplies or services under usual timeframes. This is to ensure that the option price is indeed fair and reasonable.
4. The option supports METRO's need for continuity of operations and minimizes or eliminates the potential costs of disrupted operations.

H. Before exercising an option, the Contract Administrator shall determine that:

1. Such action is in accordance with the terms of the *option*;
2. Such action is in accordance with the terms of the *contract*;
3. The contract performance period has not expired before the option is exercised;
4. Applicable FTA option provisions are used when the procurement is federally funded;

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5. Option quantities are no more than 100% of the initial quantity of the same line item in the contract; and
 6. There are no changes to the terms and conditions of the requirement, as this would require the issue of a new solicitation.
- I. Negotiating is prohibited for changes to the terms and conditions or technical requirements of an existing option. Doing so would result in a new, unsolicited contract, even if the Contractor has offered a lower price.

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8 SMALL PURCHASES

8.1 GENERAL – SMALL PURCHASES

This chapter details METRO procedures for purchasing equipment, materials and supplies (hereinafter referred to as 'items') as well as non-personal services, construction services, personal services and professional services (hereinafter referred to as 'services'), valued at \$50,000 or less, as amended by HB 2325 of the Texas Legislature. Purchases for dollar amounts of \$50,000 or less are 'small purchase(s).'

The Chief Procurement Officer or authorized designee retains primary responsibility for purchasing equipment, materials, supplies and services of \$50,000 or less, as delegated by the President & CEO.

8.2 POLICY – SMALL PURCHASES

- A. METRO shall use funds for small purchases for items and services solely for carrying out authorized METRO functions.
- B. METRO shall fulfill procurement requirements in the open market if the purchase price does not exceed \$50,000.
- C. Only the following METRO personnel shall make small purchases:
 - 1. METRO personnel who have been delegated the authority to contractually bind METRO, in accordance with the Delegation of Authority, Table 1, in Chapter 1 of this Manual; or
 - 2. METRO personnel authorized to make small purchases through the purchasing methods listed in section 8.3 of this chapter.
- D. The procurement of small purchases shall be made only by authorized personnel through the methods listed in section 8.3. Purchase Orders shall not be used to make small purchases.
- E. The President & CEO may declare an emergency wherein severe time constraints may not allow sufficient time for conducting a formal competitive bidding process. In situations when items or services that cost more than \$50,000 must be purchased quickly to satisfy an emergency or urgent requirement, the person requesting the purchase must complete and have approved a 'Purchasing Procedure Exception Request form'² to permit issue of a purchase order. For more information, see the 'Emergency and Urgent Purchasing' Guideline³.
- F. Texas law and METRO policy expressly forbid dividing a requirement into several smaller purchases with the intention to evade formal competitive bidding or circumvent METRO purchasing process.
- G. METRO prohibits personnel from making 'after the fact' purchases, a type of unauthorized procurement that occurs when a METRO employee orders materials and afterwards requests the Procurement Department to issue a purchase order.

Procurement shall not issue such purchase orders or contracts for after-the-fact purchases.

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METRO personnel who violate METRO purchasing policies and procedures shall be subject to disciplinary action up to and including termination.

- H. A Contract Administrator shall not use Small Purchase procedures when the procurement estimate exceeds the Small Purchase threshold even though the resulting award does not exceed that limit.

A Contract Administrator shall not split a procurement totaling more than the Small Purchase threshold into several purchases in order to circumvent these Regulations and, therefore, circumvent the process for procuring goods and services.

8.3 APPROVED METHODS FOR SMALL PURCHASE PROCUREMENTS

- A. Authorized METRO personnel may make small purchases using the following approved small purchase procurement methods:
1. Petty Cash: Coin and currency managed by authorized METRO personnel for micro-purchases up to \$150.00. Refer to the 'Petty Cash Control' Guideline^{3 Finance} for all requirements and procedures for making purchases with petty cash.
 2. Purchasing Card (P-Card) Program: A limited-use credit-card program established by METRO for authorized personnel to use for small purchases in lieu of purchase orders and delivery orders against requirements contracts, as well as certain other items. The P-Card Program also authorizes charges with a Blanket Purchasing Card Account (see below). Refer to the 'Purchasing Card Program Procedure'³ for all requirements and procedures for making small purchases with P-Cards.
 3. Check Requests: Procedures that authorize payments by check for small purchases and other METRO obligations not handled through the normal procurement process. Restrictions apply. Generally, payments by check request to a single supplier may not exceed \$25,000 during a 12-month rolling timeframe. Refer to the 'Check Requests' Guideline^{3 Finance} for all requirements and procedures for making purchases with check requests.
 4. Blanket Purchasing Card Account (BPCA) Program: Maximum-level spending accounts approved and established by the Procurement and Finance Departments against which designated and authorized users make incremental small purchases of items from specified vendors, using P-cards. Refer to the 'Blanket Purchasing Card Accounts' Procedure³ for all requirements and procedures for making purchases with a P-Card against a BPCA.
 5. Blanket Purchasing Credit Agreement (BPCA) Program: Issues a type of purchase order that allows authorized personnel to pay for portions of an entire procurement with a P-Card. These purchases can total no more than \$50,000. Refer to the 'Blanket Purchasing Card Accounts' Procedure³ for all requirements and procedures for making purchases with a P-Card against a BPCA.

8.4 SOLICITING MARKET QUOTES

Obtain market quotes for small purchases via the procedures below. Except as noted herein, the same procurement requirements noted for IFBs and RFQs, for purchases more than \$50,000 also apply to small purchases.

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³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

- A. Solicit pricing for small purchases with RFQs, per the guidelines specified below.

Total Purchase Amount	Quote Requirements by Type of Service or Item	
	Off the Shelf Service/Item:	Custom, Specified Service/Item:
≤ \$10,000	One (1) Verbal Quote	One (1) Written Quote
< \$10,001 to ≤ \$25,000	Two (2) Verbal Quotes	Two (2) Written Quotes
< \$25,001 to ≤ \$50,000	Three (3) Written Quotes	Three (3) Written Quotes

- B. If the Buyer or Contract Administrator determines that the price to be paid is fair and reasonable, make purchase of small items or services, totaling \$10,000 or less, without soliciting competitive quotations. (See F below).
- C. The Buyer or Contract Administrator shall select the sources for solicitation. One of the sources shall be the last vendor that received an award for the same type of item or service. The Buyer or Contract Administrator may include additional vendors deemed necessary for adequate competition. However, source lists for small purchases will generally not contain more than six (6) vendors.
- D. The Buyer or Contract Administrator may use email or facsimile to send and receive RFQs to expedite receipt of pricing with vendors. They must electronically transmit the entire RFQ package, including terms and conditions, to all vendors.
- E. The Buyer or Contract Administrator may reject as non-responsive any quotes received after the date and time set forth in the solicitation. When only one vendor submits a quote, Contract Administrators or Buyer will conduct negotiations with that vendor, if needed.
- F. The Buyer or Contract Administrator is responsible for determining that the prices quoted are fair and reasonable, particularly when receiving only one quote, or determining inadequate competition. This determination applies for payments by either METRO or federal funds. Base price reasonableness on such factors as:
1. Adequate price competition;
 2. Published price list;
 3. Comparison with prior purchases of same or similar items;
 4. Value analysis;
 5. Established market prices;
 6. Comparison with an independent estimate.
- G. The Buyer or Contract Administrator will extend the award to the responsive and responsible offeror submitting the lowest price for equipment, supplies and materials purchases and applicable non-personal services. For personal or professional services, the Buyer or Contract Administrator will extend the award to the responsive and responsible offeror who submits the most qualified proposal with price and other factors considered.
- H. If the lowest quoted price exceeds the requisition-estimated amount, the Buyer or Contract Administrator shall obtain the requestor's written authorization before making an award.

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8.5 **SHOPPING CARTS TO INITIATE SMALL PURCHASES**

- A. A Shopping Cart is required to initiate the small purchase process. A Shopping Cart is a confidential METRO internal document. No information other than purchase item description, quantity, unit of issue, and delivery and packaging requirements, shall be disclosed external to METRO, either verbally, electronically or in hard copy, until the award process has been completed and only then with the concurrence of general counsel.
- B. Shopping Carts are not purchase orders and do not authorize requestors to act as agents with the authority to enter into or negotiate binding procurement agreements with vendors.
- C. Requestors of Shopping Carts shall complete the document in the appropriate procurement system, e.g., SAP.
- D. Only authorized personnel as listed in METRO's Delegation of Authority Table 1, in Chapter 1, or in the Audit Department Authorized Approval List, shall approve requisitions. Authorized personnel will provide approvals electronically as the Shopping Cart routes through the procurement system.
- E. The Procurement Manager and Contract Administrator who process the procurement will conduct research as necessary to prevent purchase of any duplicative or unnecessary items or services. Procurement staff will notify the requestor of suspected instances before initiating any purchasing action.
- F. The purchase requisition must note a 'ship-to' address per the 'Delivery of Equipment, Supplies, Parts and Materials' Guideline³.
 - 1. Deliver revenue and non-revenue vehicles to METRO's Central Supply Warehouse, for inspection and acceptance;
 - 2. Deliver all IT equipment and software to the IT Department at 1900 Main;
 - 3. Deliver all rail parts and equipment to applicable Rail Operating Facilities;
 - 4. The delivery address for construction projects and other services is the location for performance of the services. All ship-to addresses will contain the name of the requestor to assist in the routing and delivery of requested items and services.
- G. The Procurement Manager or Contract Administrator cannot process a Shopping Cart without the following documents:
 - 1. A completed Specification, Statement of Work, or Scope of Service. For assistance in preparing a spec, SOW or SOS, refer to the Scope Guide and Examples⁴. These are available under the 'Project Manager Tools' tab on the Procurement Intranet page.
 - 2. Drawings (as applicable);
 - 3. A written justification memo, if the service or item purchased is an urgent or emergency procurement. (the Purchasing Procedure Exception Request form¹ is preferred.) Also refer to the 'Emergency and Urgent Purchasing' Guideline³.
 - 4. A written Brand Name Justification form¹ is required if a brand name product is the only product that usable for the purpose of the purchase, or if absolutely no other equivalent product exists in the market.

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- H. Requisitions are generated in SAP by Materials Management staff and processed by Procurement staff to replenish stocked inventory items.
- I. Procurement and Materials Management staff will work jointly to review consumption history to establish inventory requirements contracts.
- J. An existing small purchase must be electronically modified in SAP.

8.6 PURCHASE ORDERS

- A. Unless appropriate authorities approve an exception to normal purchasing procedures (such as an urgent or emergency circumstance), use a PO to buy equipment, materials, supplies, and non-personal services (including construction services) that cost no more than \$50,000.
- B. Incorporate terms and conditions that relate to the type of items or services procured into the PO as it travels electronically through the procurement system.
- C. Approve POs by signature of the appropriate Procurement Manager and/or others with the delegated signature authority to execute them, according to the dollar value of each order. Procurement Manager or designee must approve all modifications to purchase orders.
- D. Purchase orders for work performed on METRO property require the vendor be bound to insurance, wage rates and safety requirements.
- E. Vendors may be required to acknowledge receipt of a purchase order to ensure they are fully aware of METRO's requirements for performance and deliverables.
- F. After PO execution, provide the original PO and all associated documentation to the awarded vendor. It is also acceptable for the vendor to receive electronic copies. Procurement will maintain an official file of executed purchase order and all attachments.
- G. The PO file shall contain all necessary documentation to provide a complete audit trail of what occurred during the purchasing process. Refer to the File Checklist: Purchase Order Award (Non-Inventory Items) form¹ for a list of the documentation required for file.
- H. The PO file for Inventory Item procurements shall include the Shopping Cart, the P.O., price quotes, and the P.O. Award Justification/Price Analysis form¹.

8.6.1 Instructions for Issuing Purchase Orders Against Cooperative Agency Contracts

- A. METRO will issue a purchase order to purchase materials and services that exist under cooperative agency contracts.
- B. The cooperative contracts must be authorized and active and all applicable METRO Board approval requirements met before a purchase order is issued against the cooperative contract.
- C. The purchase order must reference the number of the cooperative contract and state that all terms and conditions of the cooperative contract extend to the purchase order. Other additional terms and conditions, such as insurance requirements, may be added to the purchase order as necessary, including Small Business participation.

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- D. The purchase order need be signed only by a Procurement representative with the proper level of signature authority as cited in the Delegation of Authority table, section 1.3 of this manual.
- E. In addition to the usual documentation requirements, the following documents must be included in the Purchase Order File:
 - 1. An electronic link to the contract or agreement (the link can be included in the body of the Purchase Order, or in the Summary of Procurement if the purchase is \geq \$50,000 and the latter is required)
 - 2. A Summary of Procurement that summarizes the authorized use of the cooperative agency contract, if the purchase requires Board approval
 - 3. All METRO Board authorization documents that may apply to the particular procurement

9 **BONDS, OTHER SECURITY, INSURANCE and SAFETY**

This chapter provides guidance to determine when a bid, performance and/or payment bond(s) is required in solicitations and contracts, and establishes the minimum criteria for making that determination.

Note: Bonding requirements are also applicable to work authorizations and task orders, if not previously obtained under the base contract.

9.1 **TYPES OF BONDS**

- A. Surety bonds are agreements under which a surety firm agrees to assume responsibility to METRO for the debt, default, or failure of a Contractor to fulfill their contractual obligations.
- B. There are three distinct types of surety bonds. Please refer to section 9.2B2 below for requirement exceptions.
 - 1. Bid Bond guarantees that the successful Bidder will execute a contract and furnish performance and payment bonds when required. The bond amount equals 5% of bid amount. Bid bonds are required for contracts greater than \$50,000.
 - 2. Payment Bond guarantees the payment of up to 100% of the contracted amount for Contractor's bills for labor, equipment, and materials (consumed or utilized in performance of the work) unless the bond specifies a lesser percentage. Payment bonds are required for contracts greater than \$25,000.
 - 3. Performance Bond guarantees that the Contractor will perform all the terms and conditions of the contract, and, in the event of a default, protects against loss up to 100% of the contracted amount, unless the bond specifies a lesser percentage. Performance bonds are required for contracts greater than \$100,000.

9.2 **BONDING REQUIREMENTS**

- A. For **Construction** Solicitations and Contracts:

- 1. \$25,000 or Less

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No bonds of any type are required for construction estimates/contracts that are \$25,000 or less. (Texas Government Code 2253, June 2013).

2. Exceeding \$25,000 to \$50,000

Federally funded:

- a. Bid bond: Five percent (5%) of bid amount
- b. Payment bond: Equal to one hundred percent (100%) of the resulting contract amount
- c. Performance bond: Not required

Locally funded:

- a. Bid bond: Not required, but Procurement may request certification from the bidder's bonding company that the bidder can obtain payment and performance bonds.
- b. Payment bond: Equal to one hundred percent (100%) of the resulting contract amount
- c. Performance bond: Not required

The bid security shall be in the form of a cashier's check, a certified check or a bid bond issued by a surety company licensed to do business in the State of Texas, and approved for the full amounts of bond coverage required by the U.S. Department of the Treasury Circular 570 (Circular 570), <https://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570.htm>.

3. \$50,001 to \$100,000

- a. Bid bond: Five percent (5%) of bid amount
- b. Payment bond: Equal to one hundred percent (100%) of the resulting contract amount
- c. Performance bond: Not required

4. Exceeding \$100,000

- a. Bid bond: Five percent (5%) of bid amount
- b. Payment bond: Equal to one hundred percent (100%) of the resulting contract amount
- c. Performance bond: Equal to one hundred percent (100%) of the resulting contract amount

The payment and performance bonds shall be in the form of bonds issued by a surety company that is licensed to do business in the State of Texas, is approved for the full amounts of the bond coverage required by Circular 570, can provide such bonds in the amounts required, and meets the requirements of the contract terms and conditions.

B. **For Non-Construction Services, Supplies and Equipment Solicitations and Contracts**

1. \$50,000 or less

No bonds of any type are required for non-construction contracts that are \$50,000 or less.

2. \$50,001 to \$100,000

Federally funded:

- a. *Bid bond: At discretion of Contract Administrator; bid bond only may be sufficient, but is mandatory if payment and/or performance bonds deemed necessary

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- b. Payment bond: At discretion of Contract Administrator, if deemed necessary to protect METRO's interests
- c. **Performance bond: At discretion of Contract Administrator, if deemed necessary to protect METRO's interests

*Locally funded:

- a. Bid bond: Not required
- b. **Payment bond: At discretion of Contract Administrator, if deemed necessary to protect METRO's interests
- c. **Performance bond: At discretion of Contract Administrator, if deemed necessary to protect METRO's interests

*The following situations may warrant a bond:

There is concern with an industry's financial condition or potential bidders' financial capabilities within the respective industry;

- a. METRO makes progress or partial payments to a contractor over a lengthy period prior to the delivery of finished products or completion of the services;
- b. METRO-furnished property falls under the control of a Contractor;
- c. METRO could incur extensive damages due to a Contractor's abandonment or failure to perform a service;
- d. Major equipment is built specifically to METRO specifications;
- e. METRO wants assurance that a successor firm is financially capable after a predecessor firm sells assets to or has merged with the successor firm; or
- f. A contract is for the dismantling, demolition, or removal of improvements.

**Performance and payment bonds for non-construction contracts are not normally required for the following:

- a. Off-the-shelf supplies and nominal fabrication;
- b. Services involving low dollar amounts;
- c. Professional services;
- d. Personal services; or
- e. Service contractors evidencing prior satisfactory performance with METRO.

9.3 WAIVER OF BOND REQUIREMENTS

For non-construction procurements, the Chief Procurement Officer has the authority to rescind the requirements for performance and payment bonds after they have been called for in a solicitation, if it is determined that to do so is in METRO's best interests.

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9.4 **APPROVAL OF SURETY COMPANIES AND BONDS**

- A. The surety company shall hold a certificate of authority as an acceptable surety, and be listed either on the U.S. Department of Treasury Bureau of Fiscal Service <http://www.fms.treas.gov/c570/c570.html> at http://www.fiscal.treasury.gov/fsreports/ref/suretyBnd/c570_a-z.htm, or on the Texas Department of Insurance (TDI) website at <http://www.tdi.texas.gov/commercial/pcbondsurety.html>. To do business in the State of Texas, the surety company must be licensed and have an underwriting limitation equal to or greater than the contract value. For additional help at the state level, Contract Administrators may contact the TDI Personal & Commercial Lines Personal & Commercial Lines Office, at (512)-676-6710. The office address is 333 Guadalupe St., P.O. Box 149104 Austin, TX 78714-9104.
- B. The Contract Administrator will require payment and performance bonds and review them for areas of non-compliance. The Contract Administrator shall take whatever action is necessary to correct the matter.

9.5 **INSURANCE**

- A. The Operations, Public Safety & Customer Service Department/Risk Management Division is responsible for reviewing and evaluating METRO contractual involvement to identify level of METRO risk exposure. Risk Management will coordinate risk mitigation plans with Procurement and other concerned Departments, establishing all required insurance limits and a safety plan commensurate with the risk. Coverage and limits will be maintained within the bounds of 'reasonable and prudent,' in keeping with sound Risk Management practice.
- B. METRO has certain contractual obligations to other public entities to protect their interests in projects. In those cases, limits of insurance must be adequate to cover the interests of all parties.
- C. The Operations, Public Safety & Customer Service Department is responsible for all safety-related matters and must approve all safety plans required by the Contractor.
- D. The Operations, Public Safety & Customer Service Department/Risk Management Division will receive and evaluate all Shopping Carts submitted to evaluate risk and establish insurance and safety requirements. The Shopping Cart shall identify all insurance and safety requirements exactly, in a format transferrable verbatim to an IFB or RFP.
- E. Insurance companies providing insurance shall meet or exceed certain ratings as published in the most recent issue of Best's Key Rating Guide, Property-Casualty, with a rating of B++ or better and VI or better.
- F. At Contract Administrator request, a Risk Management and/or Safety representative will attend pre-bid and pre-proposal conferences to respond to questions regarding insurance safety matters. The representative will provide support at all other times possible, for advice in insurance and safety matters pertaining to the contract.
- G. Risk Management will monitor compliance with insurance requirements throughout the duration of the contract and will coordinate with Procurement to correct matters on noncompliance.

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9.6 CLAIMS HANDLING AND REPORTING

The Contractor is required to report all claims to their appropriate insurance carrier. If the claim may result in claims against the Contractor and/or METRO, the Contractor is also required to report the incidents immediately to METRO. In turn, Contracting Officers will report the incident to the Claims Division, who will investigate on behalf of METRO. Contracting Officers will advise the Contractor to give full cooperation to METRO claims representatives. Under no circumstances should the Contractor and/or Contracting Officer negotiate claims for damages by third parties against METRO. Refer any such requests for negotiation to the Claims Division.

9.7 CONTRACT ADMINISTRATION

- A. The Contracting Officer will obtain Certificates of Insurance as required in a contract and forward copies to Risk Management for review. If the insurance is deficient or non-compliant in any area, Risk Management will contact the Contracting Officer immediately. The Contracting Officer shall take whatever action is necessary to correct the issues. Risk Management will approve and return Certificates of Insurance to the Contracting Officer for inclusion in the official file.
- B. The Contracting Officer is responsible for making sure that there is current and proper insurance coverage during the life of the contract. The Contracting Officer will obtain renewal certificates during the life of the contract and place them in contract files after approval by Risk Management.
- C. The prime Contractor is responsible for its subcontractors. If METRO requires and receives proof of adequate insurance coverage and limits from the prime and the contract contains an appropriately worded indemnification clause, METRO does not need Certificates of Insurance from subcontractors, except as indicated in paragraph C below. The key is the indemnification clause - the contractual transfer of exposure from METRO to the Contractor. The insurance coverage simply assures METRO of the Contractor's financial ability to pay in the event there is a loss.
- D. For construction contracts, a Certificate of Insurance for worker's compensation coverage is required prior to contract award for Prime Contractors and prior to commencement of work for subcontractors.
- E. Not until after approval of all bonds and Certificates of Insurance, along with review and concurrence from other departments that they are demonstrating compliance with the contract requirements, will the Contracting Officer issue a Notice to Proceed (NTP).

9.8 SAFETY

- A. Ensuring the safety of METRO employees and others who perform work for the benefit of METRO, including contractors and subcontractors, is paramount. For this reason, the Safety Department works closely with Procurement staff, Project Managers and other METRO personnel throughout every procurement process. The Safety Department is responsible for managing the System Modification, Safety Certification, and Hazardous Materials programs, among others.
- B. The Safety Department must review any safety-critical system or parts thereof, prior to actual procurement, and any purchases that could modify or change configuration of the rail system in any way must be reviewed and approved by METRO. Project Managers or other requisitioners are to contact the Director of Safety prior to purchasing hazardous materials or safety-sensitive non-OEM items. Such items shall not be purchased until

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the requisitioner and the Safety Department complete a hazard analysis and further review the potential purchase as deemed necessary, and the items are approved by Safety.

- C. Safety-critical systems can include, but are not exclusive of: propulsion systems, braking systems, or software systems for vehicles; signaling systems, track structures, maintenance or repair of vehicles, or the construction of infrastructure used by rail or bus vehicles; control systems used for monitoring safety-critical systems; replacement parts for any of these systems; or any other item that might be used in a safety capacity.
- D. Safety's procurement-related participation also includes drafting safety-related language that appears in procurement documents, attending pre-bid and/or pre-construction meetings, and reviewing all safety requirements for vendors or contractors who perform work on METRO property. Depending on the type of work being done, requirements may include necessary personal protection equipment (PPE), safety training, permits, etc.
- E. The METRO Safety Department conducts training for vendors' employees, including mandatory training for all persons who will work on or near light rail corridors. Safety assigns a field safety officer to monitor safety at work sites. The safety officer has the authority to shut down any project if any safety violations occur.
- F. The Procurement, Materials Management & Small Business Department ensures that its policies and procedures are in alignment with all safety-related responsibilities cited in METRO's Rail Safety System Program Plan (RSSPP). Such responsibilities include ensuring that any hazardous materials purchased and inventoried by the Authority are included on the approved chemicals list, with hard-copy and electronic Materials Safety Data Sheets (MSDSs) on file, and are properly identified and labeled.
- G. A copy of the RSSPP is filed on the Safety Department's Intranet site under the 'Policies, Procedures and Guidelines' tab, and is accessible to all employees. MSDS sheets are filed on the Safety Intranet home page under the 'Documents' tab and then 'MSDS Search.'

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10 REQUIREMENTS FOR GENERAL COUNSEL REVIEW

The principal role of general counsel is set out in Section 1 of Article 3 of the By-Laws of the Metropolitan Transit Authority. That section states, in pertinent part:

"All contracts shall be executed by either the Chairman or the Executive Director, attested by the Secretary or an Assistant Secretary, and approved by the Chief Financial Officer and the General Counsel or their designated representatives. Any contract not so approved is void and of no effect as to the Authority."

The title 'Executive Director' is now 'President & CEO.' The Chief Financial Officer has delegated the responsibility for certifying that funds are available to the Director of Accounting/Controller and in his absence to the Director of Treasury.

While not stated in the By-Laws, traditionally the review and approval of Legal Counsel relates to form of the contract and not necessarily its sufficiency.

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11 REQUIREMENTS FOR AUDIT DEPARTMENT REVIEW

The Procurement, Materials Management & Small Business Department and Audit Department maintain a close, collaborative relationship resulting in savings for METRO.

11.1 PRE-AWARD CONTRACT AND MODIFICATIONS AUDITS

- A. Competitively bid, fixed price contracts do not normally warrant pre-award audits.
- B. Pre-award audits for negotiated contracts or modifications of \$100,000 or less are not normally required subject to the constraints in paragraph E below.
- C. Pre-award audits in negotiated firm, fixed price contracts or modifications exceeding \$100,000 normally are not necessary when sufficient independent information exists to determine a fair and reasonable price without an audit. If the Contract Administrator or Manager of Contracts is not satisfied that sufficient information exists, he or she will request an audit. The cost/price analysis should be well-documented for future audit review.
- D. The Audit Department should perform pre-award audits for negotiated contracts or modifications exceeding \$100,000 when price is contingent on the Contractor's overhead rates or indirect cost or for which cost or pricing data is required or requested.
- E. Contract Administrators should consider an audit in the following circumstances:
 - 1. Cost reimbursement contracts;
 - 2. Sole source contracts;
 - 3. When conducting negotiations with a single bidder responding to an IFB;
 - 4. The adequacy of the Contractor or subcontractor accounting system;
 - 5. Prior audit experience indicates a new audit may be appropriate;
 - 6. Analysis and verification of adequacy of cost or pricing data;
 - 7. Previous unfavorable experience indicating doubtful reliability of estimating, accounting, or purchasing methods;
 - 8. A lack of cost experience due to the procurement of a new supply or service; or
 - 9. Any other circumstance that an audit is in METRO's best interests.
- F. METRO shall apply standard provisional overhead rates of 150% for services performed in-house and 125% for services performed in the field to all contractors that cannot provide supporting documentation to substantiate higher rates. METRO's Audit Department will verify all supporting documentation presented by contractors to justify higher than standard overhead rates.

11.2 POST AWARD CONTRACT AUDITS

- A. The type of contract or contract modification which should be audited is that in which price is subject to adjustment based on costs, or that in which auditing may be appropriate to ensure satisfactory performance (such as a labor hour or time and materials contract), or occasionally to ensure compliance with the contract requirements or federal guidelines. An audit may be required or appropriate in the following circumstances:
 - 1. For contract modification proposals, which exceed \$100,000, subject to Part 15.1;

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2. In order to verify that billed costs are accurate and to establish an audited overhead rate, the Audit Department should conduct audits annually and/or upon close out, (if the performance period is less than one year) for cost-plus contracts;
3. The Audit Department should perform a close-out audit on competitively bid contracts (both construction and procurement) over \$100,000 to ensure compliance with the terms and conditions of the contract, proper and adequate documentation, and proper accounting and safeguarding of the assets received. Part of this process would include an accounting of grant funds, if any;
4. To confirm the adequacy of the Contractor or subcontractor's accounting system;
5. To confirm the accuracy of cost reimbursement invoices submitted by the Contractor or subcontractor for payment;
6. When the contract includes federal assistance funds;
7. To assess the fluctuation of market prices affecting the contract;
8. To audit Contractor claims, not initially denied, to assess accuracy of the cost claimed, logic of the claim within the contract scope, and the relative financial position of the firm.

11.3 BUY AMERICA (PRE-AWARD AND POST AWARD)

METRO shall request and perform Buy America pre-award and post-award audits for federally funded procurements of rolling stock in accordance with Federal Transit Administration (FTA) guidelines.

A. *Basic Requirement:*

Per FTA's 'Buy America' requirements, federal funds may not be obligated unless the United States produces the steel, iron, and manufactured products used in FTA funded projects, unless FTA has granted a waiver, or the product is subject to a general waiver. Rolling stock must have seventy percent domestic content and final assembly must take place in the United States.

B. *Areas to Examine:*

1. Buy America Provisions and Certifications

For all procurement of steel, iron, and manufactured products (including rolling stock) over \$100,000, the grantee is required to obtain and retain a Buy America certification of compliance from the successful bidder. The only exception is for an item subject to a Buy America waiver. If the procurement is not subject to a permanent waiver and the successful bidder/responder certified non-compliance with Buy America, then the grantee must have a waiver from FTA on file.

Grantees may request and FTA can grant a specific Buy America waiver in one of three circumstances: (1) when it is in the public interest, (2) when domestically produced goods are not available, or (3) when there is a price differential of at least 25 percent between domestic and foreign bids. Refer to the FTA website for detailed information on Buy America waivers. Grantees should know that issue of waivers is on a case-by-case basis and typically applies only to the particular procurement. A grantee may not apply a ruling from another grantee's procurement to its particular situation.

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2. Pre-Award and Post-Delivery of Rolling Stock

Grantees must conduct a pre-award and post-delivery audit for all purchases of rolling stock in order to verify achievement of the seventy percent domestic content and final assembly requirements. The Audit Department will review the process followed and the documentation maintained by the grantee to determine satisfaction of the requirements.

11.4 REQUESTS FOR AND APPROVAL OF AUDITS

- A. Contracting Officers will prepare a 'Request for Audit Services' form¹ when the need for an audit or another service provided by Audit arises.
- B. The relevant Procurement Manager will sign requests for audits and submit them to the Vice President and Chief Auditor.
- C. Contract Administrators will make reasonable efforts to submit an audit request in a timely manner before negotiations.
- D. The Vice President and Chief Auditor will determine if an audit is appropriate and determine the substance of the audit.
- E. A preliminary report will be given to the requesting party with a copy to the Director of Contracts as soon as an audit is completed, followed by a written report to the Chief Procurement Officer.

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12 **BID PROTESTS AND DISPUTES**

12.1 **PROTEST AND DISPUTES/CLAIMS OVERVIEW**

- A. This chapter addresses the processes relating to the filing and resolution of bid protests and of contract disputes or claims. Both processes begin when an interested party submits a written protest letter to METRO.
- B. To preserve and protect the integrity of METRO and its procurement system, the Authority shall conduct all procurements in a way that ensures all prospective Contractors receive fair and equal consideration in the selection and award of Contractors for METRO contracts. Interested parties to a procurement action or proposed action are eligible to submit written protests and have the right for their complaints considered and resolved administratively by METRO in an economical and expeditious manner.
- C. An interested party (protestor) is aggrieved or has direct economic interests potentially adversely affected by 1) the terms, conditions or form of the procurement, 2) the method of procurement and award, 3) the award of a contract, or 4) failure to award the contract. Subcontractors, individual members of a consortium, joint venture, partnership or team, acting solely in an individual capacity, and associations or organizations that do not perform contracts, do not qualify as interested parties
- D. Upon receipt of a protest letter, Procurement shall deliver the protest letter and complete contract file to METRO's Legal Department. All Procurement personnel, Project Managers and any METRO employees with knowledge of facts related to the protest shall refer any future inquiries by third parties to METRO's Legal Department, who shall prepare any necessary response to the protest letter and be responsible for the future representation of METRO regarding the protest matter.

12.2 **SOLICITATION INSTRUCTIONS REGARDING PROCEDURES FOR SUBMITTING PROTESTS**

- A. Solicitations shall advise bidders/offerors of the timeframe for filing any protest.
- B. Solicitations shall advise bidders/offerors to submit protests in writing to the Chief Procurement Officer. METRO will provide a copy of the procedures upon written request.
- C. For federally funded procurements, solicitations shall include the following wording:

FTA Circular 4220.1F Section VII-1, Written Protest Procedures, addresses Bid Protests. METRO will provide a copy of this paragraph upon written request. Review of a protest by FTA will be limited to a grantee's failure to have or follow its written protest procedures, its failure to review a complaint or protest, or violations at federal laws or regulations. An appeal to the FTA must be received by the cognizant FTA regional office or Headquarters within five (5) working days of the date the protester learned or should have learned of an adverse decision by the grantee or other basis of appeal to FTA.

At a minimum, METRO shall notify the FTA of any protest received. Refer to Chapter VII Section I, Written Protest Procedures, of FTA Circular 4220.1F.

- D. Protestors must exhaust all administrative remedies available with METRO by following METRO's protest procedures through to completion before appealing METRO's decision to the FTA.

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- E. When considering protests concerning violations of a specific federal law or regulation, the FTA will follow the complaint process stated within that law or regulation. The FTA will refer alleged violations of State or local law to the authority having proper jurisdiction.

12.3 PROTEST PROCEDURES

12.3.1 Written Protest Submission Requirements

Interested parties who wish to protest a matter involving a proposed procurement or contract award shall file a written submission with METRO's Chief Procurement Officer. The written submission must include, at minimum, the following:

- A. The name, address and contact information of the interested party and its relationship to the procurement, with sufficient information to establish that an interested party is filing the protest;
- B. Solicitation, contract or project number as applicable, and title of the procurement;
- C. Statement of the grounds for the protest, including the provision(s) of the solicitation and the federal or state law, or federal or METRO regulation that serves as the basis for the protest;
- D. Statement of the specific relief requested;
- E. Reference to and attachment of any pertinent documents or sources relied upon by the protestor that the protesting party wishes to have considered by METRO; and
- F. Affidavits attached to the written submission to support factual allegations stated in the submission, as necessary.

12.3.2 Timeframe for Filing Protests

- A. The Chief Procurement Officer must receive the initial protest submission directed to the terms, conditions, or form of a proposed procurement action no later than five (5) calendar days prior to the date established for opening of bids or receipt of proposals.
- B. The Chief Procurement Officer must receive the initial protest submission for protests concerning award decisions, including bid evaluations, no later than five (5) calendar days after the interested party knows, or through exercise of reasonable diligence should have known, whichever is earlier, of the grounds for the protest.
- C. The Chief Procurement Officer shall deem as untimely, any initial protest submissions received after the time periods specified in the sections above. The Chief Procurement Officer may also deny the protests on that basis unless he/she concludes that the issue(s) raised by the protest involves fraud, gross abuse of the procurement process, or otherwise indicates substantial prejudice to the integrity of the procurement system.
- D. METRO may reconsider protest requests that a protester initially submitted in a timely manner, but METRO denied, if METRO receives such requests no later than the date of award of the contract and the protestor provides data not previously known, or there was discovery of an error in law or regulation that became available since the date of denial.

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12.3.3 Protest Review and Protest Committee Assignment

- A. After review of the protest, METRO may determine that support for the protest was insufficient, or the protest was premature, untimely or for other reason(s) not appropriate for presentation to a Protest Committee. In these instances, the Chief Procurement Officer will advise the protester, in writing, of the reason(s) why its protest will not be considered by a Protest Committee.
- B. If the protest is not defective in the manner described in the preceding paragraph, the Chief Procurement Officer will designate a Protest Committee consisting of at least the following personnel: (Note: This designation does not preclude the Protest Committee from finding the protest to be defective in a manner described in the preceding paragraph.).
 - 1. A Manager, or above, within the Procurement Division not responsible for the procurement;
 - 2. A member of the Office of General Counsel;
 - 3. A Manager, or above, or professional level staff member not responsible for the procurement.
- C. Procurement will notify the Protest Committee as soon as practicable after receipt of formal protest.
- D. Protest Committee shall convene a hearing as soon as practicable after receipt of protest material.
- E. Protester and protester's representative, if any, have an opportunity to orally present basis for protest and submit any written documentation in support of protest.
- F. The Protest Committee shall provide a written report of findings and recommendations to the President & CEO as soon as practicable after the hearing.
 - 1. The President & CEO will convey the final, written decision to the protester as soon as practicable after signing the decision.
 - 2. In protests involving federal or state grant funds, the Chief Procurement Officer or General Counsel shall forward as appropriate, a copy of all necessary documents and the President & CEO's decision when requested by FTA or other appropriate grantor agency. The forwarded protest file must meet the timeframe requirements specified by FTA Circular 4220.1F or the State of Texas.

12.3.4 Notice to Other Interested Parties – Opportunity for Comment

- A. Within seven (7) calendar days of receiving and filing a protest, the Chief Procurement Officer, or designee, shall furnish notification to all other known interested parties, unless the Chief Procurement Officer rejects the protest as untimely. The Chief Procurement Officer shall provide a copy of the initial protest submission if relevant to the protest, and afford such parties an opportunity to respond to the protest. Such notification shall only apply to protests received before award.
- B. The timeframe for responses allowed by the Chief Procurement Officer or designee, depends upon the nature and complexity of the protest. Except for extraordinary circumstances, the timeframe shall not exceed seven (7) calendar days from the date of the transmittal of the protest to other interested parties.
- C. The Chief Procurement Officer or designee, shall require that a copy of any responses be provided to the party initially filing the protest and, in his sole discretion, may request or permit additional submissions from any party. The period for receipt of final submissions from any party, except in extraordinary circumstances, shall not extend beyond twenty-one (21) calendar days from the determination of the validity of the protest.

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12.3.5 Proprietary Information

From any submission and from any party, the Chief Procurement Officer shall extract information identified as proprietary, if in his judgment the following applies:

- A. The information constitutes confidential or proprietary materials, or;
- B. The materials would give a party a competitive advantage prior to furnishing such submission to any other party, unless the person furnishing the information consents, in writing, to distribution of the information to other interested parties.

12.4 ACTION PENDING PROTEST DECISION

- A. When METRO receives a timely protest, filed by the protestor prior to opening of bids or receipt of proposals, METRO will extend the date for receipt of bids or proposals to accommodate the time needed for resolving the protest and for instituting any necessary remedial measures. METRO will retain the unopened Bids during the time of protest resolution unless METRO determines to open bids using the procedures set forth in paragraph below.
- B. METRO must make timely notification to the FTA in the event of receipt of a protest, and provide access to any documents requested by the FTA.
- C. When METRO has opened bids or proposals received prior to the receipt of a timely protest, METRO shall not make an award sooner than seven (7) calendar days after the resolution of the protest, unless the Contracting Officer documents and determines that:
 - 1. The procurement items are urgently required;
 - 2. Delivery or performance will be unduly delayed by failure to make the award promptly; or
 - 3. Failure to make prompt award will otherwise cause undue harm to the Authority or the federal government.
- D. The Chief Procurement Officer's and President & CEO's approval shall be required prior to making award based upon an exception stated above.

12.5 REMEDY

If the President & CEO determines that a protest is meritorious, and upholds the protest in full or in part, METRO will take appropriate action on a case-by-case basis to correct the procurement process and protect the rights of the protestor. Depending on the circumstances and as the Protest Committee deems appropriate, METRO's actions may result in one or more of the following remedies:

- A. Change in the terms, conditions or form of the procurement
This remedy is appropriate when the procurement, if not changed, has a high likelihood of unfairly restricting competition or is in violation of requirements established in METRO's Procurement Regulations or in other applicable regulations or standards issued by the federal government.
- B. Rejection of Bid or Proposal
Use this remedy only when the record establishes convincingly that METRO cannot legally accept a bid or proposal or, where Contracting Officer discretion is involved, that the rejection has a rational basis.

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C. Cancellation of Solicitation

A solicitation may be canceled prior to disclosure of prices when it is in METRO's best interest to do so (e.g., where it does not adequately state METRO's needs and extensive revision is necessary to effect correction) or necessary to assure fair and equal competition. After prices are disclosed, an IFB may be canceled only where there is a substantial reason (e.g., all prices are excessive, specifications are defective) for cancellation.

D. Re-Evaluation of Proposals/ New Best Value Tradeoff

If METRO's Protest Committee finds a deficiency in METRO's evaluation process, whether during the evaluation of initial proposals or during the competitive range, METRO may re-evaluate submissions and/or perform a new best value tradeoff analysis without re-performing the procurement.

E. Any Action That Addresses the Procurement Deficiency

Contracting Officers have broad discretion in addressing the deficiencies discovered by METRO's Protest Committee.

F. Award to Party Filing Protest

Use this remedy only when rejecting bids or proposals that are all more favorable and the party is otherwise eligible for award.

12.6 PROTESTS FILED WITH THE FTA

- A. The Contract Administrator is responsible for compliance with all provisions of FTA protest procedures as set forth in FTA Circular 4220.1F Section VII-1, "Written Protest Procedures", for all protests involving a METRO acquisition, filed with FTA. The Contract Administrator shall obtain the concurrence of Chief Procurement Officer and Staff Counsel in all submissions to FTA.
- B. The Contract Administrator shall withhold award, pending resolution of a protest filed with the FTA unless the Contract Administrator determines that award is permissible under the FTA protest procedures and the President & CEO and Chief Procurement Officer concurs with that determination. Upon such a determination, the Contract Administrator shall notify the FTA prior to award.
- C. If the FTA sustains a protest, the Contract Administrator shall consult with the Chief Procurement Officer and with General Counsel on the course of action to take with the acquisition, but shall obtain approval from the President & CEO on the proposed course of action before initiating the action plan.

12.7 CLOSING THE RECORD – FINAL DECISION

- A. Upon receipt of final submissions or upon conclusion of any conference among the parties, METRO will consider the record closed unless the Chief Procurement Officer requests additional submissions.
- C. The President & CEO will issue a final written decision on the protest as soon as practicable after receipt of the initial protest submission.

12.8 METRO CONTRACT DISPUTES APPEAL PROCESS

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Every solicitation valued at more than \$50,000 will provide METRO's Contract Disputes Appeal Process for a Contractor or Consultant to follow in any resultant contract from the solicitation. There will be no charge to the Contractor or Consultant for the appeal process.

- A. The Contract Administrator must issue a final written denial decision hereinafter referred to as 'Final Decision of Contracting Officer,' (Final Decision) unless advised to settle by METRO Legal Counsel.
- B. The Contractor/Consultant must submit a written appeal of the Final Decision.
- C. The Chief Procurement Officer will designate a Contract Disputes Appeal Committee consisting of at least the following personnel:
 - 1. A Manager, or above in the Procurement Division not responsible for the procurement;
 - 2. A legal member of the Office of General Counsel;
 - 3. A Manager or higher-level position from the Procurement, Materials Management & Small Business Department, or a professional level staff member from a department outside of Procurement & Materials.
- D. The Contract Administrator will prepare an indexed and tabbed Disputes Appeal file in four (4) sets. The Contract Administrator will provide one set to the Procurement & Materials Executive Assistant to maintain for the central disputes file, and the Contract Administrator will provide one set to each Contract Disputes Appeal Committee member. Each file will consist of:
 - 1. Contractor's/consultant's initial claim correspondence;
 - 2. Final Decision of Contract Administrator;
 - 3. Relevant correspondence and data pertaining to the dispute; and
 - 4. Relevant parts of specifications, statement of work, scope of service, drawings, contract articles or other provisions.
- E. The responsible Manager will notify the individual Contract Disputes Appeal Committee members of their appointment in writing.
- F. The responsible Manager will set a date for the Contract Disputes Appeal Committee hearing mutually acceptable to the Contractor/consultant and METRO.
- G. The responsible Manager will advise the Contractor/Consultant in writing of the following:
 - 1. The Contract Disputes Appeal Committee hearing time, date and location;
 - 2. The hearing will afford the Contractor the opportunity to present its position orally to the Committee;
 - 3. The Committee will also consider any written documentation the Contractor/consultant wishes to present;
 - 4. The Contractor/consultant may present technical or other representatives in its behalf; and
 - 5. The names and positions of the Contract Disputes Appeal Committee hearing members.
- H. The Contract Disputes Appeal Committee shall provide a written report of findings and recommendations to the President & CEO as soon as practicable after the hearing.
- I. The President & CEO's will convey his decision, in writing, to the Contractor/Consultant as soon as practicable after signing the decision.

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- J. In disputes involving federal or state grant funds, either the Procurement Manager or General Counsel shall forward a copy of all necessary documents and the President & CEO's decision when requested by the FTA or other appropriate grantor agency, or when METRO management staff determines it is advisable to do so.

12.9 DISPUTES REVIEW BOARD (DRB) PROCESS

- a. METRO selects this method prior to the award of large dollar contracts, such as public works projects and is so noted in the resultant contract.
- b. The Contract Administrator must issue a final written denial decision.
- c. The Contractor/Consultant must submit a written appeal of the Contract Administrator's final decision within fifteen (15) calendar days requesting the DRB, or the Contract Administrator may refer the matter to the DRB.
- d. The DRB shall establish a hearing time and date within fifteen (15) calendar days from the request of hearing.
- E. A response to potential claims under this method shall be as follows:

<u>Amount of Claim</u>	<u>Response Time</u>
Under \$50,000	within 45 days
\$50,000-\$375,000	within 60 days
\$Over \$375,000	within 90 days

METRO and the Contractor may extend these time limits, as specified by mutual agreement, in writing.

- F. The decision of the Contract Administrator will be final unless, within 10 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes a written appeal of the final decision.

12.9.1 Composition of the DRB

- A. Within 20 days after the Notice-to-Proceed (NTP), the Contractor and METRO shall each designate a member of the Disputes Review Board (DRB) and within forty (40) days after the NTP, both shall designate a third member of the DRB.
- 1. DRB members should be experienced with the work involved in the contract and be experienced in interpreting contract documents.
 - 2. No member of the DRB shall have any conflict of interest that would prevent that member from impartially serving on the DRB.
 - 3. No member shall have been an employee, within a period of one year prior to award of the contract, of any entity with a financial interest of the contract; except that service as a member of any other Dispute Review Board on other contracts will not preclude a member from serving on the DRB for this contract.
 - 4. All prospective members of the DRB shall make full disclosure of all financial interest in, or other involvement with, the work and any entities associated with the work, including any close professional or personal relationships.
 - 5. All parties shall sign the agreement, which shall become part of the contract file.

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B. Termination and Replacement of any DRB Member

1. Service of a DRB member may be terminated at any time with not less than ten (10) days written notice as follows:
 - a. METRO may terminate service of the METRO appointed member;
 - b. The Contractor may terminate service of the Contractor appointed member;
 - c. The two members must agree to terminate the Chair's service; and
 - d. By resignation or incapacity of any member.
2. Should a member of the DRB need replacement, METRO or the Contractor shall appoint the replacing member in the same manner as the original (replaced) member. The appointment process shall begin promptly upon determination of the need for replacement, and shall be complete within twenty (20) days.

C. Duties of the Dispute Review Board

1. The DRB shall receive written progress reports on a monthly basis and shall visit the Contractor's facilities and work sites in Houston, Texas as necessary. All parties shall agree upon the visits in advance.
2. The DRB shall hold regular meetings and if necessary, METRO shall prepare minutes of these meetings.
3. The DRB shall establish regular operating procedures including frequency of meetings, time and place of meetings.

D. Cost of the DRB

1. METRO, through its Project Manager, shall provide administrative services, at no cost to the Contractor.
2. Compensation and expenses of the DRB shall be borne equally by METRO and the Contractor as follows:
 - a. METRO and the Contractor shall pay the DRB member each selected all compensation for fee and expenses of that DRB member.
 - b. METRO and the Contractor shall each pay one-half of all compensation for fees and expenses for the third member.
 - c. An allowance shall be included in the contract to pay METRO's share of the costs of the DRB. The allowance will not cover the salaries and costs of the representative or the Contractor who participates in the DRB process. The Contractor shall be responsible for the payment of the fees and expenses of the three members of the DRB. METRO will reimburse the Contractor for the costs of METRO's representatives from the allowance.

12.9.2 Hearing of Disputes

- A. A hearing must be held within thirty (30) days of referral.

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B. Hearing Procedure:

1. Their respective project management will represent METRO and the Contractor;
2. Legal representatives may participate only by agreement of both parties;
3. Each may offer evidence to support their positions;
4. DRB members may ask questions, seek clarification, or request data;
5. The DRB will take into consideration as part of their decision, a refusal by either party to provide requested documentation

C. Post-Hearing Procedures:

1. After conclusion of the hearings, the DRB shall meet in private and reach a decision supported by two or more members.
2. The DRB shall submit their recommendation in a written report to METRO's President & CEO, who shall make the final decision on the dispute.
3. Should a decision not be unanimous, the dissenting member may prepare a minority report.

D. Non-binding:

1. The decision of the President & CEO will be final and conclusive with respect to the Contractor's administrative remedies under the Disputes Article.
2. The Contractor shall continue work under the terms of the contract while awaiting the final decision.
3. Either party may appeal to the DRB for reconsideration of the final decision when there is new evidence to present.
4. If the dispute is not resolved, it is the intent of the parties that all documents submitted to the DRB and its hearing record and written pertaining to the dispute will be admissible as evidence, to the extent permitted by applicable law, in any subsequent proceeding.

E. Action on DRB Recommendation:

1. Within twenty-one (21) calendar days of receiving the decision from METRO's President & CEO or such other time as specified by the DRB, both METRO and the Contractor shall respond to the other in writing stating whether the dispute is resolved or remains unresolved.
2. If the dispute is resolved, METRO shall promptly modify the contract, as may be appropriate.
3. Should the dispute remain unresolved, either part may appeal the decision back to the DRB, or may resort to other methods of settlement.

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The METRO Board of Directors (METRO Board) has established two policies for the certification and use of small businesses in the contracting of goods and services. The Small Business Enterprise (SBE) Program has been approved by the METRO Board and the Disadvantaged Business Enterprise (DBE) Program has been approved by the METRO Board and the Federal Transit Administration (FTA). Each Program works in concert with the Procurement Manual but is separate and independent and incorporated herein by reference.

Execution of the duties and activities related to the METRO Small Business Enterprise Program and the FTA-approved Disadvantaged Business Enterprise Program (DBE) requirements fall under the administration of the **Office of Economic Business Opportunity** (OSB). The role of the **Office of Economic Business Opportunity** is to provide leadership to ensure full and equal business opportunity in METRO contracting and procurement opportunities. OSB staff will work internally with METRO managers and procurement personnel as well as externally with contractors, suppliers and other vendors. Throughout the procurement process, **Office of Economic Business Opportunity** staff helps identify and resolve problems in order to maintain METRO compliance with local, state and federal statutes.

- A. The METRO President & CEO is responsible for seeing that the objectives of the program are satisfied. The Deputy Chief Procurement Officer is delegated the responsibility to ensure that the day-to-day duties and activities of the department are carried out in compliance with federal, state and local laws, as well as METRO policy.
- B. METRO is required by federal regulation to designate a Disadvantaged Business Enterprise Liaison Officer (DBELO). The DBELO must have direct access to the President/CEO and is responsible for ensuring agency compliance with the federal DBE statute and regulations.
- C. For additional information, METRO's Small Business and Disadvantaged Business Enterprise programs and procedures are available on the METRO website at <http://www.ridemetro.org/Pages/SB-FormsTemplates.aspx> under 'Business With METRO/'Small Business.'
- D. METRO commits to include small businesses in the region's economic system, thereby ensuring that small firms have an equitable opportunity to participate in METRO procurements. METRO will encourage small businesses to participate as fully as possible in all aspects of METRO's Small Business Program.
- E. METRO's Procurement Department will take action to ensure that small businesses have an equal opportunity to participate in procurement and contracting opportunities financed in whole or in part, with funds that are local and/or derived from the Federal Transit Administration (FTA).
- F. The Procurement process will include the following steps in compliance with the SBE and DBE Programs:
 1. Ensure contracts are sent to OSB to be evaluated for a SBE goal.
 2. Include SBE documents in contracts with small business goals as determined by OSB.
 3. Include contract clauses committing to fifteen (15) business days payment on invoices for contracts with Small Business goals after the receipt of properly prepared invoices, which includes completion of METRO's on-line Contract Audit screen, Subcontractor Invoice Report and loaded subcontractor invoices.
 4. Include OSB in contract issues involving an SBE
- G. Following is a partial list of on-going procurement and related activities of the **Office of Economic Business Opportunity**:
 1. Reviewing scope of works and establishing Small Business goals as applicable;
 2. Confirmation of small business documentation and/or language in procurements prior to advertisement and during the evaluation process and at contract award;
 3. Participation at pre-bid and pre-proposal conferences;

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4. Participation on evaluation and selection committees for contracts with Small Business goals;
5. Participation at pre-construction conferences and kick-off meetings;
6. Assist in the resolution of SBE/DBE vendor complaints;
7. Compliance tracking, monitoring and reporting;
8. Hosting and attending procurement information seminars; and
9. Providing management and technical assistance to qualified firms.

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14.1 **MASTER AGREEMENTS AND CLAUSES (ARTICLES) FOR FTA-FUNDED CONTRACTS; DAVIS-BACON RATES**

- A. Master Agreement sets forth the terms and conditions that govern the administration of a mass transportation project or program of projects supported with federal financial assistance awarded by FTA through a Grant Agreement or Cooperative Agreement with METRO.

The latest FTA Master Agreement can be located on the Internet at

<https://www.transit.dot.gov/funding/grantee-resources/sample-fta-agreements/fta-grant-agreements>

- B. The Contracting Officer must include in the solicitation and contract both the FTA mandatory clauses and required clauses specified in the specific FTA grant. In the event of a conflict in language, the grant required clause has precedence. The Contracting Officer may obtain a copy of the specific grant from the Grant Program Division. Third party required contract clauses are set forth in Appendix D of FTA Circular 4220.1F.
- C. Federally Funded Contracts

Refer to the latest version of the FTA Circular for Third Party Contracts for guidance when using FTA assistance to support the acquisition. Federal Contracts shall include all the Third-Party Contract requirement clauses set forth in Appendix D of FTA Circular for Third Party Contracts. Listed below are procedures for Contract Administrators, specific to contracts associated with federal funding.

1. Provisions or conditions, which will allow for administrative, contractual, or legal remedies in instances where Contractors violate or breach contract terms, and provide for such sanctions as may be appropriate.
2. All contract amounts in excess of \$10,000 shall contain suitable provision for termination by METRO, including the manner by which the termination will be effected and the basis for settlement. Additionally, such contracts shall describe conditions under which METRO may terminate the contract for default, as well as conditions of contract termination because of circumstances beyond the control of the Contractor.
3. All contracts awarded with a value exceeding \$10,000 shall contain a provision requiring compliance with Executive Order 11246, entitled 'Equal Employment Opportunity' as amended by Executive Order 11375, and as supplemented in Department of Labor Regulations (41 CFR Part 60).
4. All federally funded contracts for construction or repair having a value of more than \$2,000 shall include a provision for compliance with the Copeland 'Anti-Kickback' Act (18 USC 871) as supplemented in Department of Labor Regulations (29 CFR Part 3).
5. All construction contracts awarded in excess of \$2,000, when required by federal grant program legislation, shall include a provision for compliance with the Davis-Bacon Act (40 USC 276a to 1-7) and as supplemented by Department of Labor Regulations (29 CFR Part 5). In addition to paying hourly wages of not less than the minimum wage, Contractors shall be required to pay wages not less than once a week. A copy of METRO's current prevailing wage determination shall be included in each solicitation and the award of the contract shall be on the condition that the Contractor accepts the wage determination.
6. All federally funded contracts awarded (in excess of \$2,000 for construction contracts, in excess of \$2,500 for other contracts, and which involve the employment of mechanics or laborers), shall include the

¹ see Procurement Intranet Home page-Procmt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools

² see METRO Intranet Home page Online Forms (Procurement, unless noted) ⁵ see Procurement Intranet Home page (Office of Economic Business Opportunity)

³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

following provisions. Compliance with Sections 103 and 107 of the contract work hours and Safety Standards Act (40 USC 327-330), as supplemented by Department of Labor Regulations (29 CFR Part 5). Section 103 requires an 8-hour standard weekday - 40 hours per week and 1 1/2 times the basic pay for all hours worked in excess of 8 hours in any calendar day or 40 hours in the workweek. Section 107 requires that working conditions must be sanitary, and not hazardous or dangerous to the health or safety of the worker. These requirements do not apply to the purchase of supplies or materials or articles ordinarily available on the open market.

7. All federally funded contracts in excess of \$100,000 shall contain a provision requiring the recipient to agree to comply with all applicable standards, orders or regulations issued under the following:
 - a. Section 306 of the Clean Air Act (42 USC 1857(h));
 - b. Section 508 of the Clean Air Water (33 USC 1368);
 - c. Executive Order 11738;
 - d. Environmental Protection Agency Regulations (40 CFR Part 15); and
 - e. Reporting requirements for violations.
8. All federally funded contracts shall include notice of the requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention that arises or develops during the contract, and requirements and regulations pertaining to copyrights and rights in data.
9. Appropriate provisions for access to any books, documents, papers, and records directly pertinent to the specific contract for the purpose of making audit, examination, excerpts, and transcriptions in negotiated contracts, and such records shall be required to be maintained for three years following final payment or all other pending matters are closed, whichever is later.
10. All federally funded contracts and other contracts where required by law, shall recognize mandatory standards and policies relating the energy efficiency, which are contained in the State Energy Conservation Plan in compliance with the Energy Policy and Conservation Act.
11. Federally funded procurements prohibit the use of piggybacking, however, piggybacking is permissible when the Invitation for Bids (IFB) and the resultant contract contain an assignability clause that provides for assignment of all or a portion of the items as originally advertised, competed, evaluated, and awarded. Refer to the Piggybacking Worksheet¹. If METRO solicited, competed and awarded the items through a requirements-type contract, both the IFB and the contract award must specify both minimum and maximum quantities that represent METRO's foreseeable needs.
12. All procurements for rolling stock and all options shall not exceed five (5) years for buses and seven (7) years for rail cars, inclusive of options. METRO should base all other types of contract (supply, service, lease of real property, revenue and construction, etc.) on sound business judgment. Any extensions in the period of performance that amounts to an out-of-scope change will require a sole source justification.

The time duration for rolling stock, from the original date of a contract plus any option periods, shall not exceed five (5) years (MAP-21 amended 49 U.S.C. Section 5325 (e) (1) (A) and (B) and 4220.1F Rev 4, Section IV).

13. For all federally funded contracts, METRO must evaluate all options at the time of bid opening. (See Chapter 7 for additional information on Options).

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14. Revenue contracts are those third party contracts whose primary purpose is either to generate revenues in connection with a transit related activity, or to create business opportunities utilizing an FTA funded asset. FTA requires that these contracts awards utilize competitive selection procedures and principles. The extent of and type of competition required is within the discretionary judgment of the grantee.
15. METRO shall not consider geographic preferences, except in those cases where applicable federal statutes expressly mandate or encourage geographic preference. This does not preempt State licensing laws. However, geographic location may be a selection criterion in procurements for architect engineer (AE) services provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.
16. METRO will not award a contract to any vendor that is on the U. S. General Services Administration (GSA) 'List of Parties Excluded from Federal Procurement or Non-Procurement Programs.' By signing his/her bid, each bidder certifies that the bidding vendor is not on the herein-mentioned list. As described in Chapter 4, Section 10 as part of the due diligence effort the Contract Administrator shall check the GSA website at <https://www.sam.gov/index.html/#1> <https://www.sam.gov/index.html/#1> (must have IE11 or higher, or Chrome, Firefox, Safari) to verify that the successful bidder is not on the list prior to award of a contract. This debarment website is included in the list under the Procurement Intranet page 'Useful Links' tab.
17. METRO shall implement time-and-materials contracts only under the following circumstances:
 - a. After a determination that no other type of contract is suitable; and
 - b. If the contract specifies a ceiling price, the Contractor shall not exceed except at its own risk.
18. METRO shall not implement the 'cost-plus-a-percentage-of-cost' method.

19. PAYMENT PROVISIONS

1. Advance Payments: FTA does not authorize and will not participate in funding payments to a Contractor prior to the incurrence of costs by the Contractor unless FTA obtains prior written concurrence. There is no prohibition on the use of local match funds for advance payments. However, advance payments made with local funds before award of a grant, or before the issuance of a letter of no prejudice or other pre-award authority, are ineligible for reimbursement.
2. Progress Payments: Progress payments are acceptable provided the following requirements are satisfied:
 - a. METRO makes progress payments to the Contractor for costs incurred in the performance of the contract only;
 - b. METRO maintains adequate security for progress payments. Adequate security may include taking title, letter of credit or equivalent means to protect METRO's interest in the progress payment.

D. Davis Bacon General Wage Determinations (GWDs)

Davis Bacon GWDs are issued annually and with periodic interim updates by the Dept. of Labor for Building Construction, Heavy Construction, and Highway Construction.

As a general rule, the most current wage determinations issued and in effect at the time of contract award must be used in Davis-Bacon covered contracts. There is, however, some flexibility concerning wage

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determinations issued close to a bid opening date, especially for contracts stemming from competitive bidding procedures (IFBs).

1. GWDs Issued BEFORE A Bid Opening Date:

If a GWD is issued less than 10 days before a bid opening date, the newly issued wage rates should be used in the resulting contract and all bidders notified of the update. HOWEVER, if it is determined that there is not sufficient time to notify all bidders of the update before the bid opening date, the rates in effect before the recent update may be used in the contract. If the latter decision is made, it must be documented in the contract file and a copy sent to the Dept. of Labor.

2. GWDs Issued AFTER A Bid Opening Date:

- a. When a GWD is issued within 90 days after a bid opening date, whether or not a contract has been awarded determines if the former or updated wage rates are to be used in the contract.
- b. If the contract has not been awarded within the 90-day period following the bid opening date, then the newly issued wage rates must be used in the contract. The contracting agency may, however, request an extension of the 90-day period from the Dept. of Labor.
- c. If the contract has been awarded and executed within the 90-day period following the bid opening date, then the wage rates cited in the contract remain unchanged and in effect.
- d. Changes/modifications made to Davis-Bacon wage rates through a GWD do not apply to contracts already awarded.

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CODE OF FEDERAL REGULATIONS

SUPER CIRCULAR

In 2014, the Department of Transportation published 'The Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards' -- commonly referred to as 'the Super Circular' or 'Uniform Guidance' -- which sets forth pre- and post-award requirements for grantees.

The Super Circular consolidates eight (8) existing grant-related circulars into one set of uniform regulations located in Title 2 of the Code of Federal Regulations (CFR). Highlights of the Procurement section are listed below:

- Added information on Super Circular requirements being the point of reference over FTA Circular 4220.1F where there is conflicting information between the two.
- Added information on thresholds relating to Buy America (\$150,000) and micro-purchases (\$3,500).
- Revised explanation for notification to FTA of protests.
- Provided additional information on geographic preference related to construction hiring and USDOT's pilot program for other-than-construction hiring.
- Revised information relating to need to search System for Award Management (SAM) prior to award.
- Updated Buy America information noting that requirements apply to capital leases.
- Updated information on piggyback, state-led or joint procurements based on FAST Act.
- Updated information on Altoona testing pass/fail requirements per FAST Act.
- Included transit vehicle manufacturer (TVM) definition and additional related information.

For additional information on FTA and the Super Circular, please visit:

<https://www.transit.dot.gov/regulations-and-guidance/regulations-and-guidance>

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U.S. Department of Transportation
Federal Transit Administration



FACT SHEET:
BUY AMERICA
5323(j)

PROGRAM REQUIREMENT: This provision requires that federal tax dollars used to purchase steel, iron, and manufactured goods used in a transit project are produced domestically in the United States.

Statutory References: 49 U.S.C. Section 5323(j) / FAST Section 3011

Eligible Activities: Buy America applies to all federally funded purchases of steel, iron and manufactured goods, including rolling stock purchases and capital leases.

What's Changed?

- 1) The FAST Act phases in an increased domestic content percentage requirement for rolling stock, as follows:
 - FY16 & FY17: more than 60% domestic content
 - FY18 & FY19: more than 65% domestic content
 - FY20 & beyond: more than 70% domestic content
- 2) For rolling stock purchases for which the average cost of the vehicle is more than \$300,000, the FAST Act allows the cost of steel or iron produced in the U.S. and used in the rolling stock frames or car shells to be included in the domestic content calculation, regardless of whether the frame or car shell is produced in the U.S.
- 3) Alters the Buy America waiver process to include a requirement that USDOT/FTA must 1) certify that the steel, iron, or manufactured good is produced in the U.S. in a sufficient and reasonably available amount; 2) certify that the item produced in the U.S. is of a satisfactory quality; and 3) disclose the waiver denial and accompanying rationales on the DOT website.
- 4) For purposes of qualifying for the General Public Interest Waiver for Small Purchases, the FAST Act defines a Small Purchase as a purchase of \$150,000 or less.

For additional information on FTA and the FAST Act, please visit: www.fta.dot.gov/fast.html

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14.3.1 REVISED BUY AMERICA GUIDELINES



EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

April 18, 2022

M-22-11

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Shalanda D. Young Director

SUBJECT: Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (“IIJA”), Pub. L. No. 117-58, which includes the Build America, Buy America Act (“the Act”). Pub. L. No. 117-58, §§ 70901-52. The Act strengthens Made in America Laws¹ and will bolster America’s industrial base, protect national security, and support high-paying jobs. The Act requires that no later than May 14, 2022—180 days after the enactment of the IIJA—the head of each covered Federal agency² shall ensure that “none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.”³

The Act affirms, consistent with Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America’s Workers* (“the Executive Order”), this Administration’s priority to “use terms and conditions of Federal financial assistance awards to maximize the use of goods, products, and materials produced in, and services offered in, the United States.”⁴

The Act provides statutory authorities for the Made in America Office (“MIAO”) in the Office of Management and Budget (“OMB”) to maximize and enforce compliance with Made in

¹ “Made in America Laws” means all statutes, regulations, rules, and Executive Orders relating to Federal financial assistance awards or Federal procurement, including those that refer to “Buy America” or “Buy American,” that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured products offered in the United States. Made in America Laws include laws requiring domestic preference for maritime transport, including the Merchant Marine Act of 1920 (Pub. L. No. 66-261), also known as the Jones Act. Exec. Order No. 14,005, 86 Fed. Reg. 7475, § 2(b) (Jan. 28, 2021), available at <https://www.federalregister.gov/documents/2021/01/28/2021-02038/ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers>. Made in America Laws also include laws that give preference to Indian-owned and -controlled businesses, such as the Buy Indian Act (25 U.S.C. 47), that produce items in the United States.

² For the purposes of this guidance, the terms “Federal agency” and “agency” mean any authority of the United States that is an “agency” (as defined in section 3502 of title 44, United States Code), other than an independent regulatory agency (as defined in that section). IIJA, § 70912(3).

³ IIJA, § 70914(a).

⁴ Exec. Order No. 14,005 (see footnote 1).

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America Laws.⁵ MIAO aims to increase reliance on domestic supply chains and reduce the need for waivers through a strategic process aimed at: achieving consistency across agencies; gathering data to support decision-making to make U.S. supply chains more resilient; bringing increased transparency to waivers in order to send clear demand signals to domestic producers; and concentrating efforts on changes that will have the greatest impact.⁶

This memorandum provides implementation guidance to Federal agencies on the application of: (1) a “Buy America” preference⁷ to Federal financial assistance programs for infrastructure; and (2) a transparent process to waive such a preference, when necessary. A Federal financial assistance program for infrastructure is any program under which an award may be issued for an infrastructure project, regardless of whether infrastructure is the primary purpose of the award. The term “project” means any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States.⁸

Agencies should determine how this guidance is best applied to their infrastructure programs and processes, and consult with OMB, as needed, on establishing criteria, processes, and procedures for applying a Buy America preference and issuing waivers. OMB may update or provide additional guidance, as appropriate, to further assist agencies in the implementation of a Buy America preference.

I. Application of a Buy America Preference

By May 14, 2022, agencies must ensure that all applicable programs comply with section 70914 of the Act, including by the incorporation of a Buy America preference in the terms and conditions of each award with an infrastructure project.⁹ The Act requires the following Buy America preference:

- (1) All iron and steel used in the project are produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- (2) All manufactured products used in the project are produced in the United States. This means the manufactured product was manufactured in the United States, and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation.

⁵ IJIA, § 70923(a) & (b)(1).

⁶ OMB Memorandum M-21-26, Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws available at: <https://www.whitehouse.gov/wp-content/uploads/2020/11/M-21-06.pdf>

⁷ For the purposes of this guidance, a “Buy America” preference is a domestic content procurement preference as defined in IJIA, § 70912(2).

⁸ IJIA, § 70912 (5) & (7).

⁹ See Appendix I: Example of Award Term - Required Use of American Iron, Steel, Manufactured Products, and Construction Materials.

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- (3) All construction materials are manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.^{10, 11}

II. Applicability to Federal Financial Assistance Programs

This guidance applies to all Federal financial assistance as defined in section 200.1 of title 2, Code of Federal Regulations¹²—whether or not funded through IJA—where funds are appropriated or otherwise made available and used for a project for infrastructure. Federal financial assistance means assistance that non-Federal entities receive or administer in the form of grants, cooperative agreements, non-cash contributions or donations of property, direct assistance, loans, loan guarantees, and other types of financial assistance. The term “non-Federal entity” includes States, local governments, territories, Indian tribes, Institutions of Higher Education (IHE), and nonprofit organizations.¹³

For purposes of this guidance, for-profit organizations are not considered non-Federal entities. However, this guidance does not alter independent statutory authorities that agencies may have to include domestic content requirements in awards of Federal financial assistance issued to for-profit organizations.

Federal agencies are encouraged to consult with OMB if they are uncertain about the applicability of this guidance to any particular infrastructure program.

Before applying a Buy America preference to a covered program that will affect Tribal communities, Federal agencies should follow the consultation policies established through Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, and consistent with policies set forth in the Presidential Memorandum of January 26, 2021, on Tribal Consultation and Strengthening Nation-Nation Relationships. Federal agencies should commence consultation promptly.

This guidance does not apply to “expenditures for assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170a, 5170b, 5170c, 5172, 5174, or 5192) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively, of such Act (42 U.S.C. 5170, 5191) or pre and post disaster or emergency response expenditures.”¹⁴ “[P]re and post disaster or emergency response expenditures” consist of expenditures for financial assistance that are (1) authorized by statutes other than the Stafford Act, 42 U.S.C. §§ 5121 et seq., and (2) made in anticipation of or response to an event or events that qualify as an “emergency” or “major disaster” within the meaning of the Stafford Act, *id.* § 5122(1), (2). Awards made to support the construction or improvement of infrastructure to mitigate the damage that may be caused by a non-imminent future emergency or disaster, such as awards

¹⁰ IJA, § 70912 (2) & (6)(B)(ii).

¹¹ See Section VIII. of this guidance for more information on construction materials.

¹² IJA § 70912(4)(A)

¹³ See 2 C.F.R. § 200.1.

¹⁴ IJA § 70912(4)(B)

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made under FEMA’s Flood Mitigation Assistance program,¹⁵ do not qualify as “pre and post disaster or emergency response expenditures.”

Subawards should conform to the terms and conditions of the Federal award from which they flow.¹⁶

The IJIA’s definition of “infrastructure” encompasses public infrastructure projects. Thus, the term “infrastructure” includes, at a minimum, the structures, facilities, and equipment for, in the United States, roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property.¹⁷ Agencies should treat structures, facilities, and equipment that generate, transport, and distribute energy - including electric vehicle (EV) charging - as infrastructure.

When determining if a program has infrastructure expenditures, Federal agencies should interpret the term “infrastructure” broadly and consider the definition provided above as illustrative and not exhaustive. When determining if a particular construction project of a type not listed in the definition above constitutes “infrastructure,” agencies should consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public. Projects with the former qualities have greater indicia of infrastructure, while projects with the latter quality have fewer. Projects consisting solely of the purchase, construction, or improvement of a private home for personal use, for example, would not constitute an infrastructure project. Federal agencies are strongly encouraged to consult with OMB when making such determinations.

Agencies should consult with MIAO regarding their readiness to apply the requirements of the Act to covered programs. Agencies with questions regarding the application of a Buy America preference to agency-specific programs, including questions about the possible use of waivers during adjustment periods as agencies work to implement the Act, are advised to reach out to MIAO for technical assistance and advice.

III. Consistency with International Agreements

Pursuant to section 70914(e) of the Act, this guidance must be applied in a manner consistent with the obligations of the United States under international agreements.

IV. Avoid Unnecessary Disruption

The Act makes clear that its preferences apply to a Federal financial assistance program for infrastructure only to the extent that a domestic content procurement preference as described

¹⁵ See 42 U.S.C. § 4104c.

¹⁶ 2 CFR 200.101 (b) (2)

¹⁷ IJIA, § 70912(5).

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in section 70914 of the Act does not already apply to iron, steel, manufactured products, and construction materials.¹⁸ Agencies should consider whether existing domestic content requirements meet the standards in the Act, as described in this memorandum. Agencies must make necessary changes to come into compliance with the Act's requirements, while preserving policies and provisions that already meet or exceed the standards required by the Act. For example, a program in which the standards for iron and steel already meet the standards in the Act may nevertheless be required to adopt new standards for manufactured products and construction materials. Maintaining current policies where appropriate avoids unnecessary disruption to programs, or elements of programs, that already meet or exceed Build America, Buy America requirements.

V. Effective Date for Awards

Agencies must ensure that, starting on May 14, 2022, all Federal financial assistance programs for infrastructure comply with the requirements of section 70914 of the Act.

Therefore, new awards made on or after May 14, 2022, must take appropriate steps to ensure financial assistance awards comply with these requirements, which may include appropriate terms and conditions¹⁹ incorporating a Buy America preference. Renewal awards and amendments obligating additional funds to existing awards that are executed on or after May 14, 2022, must also include a Buy America preference. This means that agencies must include a Buy America preference in awards issued on or after May 14, 2022, even if Notices of Funding Opportunities for those awards did not include a Buy America preference. In these cases, agencies may consider whether public interest waivers may be needed to avoid undue increases in the time and cost of a project. Similarly, public interest waivers may be needed for awards and amendments made on or after May 14, 2022, where budgets for purchase of covered materials have already been agreed upon (including if materials have been ordered and construction has begun). Consistent with the guidance provided below, agencies should issue waivers judiciously and clearly communicate to recipients the limitations and conditions of any such waivers.

VI. Articles, Materials, and Supplies for Infrastructure

A Buy America preference, as defined in section I of this guidance, only applies to the iron and steel, manufactured products, and construction materials used for the infrastructure project under an award. If an agency has determined that no funds from a particular award under a covered program will be used for infrastructure, a Buy America preference does not apply to that award. Similarly, for a covered program, a Buy America preference does not apply to non- infrastructure spending under an award that also includes a covered project. A Buy America preference applies to *an entire infrastructure project*, even if it is funded by both Federal and non-Federal funds under one or more awards.

A Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply

¹⁸ IIJA, § 70917(a) &(b).

¹⁹ See Appendix I: Example of Award Term - Required Use of American Iron, Steel, Manufactured Products, and Construction Materials for exemplary language.

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to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of or permanently affixed to the structure.

For the purposes of this guidance, an article, material, or supply should only be classified into *one* of the following categories: (1) iron or steel; (2) a manufactured product; or (3) a construction material. For ease of administration, an article, material, or supply should not be considered to fall into multiple categories. Agencies should apply the iron and steel test to items that are predominantly iron or steel, unless another standard applies under law or regulation.

Any waivers from these requirements must be in writing and meet the requirements of section 70914(b).

VII. Issuing Buy America Waivers

Pursuant to Section 70914(c) of the Act, the head of a Federal agency may waive the application of a Buy America preference under an infrastructure program in any case in which the head of the Federal agency finds that—

- (1) applying the domestic content procurement preference would be inconsistent with the public interest (a “public interest waiver”);
- (2) types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (a “nonavailability waiver”); or
- (3) the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent (an “unreasonable cost waiver”).

Federal agencies are responsible for processing and approving all waivers, including waivers requested by recipients and on behalf of subrecipients. To the greatest extent practicable, waivers should be targeted to specific products and projects.²⁰

Before issuing a waiver, the head of the Federal agency must make publicly available on the agency’s website a detailed written explanation for the proposed determination to issue the waiver and provide at least 15 days for public comment on the proposed waiver.²¹ General applicability waivers are subject to a minimum 30-day public comment period.²² By April 29, 2022, agencies should provide the website address where they will be posting proposed waivers for public comment to MBX.OMB.MadeInAmerica@omb.eop.gov. Pursuant to sections 70914(c) and 70937 of the Act, the waiver must be cross-posted to a centralized waiver transparency website managed by GSA, BuyAmerican.gov,²³ no later than November 15, 2022.

²⁰ See Section VII of this guidance for information on waiver principles and criteria.

²¹ Executive Order, § 4(b)(i)(2); IJIA, § 70914(c); IJIA, § 70937 (note that “Buy American” as used in this section also refers to Buy America preferences, per IJIA, § 70932(1)).

²² IJIA § 70914(d)(2)(A)(ii). See Section VII of this guidance for information on general applicability waivers.

²³ BuyAmerican.gov redirects to MadeInAmerica.gov.

¹ see Procurement Intranet Home page-Procmt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools

² see METRO Intranet Home page Online Forms (Procurement, unless noted) ⁵ see Procurement Intranet Home page (Office of Economic Business Opportunity)

³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

To minimize duplication and promote efficiency, MIAO and GSA will coordinate with agencies on the expansion of the existing website's functionality to display waivers for Federal financial assistance and provide further instructions to agencies as necessary.

Federal agencies are responsible for performing due diligence and approving or rejecting waivers consistent with the Act, this guidance, and any other applicable Buy America laws.

Federal agencies should notify MIAO in advance of posting an award- or project-level proposed waiver for public comment. However, Federal agencies must consult with MIAO for proposed waivers with broader applicability (such as a general applicability waiver) before posting them for public comment. The purpose of the consultation is to identify any opportunities to structure the waiver in order to maximize the use of goods, products, and materials produced in the United States to the greatest extent possible consistent with law. Federal agencies should send proposed waivers for review to MBX.OMB.MIAwaivers@omb.eop.gov.

Federal agencies must submit to MIAO a proposed waiver for review after the public comment period has concluded. MIAO will review the proposed waiver to determine if it is consistent with applicable law and policy,²⁴ and will notify the Federal agency of its determination.

All waiver requests must include a detailed justification for the use of goods, products, or materials mined, produced, or manufactured outside the United States²⁵ and a certification that there was a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with potential suppliers.²⁶ In addition, at a minimum and to the greatest extent practicable, each proposed waiver submitted to MIAO should include the following information, as applicable:

- Waiver type (nonavailability, unreasonable cost, or public interest)
- Recipient name and Unique Entity Identifier (UEI)
- Federal awarding agency organizational information (e.g., Common Government- wide Accounting Classification (CGAC) Agency Code)
- Financial assistance listing name and number
- Federal financial assistance program name
- Federal Award Identification Number (FAIN) (if available)
- Federal financial assistance funding amount
- Total cost of infrastructure expenditures, including all Federal and non-Federal funds (to the extent known)
- Infrastructure project description and location (to the extent known)
- List of iron or steel item(s), manufactured products, and construction material(s) proposed to be excepted from Buy America requirements, including name, cost, country(ies) of origin (if known), and relevant PSC and NAICS code for each.
- A certification that the Federal official or assistance recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with the prime contractor.

²⁴ Executive Order, § 4(c).

²⁵ IIJA, § 70937(c)(2)(A).

²⁶ IIJA, § 70937(c)(2)(D).

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- A statement of waiver justification, including a description of efforts made (e.g., market research, industry outreach), by the Federal awarding agency and, and in the case of a project or award specific waiver, by the recipient, in an attempt to avoid the need for a waiver. Such a justification may cite, if applicable, the absence of any Buy America-compliant bids received in response to a solicitation.
- Anticipated impact if no waiver is issued.
- Any relevant comments received through the public comment period.

The purpose of the information is to ensure that the agency has adequate information to perform due diligence, that MIAO has sufficient information to determine whether the proposed waiver is consistent with law and policy, and that sufficient information is available for public review. Information provided for public review should help interested manufacturers gauge the demand for products for which agencies are considering waiving a Buy America preference.

To avoid a need for duplicative waiver requests from entities that receive funding for one infrastructure project through multiple Federal agencies, the Federal agency contributing the greatest amount of Federal funds for the project should be considered the “Cognizant Agency for Made in America” and should take responsibility for coordinating with the other Federal awarding agencies. Such coordination will provide uniform waiver criteria and adjudication processes, minimize duplicative efforts among Federal agencies, and reduce burdens on recipients. The Cognizant Agency for Made in America shall be responsible for consulting with the other Federal awarding agencies, publicizing the proposed joint waiver, and submitting the proposed joint waiver for review to MIAO.

a. Exceptions for Unforeseen and Exigent Circumstances

In limited situations where there is an urgent need in an unforeseen and exigent circumstance, agencies have the authority to waive the application of Buy America preferences without submitting the waiver for public comment and MIAO determination.²⁷ As an exception to the public transparency requirements of the Act, agencies should exercise that authority only when necessary. Further, to ensure MIAO can fulfill its role as a central and transparent source of Made in America waivers, an agency that issues a waiver without first seeking public comment and MIAO approval must, within 30 days of the waiver’s issuance, submit a report to MIAO explaining its reliance upon the “unforeseen and exigent circumstance” exception.²⁸ MIAO will provide further instructions to agencies on how to submit those reports. Although public posting and MIAO review may be waived in exigent circumstances, agencies remain responsible for performing due diligence appropriate to the circumstances, consistent with the principles and criteria in paragraphs VII(b) and (c) below.

²⁷ IIJA, § 70937(b)(2).

²⁸ This reporting process was established pursuant to Executive Order 14,005, § 4(d) and OMB Guidance on Improving the Transparency of Made in America Waivers available at: <https://www.whitehouse.gov/wp-content/uploads/2021/10/Guidance-Memo-Improving-the-Transparency-of-Made-in-America-Waivers.pdf>.

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b. Waiver Principles and Criteria

To ensure they are scrupulously monitoring, enforcing, and complying with applicable Buy America Laws and minimizing the use of waivers,²⁹ agencies must apply standard criteria to determine whether to grant a waiver in a given circumstance. Agencies with existing criteria must review it for consistency with this guidance and update it as appropriate. All other agencies must establish criteria.

Agencies may reject or grant waivers in whole or in part. To the greatest extent practicable, waivers should be issued at the project level and be product-specific. Overly broad waivers undermine market signals designed to boost domestic supply chains, particularly for key articles, materials and supplies in critical supply chains (i.e., critical supply chains identified in Executive Order 14017, *America's Supply Chains*). When necessary, agencies may consider issuing a waiver that has applicability beyond a single project; however, agencies should always issue, construe, and apply waivers to ensure the maximum utilization of goods, products, and materials produced in the United States, consistent with applicable law. Federal agencies may consult with MIAO when establishing or modifying criteria for granting waivers. They may also work within the Made in America Council, a practice that will help to foster consistency across agencies to the greatest extent practical and appropriate, given agency and program missions.

Federal agencies should use the following principles before issuing a waiver of any type:

- **Time-limited:** In certain limited circumstances, a Federal agency may determine that a waiver should be constrained principally by a length of time, rather than by the specific projects to which it applies. Waivers of this type may be appropriate, for example, when an item that is “nonavailable” is widely used in projects funded by a particular program’s awards. When issuing such a waiver, the agency should identify a short, definite time frame (e.g., no more than one to two years) designed to ensure that, as domestic supply becomes available, domestic producers will have prompt access to the market created by the program.
- **Targeted:** Waivers that are not limited to particular projects should apply only to the item(s), product(s), or material(s) or category(ies) of item(s), product(s), or material(s) necessary. Waivers that are overly broad will tend to undermine domestic preference policies. Broader waivers will receive greater scrutiny from MIAO.
- **Conditional:** Federal agencies are encouraged to issue waivers with specific conditions that support the policies of the Act and the Executive Order.

These principles and criteria should be viewed as minimum requirements for the use of waivers by Federal agencies.³⁰

Nonavailability Waivers

Before granting a nonavailability waiver, agencies should consider whether the recipient has performed thorough market research, which may be accomplished with assistance from the agency, and adequately considered, where appropriate, qualifying alternate items, products, or

²⁹ IIJA § 70933(2).

³⁰ See Section IV. of this guidance for agencies that have existing regulations or guidance.

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materials. Waivers should describe the market research activities and methods to identify domestically manufactured items capable of satisfying the requirement, including the timing of the research and conclusions reached on the availability of sources. Agencies are encouraged to engage with the Made in America Council to develop resource lists for common items, goods, or materials.

Unreasonable Cost Waivers

An unreasonable cost waiver is available if the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent. Before granting an unreasonable-cost waiver, to the extent permitted by law, agencies should ensure the recipient has provided adequate documentation that no domestic alternatives are available within this cost parameter. Agencies may assist recipients in gathering documentation.

For requests citing unreasonable cost as the statutory basis of the waiver, the waiver justification must include, as applicable, a comparison of the cost of the domestic product to the cost of the foreign product or a comparison of the overall cost of the project with domestic products to the overall cost of the project with foreign-origin products, pursuant to the requirements of the applicable Made in America law.³¹ Publicly available cost comparison data may be provided in lieu of proprietary pricing information.³² Unreasonable-cost waivers should be no broader than necessary.

Public Interest Waivers

A waiver in the public interest may be appropriate where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements established by the Act and the proposed waiver would not meet the requirements for a nonavailability or unreasonable cost waiver. Such waivers shall be used judiciously and construed to ensure the maximum utilization of goods, products, and materials produced in the United States.³³ To the extent permitted by law, determination of public interest waivers shall be made by the head of the agency with the authority over the Federal financial assistance award.³⁴

Public interest waivers may have a variety of bases. As with other waivers, they should be project-specific whenever possible, as what is in the public interest may vary depending upon the circumstances of the project, recipient, and specific items, products, or materials in question.

Federal agencies may wish to consider issuing a limited number of general applicability public interest waivers in the interest of efficiency and to ease burdens for recipients. The agency remains responsible for determining whether such a waiver is appropriate to apply to any

³¹ IIJA, § 70937(c)(2)(B).

³² IIJA, § 70937(c)(2)(B).

³³ IIJA, § 70935(a).

³⁴ IIJA, § 70935(b).

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given project; the Made in America Office will not review each application of such a waiver. The following are examples of types of public interest waivers an agency may consider issuing.³⁵

- **De Minimis:** Ease of administration is important to reduce burden for recipients and agencies. Federal agencies may consider whether a general applicability public interest waiver should apply to infrastructure project purchases below a de minimis threshold. An agency may consider whether a public interest waiver should apply when necessary to ensure that recipients and Federal agencies make efficient use of limited resources, especially if the cost of processing the individualized waiver(s) would risk exceeding the value of the items waived. Agencies may consider adopting an agency-wide public interest waiver that sets a de minimis threshold, for example, of 5 percent of project costs up to a maximum of \$1,000,000.
- **Small Grants:** Agencies may wish to consider whether it is in the public interest to waive application of a Buy America preference to awards below the Simplified Acquisition Threshold. This type of waiver may be particularly relevant in the initial years after enactment of IIJA, and may be phased out over time as agencies develop efficient waiver review capabilities.
- **Minor Components:** Agencies may wish to consider whether it is in the public interest to allow minor deviations for miscellaneous minor components within iron and steel products. A minor components waiver in the public interest may allow non- domestically produced miscellaneous minor components comprising no more than 5 percent of the total material cost of an otherwise domestically produced iron and steel product to be used. It would not be in the public interest to use a minor components waiver to exempt a whole product from the iron and steel requirements, or to allow the primary iron or steel components of the product to be produced other than domestically.
- **Adjustment Period:** Agencies should consider whether brief, time limited waivers to allow recipients and agencies to transition to new rules and processes may be in the public interest.
- **International Trade Obligations:** If a recipient is a State that has assumed procurement obligations pursuant to the Government Procurement Agreement or any other trade agreement, a waiver of a Made in America condition to ensure compliance with such obligations may be in the public interest.
- **Other Considerations:** A waiver may be in the public interest in one circumstance, but not in another, and considerations will depend upon the nature and amount of resources available to the recipient, the value of the items, goods, or materials in question, the potential domestic job impacts, and other policy considerations, including sustainability, equity, accessibility, performance standards, and the domestic content (if any) of and conditions under which the non-qualifying good was produced.

All proposed waivers citing the public interest as the statutory basis must include a detailed written statement, which shall address all appropriate factors, such as potential

³⁵ The list is not exhaustive and no agency is required to issue the types of waivers noted as examples. As with other general applicability waivers, generally applicable public interest waivers must be reviewed at least every five years and more often as appropriate.

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obligations under international agreements, justifying why the requested waiver is in the public interest.³⁶

Before granting a waiver in the public interest, to the extent permitted by law, agencies shall assess whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products.³⁷ Agencies may consult with the International Trade Administration (ITA) in making this assessment if the granting agency deems such consultation to be helpful. The agency shall integrate any findings from the assessment into its waiver determination as appropriate.³⁸ MIAO will work with ITA and agencies to develop standard processes to expedite this required assessment, such as by ensuring agencies know how to easily access lists of dumped or injuriously subsidized products.

c. General Applicability Waivers

The term “general applicability waiver” refers to a waiver that applies generally across multiple awards. A general applicability waiver can be “product-specific” (e.g., applies only to a product or category of products) or “non-product specific” (e.g., applies to all “manufactured products”).

General applicability waivers should be issued only when necessary to advance an agency’s missions and goals, consistent with IIJA, the Executive Order, and this guidance. For example, an agency might issue a general waiver for a product for which there are well- established domestic sourcing challenges. General applicability waivers will require appropriate justification from the Federal agency.

Federal agencies with one or more existing general applicability waivers, including public interest waivers, must review such waivers within five years of the date on which the waiver was issued. Agencies issuing new general applicability waivers must review such waivers at least every five years from the date of issuance. Agencies are encouraged to review general applicability waivers more frequently, when appropriate. In conducting a review of any general applicability waiver, the head of a Federal agency shall—

(A) publish in the *Federal Register* a notice that—

- (i) describes the justification for a general applicability waiver; and
- (ii) requests public comments for a period of not less than 30 days on the continued need for a general applicability waiver; and

(B) publish in the *Federal Register* a determination on whether to continue or discontinue the general applicability waiver, considering the comments received in response to the notice published under paragraph (A).³⁹

³⁶ IIJA, § 70937(c)(2)(C).

³⁷ Executive Order, § 5.

³⁸ Executive Order, § 5.

³⁹ IIJA, § 70914(d)(1) & (2).

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For a period of five years beginning on the date of enactment of the Act, paragraphs (A) and (B) above shall not apply to any product-specific general applicability waiver that was issued more than 180 days before November 15, 2021.⁴⁰

By no later than November 15, 2022, agencies with existing, non-product specific general applicability waivers that were issued more than five years before November 15, 2021 should promptly commence review of each such waiver by publishing a *Federal Register* notice as required in section 70914(d)(2)(A) of the IIJA. Should the review justify retaining the waiver, agencies should consider narrowing the waiver in a manner that would support supply chain resilience and boost incentives to manufacture key products domestically, as appropriate.

To ensure prompt commencement of projects funded by IIJA, MIAO plans to work with agencies to expedite consideration of general applicability waivers for products or categories of products for which domestic sourcing challenges have been well documented. Agencies should align such waivers with complementary policies, such as work to boost supply chain resiliency and domestic employment. General applicability waivers should include appropriate expiration dates designed to ensure that, once available, Buy America qualifying products receive appropriate consideration.

VIII. Preliminary Guidance for Construction Materials

For construction materials, the Act requires that, not later than 180 days after November 15, 2021, OMB must issue standards that define the term “all manufacturing processes” in the case of construction materials. These standards must require that each manufacturing process required for the manufacture of the construction material and the inputs of the construction material occurs in the United States. They must also reflect efforts to maximize the direct and indirect jobs benefited or created in the production of the construction material.⁴¹

Although the deadline to issue such guidance has not yet passed, OMB is providing preliminary and non-binding guidance to assist agencies in determining which materials are construction materials so that agencies can begin applying Buy America requirements to those materials. This preliminary guidance addresses the requirements as set forth in section 70915(b) of the IIJA while providing sufficient time for OMB to receive additional stakeholder input.

The IIJA finds that “construction materials” includes an article, material, or supply— other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives⁴²— that is or consists primarily of:

- non-ferrous metals;
- plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- glass (including optic glass);
- lumber; or
- drywall.⁴³

⁴⁰ IIJA, § 70914(d)(3).

⁴¹ IIJA, § 70915(b).

⁴² IIJA, § 70917(c)(1).

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To provide clarity to item, product, and material manufacturers and processors, we note that items that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials. For example, a plastic framed sliding window should be treated as a manufactured product while plate glass should be treated as a construction material.

Pending OMB's issuance of final standards on construction materials, and absent any existing applicable standard in law or regulation that meets or exceeds these preliminary standards, agencies should consider "all manufacturing processes" for construction materials to include at least the final manufacturing process and the immediately preceding manufacturing stage for the construction material. OMB is seeking additional stakeholder input before issuing further guidance identifying initial manufacturing processes for construction materials that should be considered as part of "all manufacturing processes."

Agencies should consult with MIAO, as needed, to ensure that any waiver issued for construction materials is explicitly targeted and time-limited, in order to send a clear market signal that additional standards for "all manufacturing processes" in the case of construction materials will be forthcoming.

⁴³ See IIJA, § 70911(5).

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Appendix I: Example of Award Term - Required Use of American Iron, Steel, Manufactured Products, and Construction Materials

Where applicable, the Federal agency must include appropriate terms and conditions in all awards, in accordance with applicable legal requirements and its established procedures, in order to effectuate the requirements of the Act and this guidance. The following is sample language.

To achieve the greatest possible consistency across agencies and programs, agencies should send their proposed terms and conditions to MIAO for review prior to incorporating them into applicable awards. Agencies should begin including appropriate language in NOFOs published *before* May 14, 2022 to provide applicants fair notice of the Buy America conditions that will apply to funds obligated on or after that date.

** ** **

Recipients of an award of Federal financial assistance from a program for infrastructure are hereby notified that none of the funds provided under this award may be used for a project for infrastructure unless:

- (1) all iron and steel used in the project are produced in the United States--this means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;
- (2) all manufactured products used in the project are produced in the United States—this means the manufactured product was manufactured in the United States; and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation; and
- (3) all construction materials⁴⁴ are manufactured in the United States—this means that all manufacturing processes for the construction material occurred in the United States.

The Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of the structure or permanently affixed to the infrastructure project.

⁴⁴ Excludes cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.

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Waivers

When necessary, recipients may apply for, and the agency may grant, a waiver from these requirements. The agency should notify the recipient for information on the process for requesting a waiver from these requirements.

- (a) When the Federal agency has made a determination that one of the following exceptions applies, the awarding official may waive the application of the domestic content procurement preference in any case in which the agency determines that:
- (1) applying the domestic content procurement preference would be inconsistent with the public interest;
 - (2) the types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; or
 - (3) the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent.

A request to waive the application of the domestic content procurement preference must be in writing. The agency will provide instructions on the format, contents, and supporting materials required for any waiver request. Waiver requests are subject to public comment periods of no less than 15 days and must be reviewed by the Made in America Office.

There may be instances where an award qualifies, in whole or in part, for an existing waiver described at [link to awarding agency web site with information on currently applicable general applicability waivers].

Definitions⁴⁵

“Construction materials” includes an article, material, or supply—other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives⁴⁶—that is or consists primarily of:

- non-ferrous metals;
- plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- glass (including optic glass);
- lumber; or
- drywall.

⁴⁵ Federal agencies may choose to provide definitions on a public-facing website and reference that website in the terms and conditions, rather than including all definitions in the terms and conditions itself. If an agency chooses to do provide definitions on a public-facing website, it is not considered a deviation from the terms and conditions provided and does not need to be reviewed by OMB.

⁴⁶ IJIA, § 70917(c)(1).

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“Domestic content procurement preference” means all iron and steel used in the project are produced in the United States; the manufactured products used in the project are produced in the United States; or the construction materials used in the project are produced in the United States.

“Infrastructure” includes, at a minimum, the structures, facilities, and equipment for, in the United States, roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property. Infrastructure includes facilities that generate, transport, and distribute energy.

“Project” means the construction, alteration, maintenance, or repair of infrastructure in the United States.

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14.4 FTA CIRCULAR 4220.1F

U.S. Department
of Transportation

**Federal Transit
Administration**

CIRCULAR

FTA C 4220.1F

November 1, 2008

Rev. 1, April 14, 2009

Rev. 2, July 1, 2010

Rev. 3, February 15, 2011

Rev. 4, March 18, 2013

Subject: THIRD PARTY CONTRACTING GUIDANCE

1. **PURPOSE.** This circular provides contracting guidance for recipients of Federal assistance awarded by the Federal Transit Administration (FTA) when using that Federal assistance to finance its procurements (third party contracts). This revision incorporates the new procurement provisions of the Moving Ahead for Progress in the 21st Century Act (MAP 21), Pub. L., 112-141, July 2012, and includes the most current available guidance for the Federal public transportation program as of the date of publication.
2. **CANCELLATION.** This circular cancels FTA Circular 4220.1E, "Third Party Contracting Requirements," dated 06-19-03.
3. **AUTHORITY.** Federal Transit Laws, Title 49, United States Code, Chapter 53.
4. **WAIVER.** FTA reserves the right to waive any provision of this circular to the extent permitted by Federal law or regulation.
5. **FEDERAL REGISTER NOTICE.** In conjunction with publication of this circular, a *Federal Register* notice was published on September 30, 2008 (73 FR 56896), addressing comments received during the development of the circular.
6. **AMENDMENTS TO THE CIRCULAR.** FTA reserves the right to update this circular due to changes in other revised or new guidance and regulations that undergo notice and comment, without further notice and comment on this circular. FTA will post updates on our Web site: <http://www.fta.dot.gov/>. The Web site allows the public to register for notification when FTA issues *Federal Register* notices or new guidance; visit the Web site and click on "Sign-up for e-mail updates."
7. **ACCESSIBLE FORMATS.** This document is available in accessible formats upon request. To obtain paper copies of this circular as well as information regarding these accessible formats; telephone FTA's Administrative Services Help Desk, 202-366-4865. Individuals with hearing impairments may contact the Federal Relay Service, 1-800-877-8339 for assistance with the call.

James S. Simpson
Administrator

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THIRD PARTY CONTRACTING GUIDANCE

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CHAPTER I

INTRODUCTION AND ROLE OF THE FEDERAL TRANSIT ADMINISTRATION

1. THE FEDERAL TRANSIT ADMINISTRATION (FTA). FTA is one of ten modal administrations within the U.S. Department of Transportation (DOT) and is headed by an Administrator who is appointed by the President of the United States. FTA administers its programs and carries out its other activities through its headquarters office in Washington, DC, ten regional offices, and five metropolitan offices that assist public transportation agencies in all 50 States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, Northern Mariana Islands, American Samoa, and in federally recognized Indian tribal areas.

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

2. AUTHORIZING LEGISLATION. Most Federal transit laws are codified at 49 U.S.C. Chapter 53. Authorizing legislation is substantive legislation enacted by Congress that establishes or continues the legal operation of a Federal program or agency. Congress has amended FTA's authorizing legislation every four to six years. FTA's most recent authorizing legislation, in effect for two fiscal years, is the Moving Ahead for Progress in the 21st Century Act (MAP 21) Pub. L. 112-141, July 6, 2012, however, it authorizes FTA programs for two years, from the beginning of Federal Fiscal Year 2013 through the end of Federal Fiscal Year 2014. Revisions to this edition of the circular encompass the MAP-21 changes to Federal transit law and changes required by other laws that have become effective since FTA last issued this circular in 2003.
3. HOW TO CONTACT FTA. FTA's regional and metropolitan offices are responsible for providing financial assistance to FTA recipients and overseeing the implementation of most FTA programs. Certain programs, however, are the responsibility of FTA headquarters. You should direct inquiries to either the regional or metropolitan office responsible for the geographic area in which you are located. *See*, Appendix B for contact information.

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

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

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4. BACKGROUND. Because FTA awards a substantial amount of Federal assistance to support public transportation through its grants and cooperative agreements, Federal laws and regulations require FTA to ensure that its recipients use that Federal assistance prudently and in compliance with all applicable Federal requirements. While FTA's enabling legislation includes several provisions governing recipient procurements financed with FTA assistance (third party contracts), other government-wide Federal requirements seek to ensure fair and economical procurements when Federal assistance is expended.
5. DEFINITIONS. All definitions in 49 U.S.C. Section 5302 apply to this circular. The following additional definitions are provided:
 - a. Approval, Authorization, Concurrence, Waiver means a deliberate written statement (transmitted in typewritten hard copy or in an electronic format or medium) of a Federal Government official authorized to permit the recipient to take or omit an action required by the Grant Agreement or Cooperative Agreement for the Project, Master Agreement, or this circular, which action may not be taken or omitted without that permission. Except to the extent that FTA determines otherwise in writing, that approval, authorization, concurrence, or waiver permitting the performance or omission of a specific action does not constitute permission to perform or omit other similar actions. An oral permission or interpretation has no legal force, authority, or effect.
 - b. Best Value describes a competitive, negotiated procurement process in which the recipient reserves the right to select the most advantageous offer by evaluating and comparing factors in addition to cost or price such that a recipient may acquire technical superiority even if it must pay a premium price. A "premium" is the difference between the price of the lowest priced proposal and the one that the recipient believes offers the best value. The term "best value" also means the expected outcome of an acquisition that, in the recipient's estimation, provides the greatest overall benefit in response to its material requirements. To achieve best value in the context of acquisitions for public transportation purposes, the evaluation factors for a specific procurement should reflect the subject matter and the elements that are most important to the recipient. While FTA does not mandate any specific evaluation factors, the recipient must disclose those factors in its solicitation. Evaluation factors may include, but are not limited to, technical design, technical approach, length of delivery schedules, quality of proposed personnel, past performance, and management plan. This definition is intended neither to limit nor to dictate qualitative measures a recipient may employ, except that those qualitative measures must support the purposes of the Federal public transportation program.
 - c. Cardinal Change means a major deviation from the original purpose of the work or the intended method of achievement, or a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract.
 - d. Change Order means an order authorized by the recipient directing the contractor to make changes, pursuant to contract provisions for such changes, with or without the consent of the contractor.
 - e. Common Grant Rules, for purposes of this circular, means:
 - (1) DOT regulations, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," 49 CFR Part 18, which apply to Federal grants and cooperative agreements with governmental recipients of Federal assistance including Indian tribal governments, and

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- (2) DOT regulations, “Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,” 49 CFR Part 19, which apply to Federal grants and cooperative agreements with non-governmental recipients of Federal assistance.
- f. Constructive Change means an act or omission by the recipient that, although not identified by a “change order,” does in fact cause a change in the contract work.
- g. Contract means a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. It includes all types of commitments that obligate the recipient to expenditure and that, except as otherwise authorized, are in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. 6301, *et seq.*
- h. Cooperative Agreement means an instrument by which FTA awards Federal assistance to a specific recipient to support a particular project in which FTA takes an active role or retains substantial control, as described in 31 U.S.C. Section 6305.
- i. Design-Bid-Build Project means a construction project under which a recipient commissions an architect or engineer to prepare drawings and specifications under a design services contract, and separately contracts for construction, by engaging the services of a contractor through sealed bidding or competitive negotiations to complete delivery of the project.
- j. Design-Build Project, as defined in 49 U.S.C. Section 5325(d)(1), means (1) a project under which a recipient enters into a contract with a seller, firm, or consortium of firms to design and build a public transportation system, or an operable segment of such system, that conforms to specific performance criteria; and (2) may include an option to finance, or operate for a period of time, the system or segment or any combination of designing, building, operating, or maintaining such system or segment. Apart from the definition at 49 U.S.C. Section 5325(d)(1), a “design-build project” also means a construction project under which a recipient enters into a contract with a seller, firm, or consortium of firms both to design and construct a public transportation facility that is the subject of the project.
- k. Electronic Commerce (E-Commerce) consists of electronic techniques for accomplishing business transactions including electronic mail or messaging, World Wide Web internet technology, electronic bulletin boards, purchase cards, electronic funds transfer, electronic signatures, and electronic data interchange.
- l. Force Account means the recipient’s own labor forces and equipment, as discussed in this circular in the context of performing project work.
- m. FTA means the Federal Transit Administration.
- n. Full and Open Competition means that all responsible sources are permitted to compete.

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- o. Governmental Recipient means a recipient that must comply with the Common Grant Rule at 49 CFR Part 18. This includes a State or local government or a federally recognized Indian tribal government, as defined in this section of this Chapter.
- p. Grant means the instrument by which FTA awards Federal assistance to a specific recipient to support a particular project in which FTA does not take an active role or retain substantial control, as described in 31 U.S.C. Section 6304.
- q. Indian Tribal Government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community, including any Native village as defined in Section 3 of the Alaska Native Claims Settlement Act, 43 U.S.C. Section 1602, certified by the Secretary of the Interior as eligible for the special programs and services provided by him or her through the Bureau of Indian Affairs.
- r. Joint Procurement (sometimes informally referred to as “cooperative procurement”) means a method of contracting in which two or more purchasers agree from the outset to use a single solicitation document and enter into a single contract with a vendor for delivery of property or services in a fixed quantity, even if expressed as a total minimum and total maximum. Unlike a State or local government purchasing schedule or contract, a joint procurement is not drafted for the purpose of accommodating the needs of other parties that may later choose to participate in the benefits of that contract.

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

- s. Local Government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government. This term does not include a local public institution of higher education.
- t. Master Agreement means the FTA document incorporated by reference and made part of FTA’s standard grant agreements and cooperative agreements, that contains the standard terms and conditions governing the administration of a project supported with Federal assistance awarded by the FTA.
- u. Modification means any written change to the terms of a contract.
- v. Non-Governmental Recipient means a recipient that must comply with the Common Grant Rule at 49 CFR Part 19. This includes a public and private institution of higher education, a public or private hospital, and any other quasi-public or private non-profit organization such as, but not limited to, a community action agency, research institute, educational association, and health center. FTA reserves the right to apply the requirements of 49 CFR Part 19 to a commercial organization, a for-profit organization, a foreign or international organization (such as an agency of the United Nations), and an individual. The term does not include a government-owned contractor-operated facility or research

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center providing continued support for mission-oriented, large-scale programs that is government-owned or controlled, or is designated as a federally funded research and development center.

- w. Project Labor Agreement (PLA) means an agreement between the contractor, subcontractors, and the union(s) representing workers. Under a PLA, the contractor, subcontractors, and union(s) working on a project agree on terms and conditions of employment for the project, establishing a framework for labor-management cooperation to advance the buyer's procurement interest in cost, efficiency, and quality.
- x. Property, as used in this circular, includes real property consisting of land and buildings, structures, or appurtenances on land, equipment, supplies, other expendable property, intellectual property, and intangible property.
- y. Public Transportation means transportation by a conveyance that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, sightseeing, or intercity bus transportation, or intercity passenger rail transportation provided by the entity described in 49 U.S.C. Chapter 243, AMTRAK, (or a successor to such entity).
- z. Recipient means the public or private entity to which FTA awards Federal assistance through a grant, cooperative agreement, or other agreement. The recipient is the entire legal entity even if only a particular component of the entity is designated in the document through which FTA has awarded the Federal assistance. The term "recipient" includes "grantee," which is a "recipient" of Federal grant assistance. The term "recipient" also includes each member of a consortium, joint venture, team, or partnership awarded FTA assistance through a grant, cooperative agreement, or other agreement.

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

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

- aa. Revenue Contract means a contract in which the recipient or subrecipient provides access to public transportation assets for the primary purpose of either producing revenues in connection with a public transportation related activity, or creating business opportunities involving the use of FTA assisted property.
- bb. State means a State of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, Guam, American Samoa, and the Virgin Islands, or any agency or instrumentality of a State exclusive of local governments. "State" does not include any public and Indian housing agency under the United States Housing Act.
- cc. State or Local Government Purchasing Schedule or Purchasing Contract means an arrangement that a State or local government has established with multiple vendors in which those vendors agree to provide essentially an option to the State or local government, and its subordinate government entities and others it might include in its programs, to acquire specific property or services in the future at established prices. These arrangements are somewhat similar to the GSA's Cooperative Purchasing

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Program available for Federal Government use. If, at a later date, the State or local government permits others to use its schedules, the State or local government might seek the agreement of the vendor to provide the listed property or services to others with access to the schedules. In the alternative the State or local government establishing the schedules might permit the vendor to determine whether or not it wishes to provide others the same contractual arrangement it affords the State or local government that has established the schedules.

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

- dd. Third Party Contract refers to a recipient’s contract with a vendor or contractor, including procurement by purchase order or purchase by credit card, which is financed with Federal assistance awarded by FTA.
 - ee. Unsolicited Proposal means a proposal that is:
 - (1) Innovative and unique,
 - (2) Independently originated and developed by the offeror,
 - (3) Prepared without the recipient’s supervision, endorsement, direction, or direct involvement,
 - (4) Sufficiently detailed that its benefits in support of the recipient’s mission and responsibilities are apparent,
 - (5) Not an advance proposal for property or services that a recipient could acquire through competitive methods, and
 - (6) Not an offer responding to a recipient’s previously published expression of need or request for proposals.
 - ff. Value Engineering means the systematic application of recognized techniques that identify the function of a product or service, establish a value for that function, and provide the necessary function reliably at the lowest overall cost. In all instances, the required function should be achieved at the lowest possible life-cycle cost consistent with requirements for performance, maintainability, safety, security, and aesthetics.
6. FTA’S ROLE. Consistent with the Common Grant Rules’ directions to Federal agencies not to substitute their judgment for that of their recipients, FTA does not substitute its judgment for that of its recipients by making third party contract decisions for its recipients. FTA’s role in third party procurements complies with the principles of Executive Order No. 13132, “Federalism,” August 4, 1999, 5 U.S.C. Section 601 note. The Executive Order directs Federal agencies to refrain from substituting their judgment for that of their State recipients unless the matter is primarily a Federal concern and, to the maximum extent feasible, to permit the States to establish their own standards rather than impose national standards.

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

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

To preclude unnecessary delay of recipient procurements, FTA generally does not conduct preaward reviews of third party contracts or contract specifications as envisioned in the Common Grant Rules, 49 CFR Section 18.36(g)(2) and 49 CFR Section 19.44(e). Instead, FTA relies heavily on the recipient's self-certification of its procurement system.

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

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

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

http://www.fta.dot.gov/funding/oversight/grants_financing_100.html.

- d. Audits. FTA may perform, contract for, or instruct the recipient to obtain specific audits of particular third party contracts to determine whether payments were made in conformance with the terms of the contract, or for other purposes.

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- e. Training and Technical Assistance. FTA provides procurement training and technical assistance at both regional and national levels by offering various instructional courses, by conducting regional technical assistance conferences, and by providing assistance by a contractor as needed.
- f. Master Agreement. From the inception of its electronic award system in Fiscal Year 1995, FTA has incorporated by reference and made part of each FTA grant and FTA cooperative agreement a Master Agreement that FTA issues annually. Along with the standard terms and conditions governing an FTA assisted project, the most recent FTA Master Agreement, typically issued at the beginning of each Federal fiscal year, contains references to substantially all FTA and other cross-cutting Federal laws and regulations that may apply to a federally assisted project. Several of these Federal requirements must be included in third party contracts to the lowest tier necessary, and others will have a direct or indirect effect on the recipient's third party contracts, and therefore should be included in those third party contracts.
- g. "Best Practices Procurement Manual" (BPPM). FTA's "Best Practices Procurement Manual" (BPPM) provides suggested procedures, methods, and examples to advise a recipient how it might conduct its third party procurements in compliance with Federal laws and regulations and FTA Circular 4220.1F guidance. These procedures, methods, and examples are based on the Federal acquisition process, U.S. Comptroller General Decisions, and "Best Practices" of recipients of FTA assistance and others in the industry, and FTA encourages recipients to adopt them as needed. Although the BPPM can be a good resource for the recipient to use in conducting FTA assisted procurements, it is not the source of any FTA or Federal requirements and, as such, is not binding on FTA recipients although the underlying Federal laws and regulations from which the BPPM's advice and recommendations are derived will apply. As such, the text of the BPPM is not and should not be treated as an official description of any FTA or Federal requirement. Moreover, although FTA does revise and update the BPPM periodically, FTA cautions each recipient that relying solely on the BPPM may not ensure compliance with all applicable FTA and Federal requirements. You can obtain access to the BPPM at the FTA Web site:
http://www.fta.dot.gov/funding/thirdpartyprocurement/grants_financing_6037.html.
- h. Third Party Procurement Helpline. This Helpline at the FTA Web site provides another resource through which you may submit your third party contracting questions to FTA. To do so, access the FTA Web site:
http://www.fta.dot.gov/funding/thirdpartyprocurement/grants_financing_6040.html.
- i. "Frequently Asked Questions." To review the Frequently Asked Questions pertaining to third party contracting, access the FTA Web site:
http://www.fta.dot.gov/funding/thirdpartyprocurement/grants_financing_6039.html.
- j. FTA Offices. You may also contact your FTA regional or metropolitan office or FTA's Office of Administration for assistance. You can find a list of FTA's regional and metropolitan offices in Appendix B of this document.

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CHAPTER II

APPLICABILITY

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

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

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

2. APPLICABILITY OF THE CIRCULAR. Unless FTA determines otherwise in writing, this guidance applies when the recipient uses FTA assistance to support its procurements.
 - a. Participants in FTA Assisted Procurements. Whether and how the circular applies to a specific participant in an FTA assisted project depends on its relationship to the particular FTA assisted procurement:
 - (1) Recipients of FTA Grants or Cooperative Agreements. The circular applies to each FTA recipient of Federal assistance, including each grantee and recipient of Federal assistance under a cooperative agreement or an "other agreement" (whether an individual entity or member of a consortium, joint venture, team, or partnership) when it uses FTA assistance for third party contracts. The extent to which the provisions of this circular apply to a recipient depends on whether the recipient is a State or other than a State.
 - A. States. When procuring property and services under a grant or cooperative agreement, a State may use the same procurement policies and procedures that it uses for acquisitions not financed with Federal assistance. At a minimum, the State must comply with the federally mandated requirements on contract term limitations for revenue vehicle purchases,

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competition, prohibitions against geographic preferences, procurement of architectural engineering (A&E) services, and awards to responsible contractors. The State must also ensure that each purchase order and contract financed with FTA assistance includes all provisions required by Federal statutes and their implementing regulations.

- 1 Governmental Subrecipients of the State. Each State and its governmental subrecipients may use State procurement procedures for their third party contracts. Only those provisions of this circular and the sections of the Common Grant Rule for governmental recipients, 49 CFR Part 18, applicable to the State will apply to procurements by the State's governmental subrecipients.
 - 2 Private Non-Profit Subrecipients of the State. In contrast, the provisions of this circular and the Common Grant Rule for non-governmental recipients, 49 CFR Part 19, will apply to a private non-profit subrecipient of a State.
- B. Recipients and Subrecipients that are not States. This circular applies to third party contractors and subcontractors of all other FTA recipients and their subrecipients, including regional public transportation authorities that are not a State. Even though a recipient or subrecipient is not a State, it may use its own procurement procedures, if those procedures conform to applicable Federal law and regulations, including the applicable Common Grant Rule.
- (2) Subrecipients of FTA Assistance. This circular also applies to each subrecipient, including each subgrantee (a type of subrecipient), under an FTA grant or cooperative agreement) that enters into contracts with other parties financed with FTA assistance.
 - (3) Recipients of Both Federal Assistance Awarded by FTA and Funds Provided by Another Federal Agency. An FTA recipient that also uses funding provided by another Federal agency or agencies for a third party procurement also supported with FTA assistance must comply with the third party contracting requirements of both FTA and each additional Federal agency providing Federal assistance. If compliance with all Federal requirements is impossible, the recipient should notify the FTA Chief Counsel for resolution. If an FTA recipient finances an acquisition with funding provided by another Federal agency but not with FTA assistance, this circular would not apply to that procurement.
 - (4) Recipients of "Other Agreement" Assistance. For "other agreements" authorized by 49 U.S.C. Section 5312(a) for research, development, demonstration, and deployment projects or by 49 U.S.C. Section 5312(b) for joint partnership projects for the deployment of public transportation innovation, this circular may be used as an initial starting point from which to consider the Federal requirements and other provisions that should be adopted for the project, and the other standard Federal requirements that should be modified or waived to achieve FTA's and the recipient's objectives.
 - (5) Third Party Contractors and Subcontractors.
 - (a) Status. Neither third party contractors nor third party subcontractors are "recipients" or "subrecipients" for purposes of this circular. Consequently, third party contractors are not

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directly covered by this circular, the Common Grant Rules at 49 CFR Parts 18 and 19, or FTA's "Best Practices Procurement Manual" (BPPM) in awarding their subcontracts.

- (b) Effect of Federal Requirements. However, each third party contractor and subcontractor is required to comply with the terms of its third party contract or subcontract, including requirements to extend those federally required clauses and provisions to its subcontractors at the lowest tier required. For that reason, this circular, the Common Grant Rules at 49 CFR Parts 18 and 19, and the BPPM do provide useful information to a third party contractor and third party subcontractor about the constraints under which a recipient may enter into a third party contract financed with FTA assistance.
- b. Project Types and Third Party Contracts. With limited exceptions, FTA's Master Agreement reflects FTA and the recipient's agreement that FTA's third party contracting circular will apply to its third party contracts. The extent to which this circular applies to a recipient's contract depends on the character of that contract and the project which it supports.
 - (1) Capital Contracts. The provisions of this circular apply to most third party capital contracts except as listed below:
 - (a) Capital Contracts Financed Entirely Without Federal Assistance. Generally, the provisions of this circular do not apply to a recipient's capital contracts that are unrelated to an FTA assisted capital project and can be demonstrated to be entirely financed without FTA assistance or other Federal funds.
 - (b) Art. Procurements of art works and the services of artists are now included in this circular at Chapter IV, Subsection 4.g. These procedures are consistent with the procurement procedures of FTA Circular 9400.1A, "Federal Transit Administration Design and Art in Transit Projects," dated 06-09-95. FTA's "Best Practices Procurement Manual" still includes extensive non-binding suggestions and advice on procuring art works and the services of artists. FTA also has a Web site dedicated to art issues at http://www.fta.dot.gov/publications/reports/other_reports/about_FTA_10641.html.
 - (c) Over-the-Road Bus Accessibility Program. Section 3038 of the Transportation Equity Act for the 21st Century 1998 (TEA-21), as amended by Section 3039 of SAFETEA-LU, 49 U.S.C. Section 5310 note, authorizes the Over-the-Road Bus Accessibility Program to provide Federal assistance to private for-profit companies for the incremental costs of wheelchair lift equipment and the necessary training to implement DOT's accessibility requirements for over-the-road buses. FTA has determined that the provisions of this circular and the Common Grant Rules do not apply to the acquisition of FTA assisted property or services under that program. As a result, FTA's annual notice of availability of funds for that program does not refer to Common Grant Rule procurement requirements or this circular. The provisions of this circular and the Common Grant Rule at 49 CFR Part 19, however, apply to any over-the-road buses and related equipment for them acquired under another FTA program.
 - (d) Real Property. Procurements of real property consisting of land and any existing buildings and structures on that land are generally beyond the scope of this circular. Real property acquisition is addressed in DOT regulations, "Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs," 49 CFR Part 24,

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implementing the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. Sections 4601 *et seq.*, which provide protections for owners and lessees of real property to be acquired as part of an FTA assisted project. More guidance is included in the most recent edition of FTA Circular 5010.1, providing “Grant Management” guidance

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

- (2) Operations Contracts. FTA has reviewed its policies with respect to operations procurements undertaken by FTA recipients and their subrecipients and has adopted the following policies:
 - (a) Operations Contracts Financed With FTA Assistance. The provisions of this circular continue to apply to contracts in support of a recipient’s or subrecipient’s operations financed with FTA assistance.
 - (b) Operations Contracts Financed Entirely Without FTA Assistance. FTA has determined that its third party contracting requirements will not apply to operations contracts that recipients and their subrecipients finance entirely without FTA assistance. Notwithstanding any other provision of this circular, however, a recipient that enters into third party contracts for operations or planning must comply with the requirements of DOT regulations, “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,” 49 CFR Part 26, applicable to those contracts, regardless of how or whether it intends to use its FTA assistance for contracts or other purposes. Specifically, a recipient required to have a Disadvantaged Business Enterprise (DBE) program may not structure its operations expenditures so that an unreasonable proportion of contracts that could be performed by DBEs are removed from its DBE program. Other Federal regulations issued by FTA, DOT, or other Federal agencies may also apply to a third party contractor, either directly as a covered entity or when the third party contractor is expected to perform activities on behalf of another entity or the Federal Government.
- (3) Preventive Maintenance Contracts. Third party contracts for preventive maintenance are eligible for FTA capital assistance. This circular applies to a recipient’s preventive maintenance contracts financed with FTA assistance. If a recipient uses its FTA assistance to support specific preventive maintenance contracts that are separate and distinct from its other maintenance or operations contracts, and if, through its accounting procedures, a recipient can allocate and trace all its Federal assistance for capital preventive maintenance to those separate and distinct preventive maintenance contracts, this circular applies only to those specific FTA assisted contracts. If, however, the recipient applies its Federal capital assistance for preventive maintenance as a percentage of its total maintenance costs, and the recipient cannot allocate all of its Federal assistance for capital maintenance to specific preventive maintenance contracts that are separate and distinct from its other maintenance or operations contracts, this circular applies to all the recipient’s preventive maintenance contracts, even if specific maintenance or operations contracts were financed wholly without FTA assistance.

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- (4) Revenue Contracts. A revenue contract is a contract in which the recipient or subrecipient provides access to public transportation assets for the primary purpose of either producing revenues in connection with an activity related to public transportation, or creating business opportunities with the use of FTA assisted property. The recipient has broad latitude in determining the extent and type of competition appropriate for a particular revenue contract. Nevertheless, to ensure fair and equal access to FTA assisted property and to maximize revenue derived from such property, the recipient should conduct its revenue contracting as follows:
- (a) Limited Contract Opportunities. If there are several potential competitors for a limited opportunity (such as advertising space on the side of a bus), then the recipient should use a competitive process to permit interested parties an equal chance to obtain that limited opportunity.
 - (b) Open Contract Opportunities. If, however, one party seeks access to a public transportation asset (such as a utility that might seek cable access in a subway system), and the recipient is willing and able to provide contracts or licenses to other parties similarly situated (since there is room for a substantial number of such cables without interfering with transit operations), then competition would not be necessary because the opportunity to obtain contracts or licenses is open to all similar parties.

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

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

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Nevertheless, even in situations not covered by the third party contracting provisions, FTA generally favors full and open competition.

- (6) Public-Private Partnerships. A Public-Private Partnership (PPP) is a formal contractual arrangement between a public recipient and one or more private partners establishing a mechanism for procuring property and services under which the private sector assumes some of the public sector's customary role in the planning, financing, design, construction, operation, and maintenance of a transportation facility compared to traditional procurement methods, many of which activities are generally controlled by the public sector partner. As part of FTA's interest in fostering PPPs, FTA is considering which procurement and other requirements may be modified to simplify project implementation, including procurement requirements that are redundant with private sector safeguards, incentives, and obligations. While a recipient that has not formed a PPP may use some of the contract delivery arrangements or project delivery systems listed below, FTA is considering the implications for PPPs that use the following types of contracting delivery arrangements or project delivery systems, including, but not limited to:

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

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

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

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

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

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

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

3. **FEDERAL LAWS AND REGULATIONS**. Each recipient and subrecipient must comply with applicable Federal laws and regulations including, but not limited to, Federal transit laws at 49 U.S.C. Chapter 53, FTA regulations, and other Federal laws and regulations that contain requirements applicable to FTA recipients and their FTA assisted procurements.

- a. Common Grant Rules. The following government-wide regulations (frequently referred to as the "Common Grant Rules") contain the most comprehensive Federal requirements applicable to FTA's assistance programs:

(1) Governmental Recipients. DOT regulations, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," 49 CFR Part 18, apply to governmental recipients (apart from institutions of higher education) and Indian tribes, and

(2) Non-Governmental Recipients. DOT regulations, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 49 CFR Part 19, apply to private non-profit entities, institutions of higher education and, if FTA so determines, to private for-profit organizations.

- b. Federal Acquisition Regulation. The Federal Acquisition Regulation (FAR), 48 CFR Chapter 1, does not apply to federally assisted procurements, absent Federal laws or regulations to the contrary. In the case of FTA programs, FAR Part 31 cost principles apply to grants and cooperative agreements with private for-profit entities. Audits of A&E services listed in 49 U.S.C. Section 5325 must be carried out under FAR Part 31 cost principles. In other circumstances, in the absence of specific guidance for federally assisted projects, other FAR standards might prove useful if the recipient's circumstances are suitable for application of a specific FAR provision under consideration. One major exception concerns at this time concerns the "simplified acquisition threshold." In this matter, FTA is taking the position that the FAR clause 2.101 definition of "simplified acquisition threshold," which was increased from \$100,000 to \$150,000, does not apply to FTA's federally assisted programs absent specific guidance from the Office of Management and Budget (OMB) or DOT, which we have not received as of February 2011. Instead FTA is continuing to use the dollar standard of the underlying original statute, establishing the simplified acquisition threshold, 41 U.S.C. Section 403(11), referred to in the Common Grant Rule for governmental recipients. But when Federal regulations or guidance is issued, FTA will implement it appropriately.

- c. Other Federal Requirements. In addition to the Common Grant Rules, each FTA recipient must comply with applicable Federal transit laws and implementing regulations not addressed in the

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Common Grant Rules, and with other Federal cross cutting statutes and regulations that affect what a recipient may acquire.

(1) Compilation in the Master Agreement. Citations to most Federal requirements are included in the latest edition of FTA's Master Agreement, typically issued at the beginning of each Federal fiscal year, which includes comprehensive information about Federal laws and regulations that may apply to an FTA assisted project. FTA strongly encourages participants in FTA assisted projects to review the Master Agreement when making its procurement decisions. *See*, Chapter I, subsection 6.f of this circular for additional information about the Master Agreement.

(2) Conflicting Federal Requirements. Requirements of the various Federal agencies that may be involved in the project will sometimes differ, with the result that FTA expects the recipient to comply with all those differences. If compliance with all applicable Federal requirements is impossible, the recipient should notify the FTA Chief Counsel for resolution.

d. Waivers. Requests for waivers of Federal requirements should be addressed to the Federal Transit Administrator

4. STATE AND LOCAL LAWS AND REGULATIONS. The Common Grant Rules provide that recipients and subrecipients will use their own procurement procedures that comply with applicable State and local laws and regulations, and also comply with applicable Federal laws and regulations.

a. Inadequate State and Local Requirements. If State or local laws or regulations do not address a particular aspect of procurement adequately, Federal direct procurement principles may often (but not always) provide useful guidance.

b. Conflicts between Federal Requirements and State or Local Requirements. If Federal requirements conflict with State or local requirements, the recipient should provide written notification promptly to either the FTA Regional Counsel for the region in which the project takes place or the FTA Assistant Chief Counsel for General Law in the case of projects administered by FTA headquarters staff. FTA will then work with the recipient to make appropriate arrangements to proceed with the project. If unsuccessful, then FTA reserves the right to amend or terminate Federal assistance for the underlying Project.

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CHAPTER III

THE RECIPIENT'S RESPONSIBILITIES

1. **WRITTEN STANDARDS OF CONDUCT.** The Common Grant Rules require each recipient to maintain written standards of conduct governing the performance of its employees that are engaged in or otherwise involved in the award or administration of third party contracts.
 - a. **Personal Conflicts of Interest.** As provided in the Common Grant Rules and in the Federal Transit Administration (FTA) Master Agreement, no employee, officer, agent, or board member, or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing individuals may participate in the selection, award, or administration of a contract supported with FTA assistance if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when any of those individuals previously listed has a financial or other interest in the firm selected for award.
 - b. **Gifts.** The recipient's officers, employees, agents, or board members may neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subcontracts. The recipient may set minimum rules when the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.
 - c. **Violations.** To the extent permitted by State or local law or regulations, such standards of conduct will provide for penalties, sanctions, or other disciplinary action for violation of such standards by the recipient's officers, employees, agents, board members, or by contractors, subcontractors, or subrecipients or their agents.
2. **SELF-CERTIFICATION.** FTA expects each recipient to self-certify that its procurement system complies with Federal requirements for any FTA assisted third party contract the recipient undertakes and administers.
3. **THIRD PARTY CONTRACTING CAPACITY.** As part of an FTA recipient's obligation to maintain adequate technical capacity to carry out its project and comply with the Common Grant Rules, the recipient's third party contracting capability must be adequate to undertake its procurements effectively and efficiently in compliance with applicable Federal, State, and local requirements. The Common Grant Rules require the recipient to maintain a contract administration system to ensure that it and its third party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders and applicable Federal, State and local requirements. Many FTA recipients assign contracting duties to technical, financial or management personnel. If the recipient lacks qualified personnel within its organization to undertake the various procurement tasks, such as drafting specifications, evaluating contracts, or performing internal audits for the recipient, FTA expects the recipient to acquire the necessary services from sources outside the recipient's organization. When using outside sources, the recipient should take appropriate steps to prevent or mitigate organizational conflicts of interest that would result in conflicting roles that might bias a contractor's judgment or would result in unfair competitive advantage.
 - a. **Written Procurement Procedures.** The Common Grant Rule for non-governmental recipients requires the recipient to have written procurement procedures, and by implication, the Common Grant Rule for

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governmental recipients requires written procurement procedures as a condition of self-certification. The recipient's procurement procedures are expected to address:

(1) Solicitations. The following standards apply to solicitations:

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

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

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

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

- (6) Procurement Methods. What procurement methods may be used (discussed further in Chapter VI of this circular).
 - (7) Legal Restrictions. Any Federal, State, or local restrictions on the recipient's acquisitions (discussed further in Chapter IV of this circular).
 - (8) Third Party Contract Provisions. The specific third party contract provisions required for each third party contract including requirements that each third party contractor extend those provisions to its subcontractors to the extent required (discussed further in Chapter IV of this circular).
 - (9) Sources. The availability and use of various sources of property and services (discussed further in Chapter V of this circular).
 - (10) Resolution of Third Party Contracting Issues. Procedures to resolve third party contracting issues (discussed further in Chapter VII of this circular).
- b. Adequate Third Party Contract Provisions. The Common Grant Rules requires that all third party contracts include provisions adequate to form a sound and complete agreement. Compliance with Federal laws and regulations will usually result in the addition of many other contract provisions to ensure compliance with those laws and regulations. *See*, Chapter IV of this circular for requirements applicable to third party contractors and the property and services those third party contractors agree to provide. Because bid and offers can at times be ambiguous, in its solicitation documents, the Recipient reserves the right to request additional information before making an award. The Recipient also reserves the right to seek clarification from any bidder or offeror about any statement in its bid or proposal that the Recipient finds ambiguous.
 - c. Industry Contracts. The recipient should take special care when using an industry developed contract or contract that may be provided by a bidder or offeror. Not only may that contract lack the required Federal provisions, but its terms may also be unfavorable to the recipient. FTA does not intend to prohibit the use of industry forms, specifications, or contract terms when their use would benefit the recipient and would accommodate Federal requirements. Instead, FTA intends to remind the recipient to use industry developed forms, specifications, or contract terms cautiously.
 - d. Record Keeping. The Common Grant Rules require the recipient to prepare and maintain adequate and readily accessible project performance and financial records, covering procurement transactions as well as other aspects of project implementation. The Common Grant Rules require the recipient to maintain these records for three years after the recipient and subrecipients, if any, have made final payment and all other pending matters are closed. The recipient must also prepare, maintain, and distribute the following documents as necessary:
 - (1) Procurement History. The Common Grant Rules require the recipient to maintain and make available to FTA written records detailing the history of each procurement, as follows:
 - (a) Procurement Method. A governmental recipient must (and a non-governmental recipient should) provide its rationale for the method of procurement it used for each contract,

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including a sole source justification for any acquisition that does not qualify as competitive, while a non-governmental recipient need only provide a justification for lack of competition when it does not obtain competitive bids or proposals for contracts exceeding the simplified acquisition threshold. *See*, Chapter II, Subsection 3.b for discussion of amount of simplified acquisition threshold;

- (b) Contract Type. A governmental recipient must (and a non-governmental recipient should) state the reasons for selecting the contract type it used (fixed price, cost reimbursement, and so forth);
- (c) Contractor Selection. A governmental recipient must state its reasons for contractor selection or rejection. FTA expects the recipient to include a justification for each noncompetitive award. For procurements exceeding the simplified acquisition threshold (formerly the small purchase threshold – *see*, Chapter II, Subsection 3.b.), a non-governmental recipient must state its reasons for contractor selection, but need not state its reasons for contractor rejection. Each recipient should include a written responsibility determination for the successful contractor; and
- (d) Cost or Price. Each recipient must evaluate and state its justification for the contract cost or price.
- (e) Reasonable Documentation. The extent of documentation should be reasonable. Documents included in a procurement history should be commensurate with the size and complexity of the procurement itself. FTA recognizes that these written records will vary greatly for different procurements. For example, a receipt or bill accompanying a \$100 credit card purchase might contain all of the required information to support that procurement. Procurements that are more substantial may require extensive documentation.

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

- e. Special Notification Requirements for States. For many years, various Federal appropriations laws imposed notification requirements on all recipients of Federal assistance awards exceeding \$500,000. Currently, notification requirements have been limited to States, but the \$500,000 threshold has been removed. Therefore, each State must include provisions in all its requests for proposals, solicitations, Federal assistance applications, forms, notifications, press releases, or other publications involving FTA assistance, stating that FTA is or will be providing Federal assistance for the project, the amount of Federal assistance FTA has provided or expects to provide, and the Catalog of Federal Domestic Assistance (CFDA) Number of the program that authorizes the Federal assistance. FTA interprets the statute to require that subrecipients, lessees, or third party contractors of the State at any tier also comply with those notification requirements. Because appropriations laws expire annually and these provisions have not been enacted as permanent legislation or even appear consistently in the same appropriations acts, it is necessary to review the various Federal appropriations acts for the applicable fiscal year to determine the required level of notification. FTA's Master Agreement incorporates the notification requirements in effect when that Master Agreement is issued.

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- f. Use of Technology/Electronic Commerce. Along with other technology the recipient may choose to employ, the recipient may use a well-structured Electronic Commerce system to conduct third party procurements.
- (1) Sufficient System Capacity. The recipient's electronic system must have sufficient system capacity necessary to accommodate all Federal requirements, including applicable accessibility requirements, for full and open competition.
- (2) Written Procedures. The recipient must establish adequate written procedures before any solicitation takes place. Those procedures must be sufficient to ensure that all the information FTA requires for project administration is entered into the recipient's electronic system and can be made readily available to FTA as needed.
- (3) Uses. The recipient may undertake third party procurements through:
- A. Standard Bidding and Proposal Procedures. Standard procurement procedures may be implemented through an electronic medium or resource to the extent of the system's capacity.
- B. Electronic Bidding and Reverse Auctions. FTA recipients may use electronic bidding and reverse auctions.
- 1 Value. Procurements with a value of \$100,000 or less may be conducted through electronic bidding or reverse auctions. If permitted under State or local law, procurements with a greater value may also be conducted through electronic bidding or reverse auctions. The recipient may acquire the services of a contractor to manage electronic bidding and conduct reverse auctions.
- 2 Procedures. Although neither FTA nor the Office of Federal Procurement Policy have established a formal definition of "reverse auction" or formal procedures for reverse auctions for Federal Government or Federal assistance purposes, the U.S. Comptroller General has approved the following procedures for reverse auctions of less than \$100,000:
- a Notification. The buyer "will notify potential participants of an upcoming auction, specifying the time that the auction will start and close."
- b Bid or Quote Submission. Those who choose to participate will submit bids or quotations to the online auction Web site.
- c Information Displayed During the Auction. During the auction, the Web site will display the property to be inspected, the current lowest quotation, and the time remaining in the auction.
- d Information Not Displayed During the Auction. The Web site will not display the names of vendors, any other identifying information, or the time at which quotations were submitted.

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- e. Information Displayed at the End of the Auction. At the close of the auction, competing vendors will be able to view all submitted quotations, as well as the winning quotation, and a purchase order will be sent to the winning vendor.
 - f. Information Provided at the End of the Auction. The buyer will provide the name of the winning vendor and its quotation to unsuccessful vendors, but not the identity of the unsuccessful vendors.
4. AUDIT. A third party contract audit can be an important tool for managing procurements. In addition to special audits FTA may initiate, the recipient may find it desirable to perform an audit of one or more specific third party contracts as part of its own management process. The firm performing the recipient's federally required single annual audit may also recommend the audit of a specific third party contract.
- a. The Recipient's Auditors. In some cases, the recipient has sufficient qualified personnel to perform the third party contract audits it needs. In the alternative, the recipient may engage a qualified independent accountant or accounting firm to perform its audit responsibilities.
 - b. Independent Auditors. The recipient's personnel will not be able to perform certain audits required by the Federal Government, such as audits required by the Single Audit Act of 1984, as amended, 31 U.S.C. Sections 7501 *et seq.* and OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations" as revised. If the Federal Government requires additional audits, it may also be necessary for the recipient to engage independent auditors not performing other work for the recipient. See also Chapter IV, subparagraph 2.b(19)(a) of this circular.
 - c. Federal Audit Agencies. The Federal Government maintains a continuing Federal audit capability at certain contractor locations. On occasion, these auditors may be used to audit an FTA recipient's third party contracts. In other circumstances, an audit by a Federal agency may best serve the interests of the Federal Government and the recipient. This can be true of audits to determine a contractor's provisional overhead (burden) and General & Administrative (G&A) rates that need to be verified by audit for specific contract periods. Federal audit services, however, might not be available when needed; then the recipient will need to obtain the services of an independent private auditing firm that can perform the audit soon after an audit is requested.
5. FRAUD. As a reminder, 49 U.S.C. Section 5323(l) extends the criminal fraud provisions of 18 U.S.C. Section 1001 to all certificates, submissions, or statements made in connection with any program financed under the Federal transit program. In addition, the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. Sections 3801 *et seq.*, and DOT regulations, "Program Fraud Civil Remedies," 49 CFR Part 31, apply to any false or fraudulent statement or claim made under the Federal transit program.

CHAPTER IV

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

1. DETERMINING THE RECIPIENT'S NEEDS. To support a third party contract with Federal assistance awarded by the Federal Transit Administration (FTA), the Common Grant Rules require the recipient to

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adopt adequate procedures for determining the type and amount of property and services it needs to acquire:

- a. Eligibility. The property and services to be acquired must be eligible under the Federal law authorizing the FTA assistance award and any regulations thereunder. For example, FTA prohibits the use of capital assistance for the recipient's operations expenses. If FTA assistance will be used to finance the cost of property or services, the property or services must be within the scope of the specific project from which that FTA assistance will be derived.
- b. Necessity. The Common Grant Rules 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). In monitoring whether a recipient has complied with its procedures to determine what property or services are unnecessary, FTA bases its determinations on what would have been a recipient's reasonable expectations at the time the recipient entered into the contract.
 - (1) Unnecessary Reserves. FTA expects the recipient to limit the acquisition of federally assisted property and services to the amount it needs to support its public transportation system. In particular, FTA seeks information about the recipient's fleet to ensure that the recipient does not acquire more vehicles than it needs for public transportation service in its service area. Further guidance on spare ratios is contained in the most recent versions of FTA Circular 5010.1 providing Grant Management guidance, FTA Circular 9030.1 providing Urbanized Area Formula Program guidance, and FTA Circular 9300.1 providing Capital Investment Program guidance.
 - (2) Acquisition for Assignment Purposes. The recipient may contract only for its current and reasonably expected public transportation needs and may not add quantities or options to third party contracts solely to permit assignment to another party at a later date. These limits on assignments, however, do not preclude joint procurements that are entered into simultaneously by two or more parties to obtain advantages unavailable for small procurements.
 - (a) General Prohibition. The recipient may contract only for its current and reasonably expected public transportation needs, and may not add quantities or options to third party contracts solely to permit assignment to another party at a later date.
 - (b) Changes in the Recipient's Needs. FTA recognizes that the quantity of property or services a recipient reasonably believes it may need at the time of contract award may change. A recipient's later needs might decrease due to changed circumstances or honest mistakes. In those situations, the recipient may assign its unneeded contract authority to another entity that would like to acquire the property or services.
 - (c) Exceptions. These limits on assignments, however, do not preclude:
 1. Joint Procurements. Two or more recipients may enter into a single procurement at the same time to obtain advantages unavailable for smaller procurements, as discussed more fully in Chapter V, section 3 of this circular.

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2. State or Local Government Purchasing Schedules or Purchasing Contracts. A State or local government may enter into contracts that support its purchasing schedules or purchasing contracts established as discussed more fully in Chapter V, section 4 of this circular.
- c. Procurement Size. The recipient should consider whether to consolidate or break out the procurement to obtain a more economical purchase.
- (1) Joint Procurements. It may be economically advantageous for a recipient to enter into a joint procurement with others that have similar needs. The recipient responsible for undertaking the joint procurement may, upon contract award, assign to the other participants responsibilities for administering those parts of the contract affecting their property or services. Participation in a joint procurement, however, does not relieve any participating recipient from the requirements and responsibilities it would have if it were procuring the property or services itself, and does not relinquish responsibility for the actions of other participants merely because the primary administrative responsibility for a particular action resides in an entity other than in itself.
- (2) Small Procurements. In other circumstances, breaking out procurements may provide greater opportunities for Disadvantaged Business Enterprises (DBEs), small and minority firms, and women's business enterprises to participate. As stated in paragraph 1.b(2) of this Chapter, the FTA expects the recipient to ensure that it contracts only for its current and reasonably expected needs. Absent efforts to foster greater opportunities for DBEs, small and minority firms, and women's business enterprises, the recipient should not split a large procurement merely to gain the advantages of small purchase available for federally assisted procurements of \$100,000 or less identified in 41 U.S.C. Section 403(11).
- d. Options. The recipient's contracts may include options to ensure the future availability of property or services, so long as the recipient is able to justify 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. Chapter VI of this circular contains procedures for evaluating options.
- e. Lease versus Purchase. To obtain the best value, the recipient should review lease versus purchase alternatives for acquiring property and, if necessary, should obtain an analysis to determine the more economical alternative. The recipient may use FTA capital assistance to finance the costs of leasing eligible property if leasing is more cost effective than full ownership. Before the recipient may lease an asset, FTA regulations, "Capital Leases," 49 CFR Part 639, Subpart C, require the recipient to make a written comparison of the cost of leasing the asset compared with the cost of purchasing or constructing the asset. Costs used in the comparison must be reasonable, based on realistic current market conditions, and based on the expected useful service life of the asset.
- f. Specifications. Typically, the recipient is responsible for preparing specifications that describe its needs while assuring that those specifications are not exclusionary, discriminatory, unreasonably restrictive, or otherwise violate Federal laws or regulations. In general, specifications should clearly describe the property or services to be procured and state how the bids or proposals will be evaluated. For additional guidance, see section 2 of this Chapter, and Chapter VI, section 3 of this circular.

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

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

The recipient may also use the checklists in Appendix C of this circular as a reminder of Federal requirements, and the matrices in Appendix D of this circular for a list of clauses and provisions required by Federal laws and regulations. The recipient may also refer to the Model Clauses in FTA’s “Best Practices Procurement Manual” but cautions the recipient also to check the latest edition of FTA’s Master Agreement to determine which provisions have been added, changed, or rescinded.

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

- a. Contractor Qualifications. The following Federal laws and regulations may affect contractor selection:
 - (1) “Responsibility” Requirements. In addition to the Common Grant Rules that require contract awards be made only to responsible contractors, Federal transit law at 49 U.S.C. Section 5325(j) limits third party contractor awards to those contractors capable of successfully performing under the terms and conditions of the proposed contract. Before selecting a contractor for award, the recipient must consider such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.
 - (2) Debarment and Suspension. Debarment and suspension regulations and guidance include the following:
 - (a) DOT Debarment and Suspension Regulations. Department of Transportation (DOT) regulations, “Nonprocurement Suspension and Debarment,” 2 CFR Part 1200 apply to each third party contract at any tier of \$25,000 or more, to each third party contract at any tier for a federally required audit (irrespective of the contract amount), and to each third party contract at any tier that must be approved by an FTA official irrespective of the contract amount. *See*, 2 CFR Part 1200. Thus, the recipient must apply DOT’s debarment and suspension requirements to itself and each third party contractor at every tier to the extent required by DOT’s regulations that incorporate the requirements of Office of Management and Budget

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(OMB), “Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement),” 2 CFR Part 180.

- (b) General Services Administration (GSA) Excluded Parties List System. Even though the recipient may collect a debarment and suspension certification from the prospective third party contractor, or include a clause in the third party contract requiring disclosure, FTA strongly recommends that the recipient check the Excluded Parties List System (EPLS). Now a part of the System for Awards Management (SAM), the EPLS is an electronic, web-based system that identifies those parties excluded from receiving Federal contracts, certain subcontracts, and certain types of Federal financial and non-financial assistance and benefits. The EPLS keeps its user community aware of administrative and statutory exclusions across the entire government, and individuals barred from entering the United States. Go to www.sam.gov and the Extracts and Data Access area and click on the Public Data Access box to find the individual firm, individual or vessel you may seek.
- (c) State Debarment and Suspension Lists. A recipient may also treat any prospective contractor or subcontractor listed on a centralized State government debarment and suspension list as nonresponsible and ineligible for contract award.
- (3) Conflict of Interest. The Common Grant Rules require the recipient to be aware of conflict of interest issues a prospective contractor might have, including lack of impartiality, impaired objectivity, or unfair competitive advantage, as discussed more fully in Chapter VI, paragraph 2.a(4)(h).
- (4) Lobbying Certification and Disclosure. If the third party contract will exceed \$100,000, the recipient must obtain a lobbying certification before awarding the contract, and if applicable, a lobbying disclosure from a prospective third party contractor. *See*, DOT regulations, “New Restrictions on Lobbying” 49 CFR Part 20, modified as necessary by 31 U.S.C. Section 1352, which implement the Byrd “Anti-Lobbying” Amendment, 31 U.S.C. Section 1352.
- (5) Federal Civil Rights Laws and Regulations. Each FTA recipient has agreed that it and its third party contractors at each tier will comply with:
 - A. Federal Equal Employment Opportunity (EEO) Requirements. These include, but are not limited to:
 - 1 Nondiscrimination in Federal Public Transportation Programs. 49 U.S.C. Section 5332, covering projects, programs, and activities financed under 49 U.S.C. Chapter 53 prohibits discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimination in employment or business opportunity.
 - 2 Prohibition Against Employment Discrimination. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, and Executive Order No. 11246, “Equal Employment Opportunity,” September 24, 1965, as amended by Executive Order No. 11375, October 13, 1967, that prohibit discrimination in employment on the basis of race, color, religion, sex, or national origin.

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- (a) Nondiscrimination on the Basis of Sex. Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. Sections 1681 *et seq.* and implementing Federal regulations, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” 49 CFR Part 25 prohibit discrimination on the basis of sex.
 - (b) Nondiscrimination on the Basis of Age. The “Age Discrimination Act of 1974, as amended, 42 U.S.C. Sections 6101 *et seq.*, and Department of Health and Human Services implementing regulations, “Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance, 45 CFR Part 90, prohibit discrimination by participants in federally assisted programs against individuals on the basis of age. The Age Discrimination in Employment Act (ADEA), 29 U.S.C. Sections 621 *et seq.*, and Equal Employment Opportunity Commission (EEOC) implementing regulations, “Age Discrimination in Employment Act,” 29 CFR Part 1625, also prohibit employment discrimination against individuals on the basis of age.
 - (c) Federal Protections for Individuals with Disabilities. The Americans with Disabilities Act of 1990, as amended (ADA), 42 U.S.C. Sections 12101 *et seq.*, prohibits discrimination against qualified individuals with disabilities in programs, activities, and services, and imposes specific requirements on public and private public and private entities. Third party contractors must comply with their responsibilities under Titles I, II, III, IV, and V of the ADA in employment, public services, public accommodations, telecommunications, and other provisions, many of which are subject to regulations issued by other Federal agencies.
- (6) Socio-Economic Development. Each FTA recipient must comply with applicable Federal laws and regulations that provide competitive opportunities for a contractor that qualifies as a disadvantaged business enterprise (DBE), minority owned firm, women’s business enterprise, or small business.
- (a) Disadvantaged Business Enterprises (DBES). Section 1101 (b) of MAP-21, 23 U.S.C. Section 101 note, extends the Federal statutory requirements that FTA make available at least 10 percent of its funding under that Act for contracts with small business concerns owned and controlled by socially and economically disadvantaged people. Each FTA recipient and subrecipient of FTA funding assists FTA in meeting this national goal. To receive FTA assistance, each FTA recipient and subrecipient of FTA funding must comply with applicable requirements of DOT regulations, “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,” 49 CFR Part 26. If the recipient is required to have a DBE program, the third party contracts that the recipient has included in its DBE program determine whether the recipient meets the DBE threshold for goal setting, and the goal if the threshold is met.
 - (b) Small and Minority Firms and Women’s Business Enterprises. The Common Grant Rules require each recipient and subrecipient to take steps to ensure that it uses small and minority firms and women’s business enterprises (irrespective of whether they qualify as DBEs) to the fullest extent practicable. Notably, some potential contractors may have established their home office in a Historically Underutilized Business Zone (HUBZone). A HUBZone small business is determined, qualified, and certified by the Small Business Administration (SBA) and then added to the List of Qualified HUBZone Small Business Concerns at SBA’s website at <http://www.sba.gov/hubzone>. Although the Common Grant Rule for governmental

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recipients includes labor surplus area firms in the category of firms authorized for special treatment, this circular does not include them because Section 7101(a) of the Federal Acquisition Streamlining Act of 1994, 15 U.S.C. Section 644 note, enacted after publication of the Common Grant Rule for governmental recipients removed nearly all labor surplus area preferences.

- 1 Notice. The Common Grant Rules requires each recipient to make information about procurement opportunities available to potentially qualified firms. Each governmental recipient is directed to include these contractors on solicitation lists and request their participation when they are potential sources.
 - 2 Contract Size. To foster greater participation of small and minority firms and women's business enterprises, the Common Grant Rule for governmental recipients directs the governmental recipient to divide its total contracting requirements into small tasks or quantities, when economically feasible. The Common Grant Rule for non-governmental recipients encourages the non-governmental recipient to contract with consortia when a contract is too large for one of these firms to handle individually.
 - 3 Delivery Schedule. The Common Grant Rules requires the recipient to specify delivery schedules that encourage their participation.
 - 4 Small Business Administration and the Department of Commerce Minority Business Development Agency. The Common Grant Rules instructs the recipient to use the services and assistance of the Small Business Administration and the Department of Commerce's Minority Business Development Agency.
 - 5 Subcontracting Opportunities. The Common Grant Rule for governmental recipients directs each governmental recipient to require its prime third party contractors to include the preceding provisions in FTA assisted subcontracts. The Common Grant Rule for non-governmental recipients directs each non-governmental recipient to consider whether firms competing for larger contracts intend to subcontract with small businesses, minority-owned firms, and women's business enterprises. In addition, DOT's "Disadvantaged Business Enterprise: Program Improvements" amendments to its DBE regulations, effective February 28, 2011, now state that recipients may use race-neutral (and gender-neutral) small business set-asides for prime contracts under a stated amount, although set-asides restricted to DBEs continue to be prohibited except in limited and extreme circumstances.
- (7) Sensitive Security Information. Each third party contractor must protect, and take measures to ensure that its subcontractors at each tier protect, "sensitive security information" made available during the administration of a third party contract or subcontract to ensure compliance with 49 U.S.C. Section 40119(b) and implementing DOT regulations, "Protection of Sensitive Security Information," 49 CFR Part 15, and with 49 U.S.C. Section 114(r) and implementing Department of Homeland Security regulations, "Protection of Sensitive Security Information," 49 CFR Part 1520.
- (8) Seat Belt Use. In compliance with Federal Executive Order No. 13043, "Increasing Seat Belt Use in the United States," April 16, 1997, 23 U.S.C. Section 402 note, FTA encourages each third

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party contractor to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel that operate company owned, rented, or personally operated vehicles, and to include this provision in each third party subcontract involving the project.

(9) Texting While Driving and Distracted Driving. Consistent with Executive Order No. 13513, “Federal Leadership on Reducing Text Messaging While Driving,” October 1, 2009, 23 U.S.C. Section 402 note, and DOT Order 3902.10, “Text Messaging While Driving,” December 30, 2009, FTA encourages each third party contractor to promote policies and initiatives for its employees and other personnel that adopt and promote safety policies that to decrease crashes by distracted drivers, including policies to ban text messaging while driving, and to include this provision in each third party subcontract involving the project.

b. Administrative Restrictions on the Acquisition of Property and Services. The following Federal laws and regulations impose administrative requirements, many of which will affect specific third party procurements.

(1) Legal Eligibility. The property or services acquired must be eligible for support under the restrictions accompanying the Federal statute authorizing the Federal assistance to be used.

(2) Scope of the Project. The property or services acquired must be eligible for support within the scope of the underlying grant or cooperative agreement from which the Federal assistance to be used is derived.

(3) Period of Performance. FTA expects the recipient to use sound business judgment and be judicious in establishing and extending a contract’s period of performance.

(a) General Standards. The period of performance generally should not exceed the time necessary to accomplish the purpose of the contract. The recipient should also consider competition, pricing, fairness, and public perception. The recipient’s procurement files should document its rationale for determining the performance period designated for each contract.

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

(c) Time Extensions. Consistent with the general tone of the circular, contract time extensions will be considered in light of whether they are permissible changes or impermissible cardinal changes. Once the recipient awards the third party contract, an extension of the contract term length that amounts to a cardinal change will require a sole source justification.

(4) Federal Cost Principles. The Common Grant Rules require project costs to conform to applicable Federal cost principles for allowable costs. In general, costs must be necessary and reasonable, allocable to the project, authorized or not prohibited by Federal law or regulation, and must

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comply with Federal cost principles applicable to the recipient. Separate cost principles apply to the following four categories of recipients:

- (a) Governmental Entities. OMB Guidance for Grants and Agreements, “Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A-87),” 2 CFR Part 225, applies to project costs incurred by a recipient that is a State, local, or Indian tribal government.
 - (b) Educational Institutions. OMB Guidance for Grants and Agreements, “Cost Principles for Educational Institutions (OMB Circular A-21),” 2 CFR Part 220, applies to project costs incurred by a recipient that is a public or private institution of higher education.
 - (c) Non-Profit Entities. OMB Guidance for Grants and Agreements “Cost Principles for Non-Profit Organizations (OMB Circular A-122),” 2 CFR Part 230, applies to project costs incurred by a recipient that is a private non-profit entity.
 - (d) For-Profit Entities. FAR at 48 CFR Chapter 1, Subpart 31.2, “Contracts with Commercial Organizations,” applies to project costs incurred by a recipient that is a for-profit entity.
- (5) Payment Provisions. The recipient may use its own funds to finance its contracts. However, if the recipient intends to use FTA assistance, expects to be reimbursed with FTA assistance, or dedicates its local share funds to support contract costs it has financed, then it must structure its payment provisions carefully.
- (a) FTA Support for the Project. FTA must indicate its general interest in the project before a recipient may use FTA assistance to finance or reimburse project costs, or use local share funds for project costs. FTA expresses its general interest in the project when it has taken one of the following actions:
 - 1 Award Made. FTA has awarded Federal assistance to the recipient through a grant or cooperative agreement for the underlying project,
 - 2 Preaward Authority. FTA has provided preaward authority for the underlying project through a *Federal Register* notice, or
 - 3 Letter of No Prejudice. FTA has issued a letter of no prejudice for the underlying project.
 - (b) Advance Payments. Advance payments are payments made to a contractor before the contractor incurs contract costs. The recipient may use its local share funds for advance payments. However, if there is no automatic preaward authority for its project, then advance payments made with local share funds before FTA assistance has been awarded, or before a letter of no prejudice has been issued or other preaward authority has been provided, or before FTA approval for the specific advance payment has been obtained, are ineligible for reimbursement. The following principles and restrictions apply:
 - 1 Use of FTA Assistance Prohibited. The recipient may not use FTA assistance to make payments to a third party contractor before the contractor has incurred the costs for which the payments would be attributable.

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- 2 Exceptions for Sound Business Reasons. Apart from advance payments that are customary, as discussed further, FTA does occasionally make exceptions to its advance payment prohibitions, if the recipient can provide sound business reasons for doing so and has obtained FTA's advance written concurrence. A recipient that seeks to use FTA assistance to support advance payments should contact the regional office administering its project to obtain FTA concurrence.
- a Adequate Security for Advance Payments. FTA recognizes that advance payments may be needed for certain costs supported by sound business judgment. Adequate security for the advance payment is an essential pre-condition to FTA's concurrence in the use of FTA or local share funds.
- b Customary Advance Payments. FTA recognizes that advance payments are typically required for, but are not limited to, public utility connections and services, rent, tuition, insurance premiums, subscriptions to publications, software licenses, construction mobilization costs, transportation, hotel reservations, and conference and convention registrations. Accordingly, the recipient may use FTA assistance to support or reimburse the costs of such acquisitions. FTA concurrence is required only when such advance payment or payments customarily required in the marketplace exceed \$100,000.

In summary, if there are sound business reasons justifying the advance payment and adequate security for the payment, FTA will generally concur in a written request for an exception.

- (c) Progress Payments. Progress payments are payments for contract work that has not been completed. The recipient may use FTA assistance to support progress payments provided the recipient obtains adequate security for those payments and has sufficient written documentation to substantiate the work for which payment is requested.
- 1 Adequate Security for Progress Payments. Adequate security for progress payments may include taking title or obtaining a letter of credit or taking equivalent measures to protect the recipient's financial interest in the progress payment. Adequate security should reflect the practical realities of different procurement scenarios and factual circumstances. FTA acknowledges the practical reality that taking title to work in progress may not be desirable in some circumstances. The recipient should always consider the costs associated with providing security (for example, the recipient may need to acquire bonds or letters of credit in the commercial marketplace) and the impact of those costs on the contract price, as well as the consequences of incomplete performance.
- 2 Adequate Documentation. Sufficient documentation is required to demonstrate completion of the amount of work for which progress payments are made.
- 3 Percentage of Completion Method. The Common Grant Rules requires that any progress payments for construction contracts be made on a percentage of completion method described therein. The recipient, however, may not make progress payments for other than construction contracts based on this percentage method.

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(6) Protections Against Performance Difficulties. The Common Grant Rule for governmental recipients authorizes FTA to require each governmental recipient to include contract provisions that would reduce potential problems that might occur during contract performance. In addition to other clauses that may be approved by the Office of Federal Procurement Policy, FTA expects the governmental recipient to include provisions as described below:

(a) Changes. FTA expects a governmental recipient to include changes and changed conditions provisions or clauses in most contracts, except for routine supply contracts.

(b) Remedies. The Common Grant Rule for governmental recipients authorizes FTA to require remedies. Accordingly, FTA expectations are as follows:

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

2 Violation or Breach. Third party contracts exceeding \$100,000 must include administrative, contractual, or legal remedies for violations or breach of the contract by the third party contractor.

3 Suspension of Work. FTA may require provisions pertaining to suspension of work.

4 Termination. Termination for cause and termination for convenience provisions must be included in contracts exceeding \$10,000.

The Common Grant Rule for non-governmental recipients requires administrative, contractual, or legal contract remedies in instances in which a contractor violates or breaches terms of a contract that exceeds the small purchase threshold, which FTA recognizes as the simplified acquisition threshold. *See*, Chapter II, Subsection 3.b. The Common Grant Rule for non-governmental recipients also requires termination clauses for non-governmental recipients when procurements exceed the small purchase threshold, which FTA recognizes as the simplified acquisition threshold. *See*, Chapter II, Subsection 3.b. FTA strongly encourages care in developing appropriate performance remedies in all third party contracts.

c. Socio-Economic Requirements for the Acquisition of Property and Services. The following Federal laws and regulations imposing socio-economic requirements may affect a specific procurement:

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- (1) Labor. The following Federal labor protection laws and regulations may affect the types of property and services that may be acquired with FTA assistance:
- (a) Wage and Hour Requirements. The Common Grant Rules direct the recipient to include provisions in its third party contracts requiring the contractor to compute the wages of every mechanic and laborer based on a standard workweek of 40 hours. Work in excess of the standard workweek is permitted if the worker is compensated at a rate of not less than one and one-half times the basic rate of pay for all hours worked in excess of 40 hours in the workweek. The Common Grant Rules require these provisions for compliance with Sections 102 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. Section 3702, and Department of Labor (DOL) regulations, “Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act),” 29 CFR Part 5. Section 4104(c) of the Federal Acquisition Streamlining Act of 1994, 40 U.S.C. Section 3701(b)(3)(A)(iii), increased the wage and hour thresholds of \$2,000 for construction work and \$2,500 for nonconstruction work set forth in the Common Grant Rules to \$100,000. A federally assisted contract must exceed \$100,000 before these wage and hour requirements apply to that contract.
 - (b) Fair Labor Standards. The Fair Labor Standards Act, 29 U.S.C. Sections 201 *et seq.* applies to employees performing work involving commerce.
 - (c) Veterans Employment. Recipients and subrecipients of Federal financial assistance under this chapter shall ensure that contractors working on a capital project funded using such assistance give a hiring preference, to the extent practicable, to veterans (as defined in section 2108 of title 5) who have the requisite skills and abilities to perform the construction work required under the contract. This subsection shall not be understood, construed or enforced in any manner that would require an employer to give 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 former employee.
- (2) Civil Rights. The following Federal civil rights laws and regulations may affect the types of property and services that may be acquired with FTA assistance:
- (a) Nondiscrimination in Federal Public Transportation Programs. Federal transit law at 49 U.S.C. Section 5332, covering projects, programs, and activities financed under 49 U.S.C. Chapter 53 prohibits discrimination on the basis of race, color, creed, national origin, sex, or age, and prohibits discrimination in employment or business opportunity.
 - (b) Title VI of the Civil Rights Act. In determining the types of property or services to acquire, no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving Federal financial assistance in violation of Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sections 2000d *et seq.* and DOT regulations, “Nondiscrimination in Federally Assisted Programs of the Department of Transportation—Effectuation of Title VI of the Civil Rights Act of 1964,” 49 CFR Part 21. In addition, FTA Circular 4702.1, “Title VI and Title VI-Dependent

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Guidelines for FTA Recipients,” 05-13-07, provides FTA guidance and instructions for implementing DOT’s Title VI0020 regulations.

- (c) Environmental Justice. Executive Order No. 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” February 11, 1994, 42 U.S.C. Section 4321 note, and DOT Order 5610.2, “Department of Transportation (DOT) Order To Address Environmental Justice in Minority Populations and Low-Income Populations,” 62 FR 18377, April 15, 1997, protect minority populations and low-income populations against disproportionately high and adverse effects of federally assisted programs. FTA Circular 4702.1, “Title VI and Title VI-Dependent Guidelines for FTA Recipients,” 05-13-07, also provides FTA guidance and instructions for implementing the DOT Order on Environmental Justice.
- (d) Limited English Proficiency (LEP). Executive Order No. 13166, “Improving Access to Services for Persons with Limited English Proficiency,” August 11, 2000, 42 U.S.C. Section 2000d-1 note, and DOT, “Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (LEP) Persons,” December 14, 2005, clarifies the responsibilities of recipients of Federal financial assistance from DOT and assists them in fulfilling their responsibilities to LEP persons, pursuant to Title VI of the Civil Rights Act of 1964 and implementing regulations. FTA Circular 4702.1, “Title VI and Title VI-Dependent Guidelines for FTA Recipients,” 05-13-07, also provides FTA guidance and instructions for implementing the DOT Policy Guidance.
- (e) Nondiscrimination on the Basis of Disability. The recipient agrees to comply, and assures the compliance of each third party contractor and each subrecipient at any tier of the project, with the applicable laws and regulations, discussed below, for nondiscrimination on the basis of disability.
 - 1 Section 504 of the Rehabilitation Act of 1973, as amended (Section 504), 29 U.S.C. Section 794, prohibits discrimination on the basis of disability by recipients of Federal financial assistance.
 - 2 The Americans with Disabilities Act of 1990, as amended (ADA), 42 U.S.C. Sections 12101 *et seq.*, prohibits discrimination against qualified individuals with disabilities in all programs, activities, and services of public entities, as well as imposes specific requirements on public and private providers of transportation.
 - 3 DOT Public Transportation Regulations implementing Section 504 and the ADA. These regulations include DOT regulations, “Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance,” 49 CFR Part 27, DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 CFR Part 37, and Joint Architectural and Transportation Barriers Compliance Board (ATBCB)/DOT regulations, “Americans With Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 CFR Part 1192 and 49 CFR Part 38. Examples of requirements include, but are not limited to, the following:
 - a Design and Construction. Accessibility requirements for the design and construction of new transportation facilities;

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- b) Accessibility and Usability. Requirements that vehicles acquired (with limited exceptions) be accessible to and usable by individuals with disabilities, including individuals using wheelchairs;
 - c) Complementary Paratransit Service. Requirements that public entities providing fixed-route service, (including a private non-profit entity providing public transportation service on behalf of the State or designated recipient as a subrecipient providing fixed-route service), provide complementary paratransit service to individuals with disabilities who cannot use the fixed-route service;
 - d) Equal Opportunity. Requirements for compliance with service requirements intended to ensure that individuals with disabilities are afforded equal opportunity to use transportation systems and services.
- (f) Electronic Reports and Information. Reports and other information prepared in electronic format developed in connection with a third party contract that the recipient intends to provide to FTA, among others, whether as a contract end item or in compliance with contract administration provisions, must comply with the accessibility standards of Section 508 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. Section 794d, and ATBCB regulations, “Electronic and Information Technology Accessibility Standards,” 36 CFR Part 1194.
- (3) Environmental Protections. Federal laws and regulations require the recipient to comply with applicable environmental requirements and implement them as necessary through third party contracts.
- (a) Environmental Mitigation. FTA expects the recipient to include adequate third party contract provisions to facilitate compliance with environmental mitigation measures it has agreed to implement.
 - (b) National Environmental Policy Act. Certain acquisitions and the timing of certain acquisitions can adversely affect the environmental review process for a project constituting a major Federal action, and may result in a violation of the National Environmental Policy Act (NEPA), 42 U.S.C. Sections 4321 through 4335, and joint FHWA/FTA regulations, “Environmental Impact and Related Procedures,” 23 C.F.R. Part 771 and 49 C.F.R. Part 622.
 - 1 Property. The recipient may not enter into binding arrangements for the acquisition of property that may or would affect environmental impact determinations with respect to the underlying project or otherwise interfere with any required environmental impact reviews until applicable environmental impact determinations have been made.
 - 2 Services. Council on Environmental Quality regulations, “Other Requirements of NEPA,” 40 CFR Part 1506, at Section 1506.5(c), require the recipient to obtain a disclosure statement from the contractor selected to prepare an environmental impact statement specifying that the contractor has no financial or other interest in the outcome of the project.
 - (c) Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites. DOT’s enabling legislation has special requirements designed to protect publicly owned parks,

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recreation areas, wildlife and waterfowl refuges, and historic sites, at 49 U.S.C. Sections 303(b) and 303(c) (often referred to as “Section 4(f)”), that may affect the timing and methods of recipient procurements. The Federal Highway Administration (FHWA) and FTA have published implementing regulations, “Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites,” 23 CFR Parts 771 and 774, and 49 CFR Part 622.

- (d) Clean Air. The Common Grant Rules specifically prohibit the use of facilities included in the Environmental Protection Agency (EPA) “List of Violating Facilities,” in the performance of any third party contract at any tier exceeding \$100,000. The contractor must also comply with all applicable standards, orders, or regulations issued under Section 306 of the Clean Air Act, as amended, 42 U.S.C. Section 7414, and other applicable provisions of the Clean Air Act, as amended, 42 U.S.C. Sections 7401 through 7671q.
 - (e) Clean Water. The Common Grant Rules specifically prohibit the use of facilities included in the EPA “List of Violating Facilities,” in the performance of any third party contract at any tier exceeding \$100,000. The contractor must also comply with all applicable standards, orders, or regulations issued under Section 508 of the Clean Water Act, as amended, 33 U.S.C. Section 1368, and other applicable requirements of the Clean Water Act, as amended, 33 U.S.C. Sections 1251 through 1377.
 - (f) Recycled Products. The Resource Conservation and Recovery Act of 1976, 42 U.S.C. Section 6962, requires governmental recipients to provide a competitive preference to products and services that conserve natural resources, protect the environment, and are energy efficient. EPA guidelines, “Comprehensive Procurement Guideline for Products Containing Recovered Materials,” 40 CFR Part 247, direct that third party contracts of \$10,000 or more with governmental recipients specify a competitive preference for products containing recycled materials identified in those EPA guidelines. For information about EPA’s recovered materials advisory notices, see EPA’s Web site:
<http://www.epa.gov/cpg/backgrnd.htm>.
 - (g) Other Federal Environmental Protection Requirements. Additional third party contract provisions may be needed for compliance with other Federal laws and regulations. FTA’s Master Agreement includes environmental laws and regulations that may affect the acquisition of property or services with FTA assistance such as various provisions to protect wild and scenic rivers, manage coastal zones, protect wetlands, conserve endangered species, and protect fisheries, archeological sites, and Indian sacred sites.
- (4) Energy Conservation. The Common Grant Rules require third party contract provisions as necessary for compliance with applicable energy efficiency standards and policies of State energy conservation plans issued under the Energy Policy and Conservation Act, as amended, 42 U.S.C. Sections 6321 *et seq.*
- (5) Preference for U.S. Property—Buy America. FTA’s “Buy America” law and regulations apply to projects that involve the purchase of more than \$100,000 of iron, steel, manufactured goods, or rolling stock to be delivered to the recipient to be used in the FTA assisted project. If FTA funds are used for the project, Buy America requirements apply to all procurement contracts under the project irrespective of whether a recipient decides to fund a discrete part of the project without FTA funds. Only if an activity is outside the FTA project and is financed entirely without funds

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to which FTA's Buy America regulations would apply may the recipient disregard FTA's Buy America requirements. Property that the contractor acquires to fabricate a deliverable for the recipient, such as tools, machinery, and other equipment or facilities, is not subject to FTA's Buy America requirements unless the recipient intends to take possession of that property upon completion of the project. Thus, if a third party contractor is acquiring property for its general inventory of equipment or facilities to conduct its overall business affairs, the recipient may enter the cost of that acquisition into its calculations of overhead amounts applicable to the FTA assisted project irrespective of whether the property acquired would comply with FTA's Buy America regulations. FTA's Buy America statute does not pre-empt State laws with stricter requirements on the use of foreign articles, materials, and supplies.

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

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

- (a) Shipments by Ocean Vessel. The Common Grant Rules require third party contract provisions to ensure compliance with 46 U.S.C. Section 55303 and Maritime Administration regulations, "Cargo Preference-U.S. Flag Vessels," 46 CFR Part 381, implementing the codified Cargo Preference Act. With few exceptions, the regulations require that U.S. Flag vessels be used to transport at least 50 percent of any federally assisted property.
- (b) Shipments by Air Carrier. Third party contracts involving shipments of federally assisted property by air carrier will require provisions to ensure compliance with Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, as amended ("Fly America" Act), 49 U.S.C. Section 40118, and GSA regulations, "Use of United States Flag Air Carriers," 41 CFR Sections 301-10.131 through 301-10.143. The regulations require shipment by U.S. flag air carriers unless such carriers are not reasonably available within the standards of GSA's implementing regulations.

- (7) Project Travel—Use of U.S. Flag Air Carriers. Third party contracts to acquire transportation by air carrier needed by people participating in a federally assisted project require provisions to ensure compliance with Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, as amended ("Fly America" Act), 49 U.S.C. Section 40118, and GSA regulations, "Use of United States Flag Air Carriers," 41 CFR Sections 301-10.131 through 301-10.143. The regulations require transportation by U.S. flag air carriers unless U.S. flag air carriers are not reasonably available within the standards of the GSA's implementing regulations.

d. Technical Restrictions on the Acquisition of Property and Services. The following Federal laws and regulations imposing technical requirements may affect a specific procurement:

- (1) Intelligent Transportation Systems. Intelligent transportation system (ITS) property and services must comply with the National ITS Architecture and Standards to the extent required by 23 U.S.C. Section 517(d) and FTA Notice, "FTA National ITS Architecture Policy on Transit Projects," 66 FR 1455 *et seq.*, January 8, 2001, and later published policies or implementing

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directives FTA may issue. Consequently, third party contracts involving ITS are likely to require provisions to ensure compliance with Federal requirements.

- (2) Metric Measurements. The Common Grant Rules require the recipient to accept property and services with dimensions expressed in metric measurements, to the extent practicable and feasible, in compliance with the Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act, 15 U.S.C. Sections 205a *et seq.*; Executive Order No. 12770, “Metric Usage in Federal Government Programs,” July 25, 1991, 15 U.S.C. Section 205a note; and applicable Federal regulations.

- (3) Use of \$1 Coins. To comply with Section 104 of the Presidential \$1 Coin Act of 2005, 31 U.S.C. Section 5312(p), FTA assisted property that requires the use of coins or currency in public transportation service or supporting service must be fully capable of accepting and dispensing \$1 coins.

e. Rolling Stock—Special Requirements. The following Federal laws and regulations impose requirements that may affect rolling stock procurements:

- (1) Accessibility. Rolling stock must comply with the accessibility requirements of DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 CFR Part 37, and Joint ATBCB/DOT regulations, “Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 CFR Part 1192 and 49 CFR Part 38.
- (2) Transit Vehicle Manufacturer Compliance with DBE Requirements. Before a transit vehicle manufacturer (TVM) may submit a bid or proposal to provide vehicles to be financed with FTA assistance, 49 CFR Section 26.49 requires the TVM to submit a certification that it has complied with FTA’s DBE requirements.
- (3) Minimum Service Life. FTA requires each recipient to maintain satisfactory continuing control of FTA assisted property. For buses and certain other vehicles, FTA has established minimum service life policies that may affect the quantity of vehicles that the recipient may acquire. *See*, the most recent versions of FTA Circular 5010.1, “Grant Management Requirements,” FTA Circular 9030.1, “Urbanized Area Formula Program: Grant Application Instructions,” and FTA Circular 9300.1, “Capital Program: Grant Application Instructions,” that addresses minimum service life for vehicles.
- (4) Spare Ratios. While all FTA assistance for third party procurements must be limited to property and services the recipient will use in the near future, FTA is concerned that the recipient does not acquire an excessive number of spare vehicles not regularly used in public transportation service.
- (5) Air Pollution and Fuel Economy. Each third party contract to acquire rolling stock must include provisions to ensure compliance with applicable Federal air pollution control and fuel economy regulations, such as EPA regulations, “Control of Air Pollution from Mobile Sources,” 40 CFR Part 85; EPA regulations, “Control of Air Pollution from New and In-Use Motor Vehicles and New and In-Use Motor Vehicle Engines,” 40 CFR Part 86; and EPA regulations, “Fuel Economy of Motor Vehicles,” 40 CFR Part 600.

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- (6) Preaward Review and Post Delivery Review. Each third party contract to acquire rolling stock must include provisions for compliance with applicable requirements of 49 U.S.C. Section 5323(m) and those provisions of FTA regulations, “Pre-Award and Post-Delivery Audits of Rolling Stock Purchases,” 49 CFR Part 663, that do not conflict with 49 U.S.C. Section 5323(m).
- (7) Bus Testing. Each third party contract to acquire a new bus model or a bus with significant alterations to an existing model must include provisions to assure compliance with applicable requirements of 49 U.S.C. Section 5318, as amended by MAP-21, and FTA regulations, “Bus Testing,” 49 CFR Part 665.
- (8) In-State Dealers. The recipient may not limit its third party bus procurements to its in-State dealers, 49 U.S.C. Section 5325(i). Although FTA respects State licensing requirements, FTA is prohibited by law from providing FTA assistance to support bus procurements that have the result of limiting competition to entities that have been able to obtain a State license.
- (9) Basis for Contract Award. As permitted by 49 U.S.C. Section 5325(f), the recipient may award a third party contract for rolling stock based on initial capital costs, or based on performance, standardization, life cycle costs, and other factors, or by selection through a competitive procurement process.
- (10) Time Limits for Options on Rolling Stock Contracts. MAP-21 amended 49 U.S.C. Section 5325(e)(1) by adding subsections (A) and (B), retaining the five (5) year option for the procurement of buses, while extending the option for rail procurements to seven (7) years. Consequently:
 - (a) Buses. A recipient:
 - 1 May enter into a multi-year contract to acquire buses or replacement parts, with an option not exceeding five(5) years to buy additional buses or replacement parts, 49 U.S.C. Section 5325(e)(1)(A), but
 - 2 May not exercise the option to acquire buses or replacement parts later than five (5) years after the date of its original contract.
 - (b) Rail. A recipient:
 - 1 May enter into a multi-year contract to acquire railcars or replacement parts, with an option not exceeding five(5) years to buy additional railcars or replacement parts, 49 U.S.C. Section 5325(e)(1)(B), but
 - 2 May not exercise the option to acquire railcars or replacement parts later than seven (7) years after the date of its original contract.

FTA interprets these five and seven-year periods as covering the recipient’s “material requirements” for rolling stock and replacement needs from the first day when the contract becomes effective to its “material requirements” at the end of the fifth or seventh year, as applicable. In the case of rolling stock, which frequently cannot be delivered expeditiously, FTA recognizes that a recipient’s “material requirements” for rolling stock will necessarily precede its

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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.

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

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

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

- (2) **Drug Use and Testing and Alcohol Misuse and Testing.** A third party contractor providing services involving the performance of safety sensitive activities must comply with 49 U.S.C. Section 5331 and FTA regulations, "Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations," 49 CFR Part 655.
- (3) **Accessibility.** A third party contractor providing public transportation services must operate its services in compliance with 42 U.S.C. Sections 12101 *et seq.*; DOT regulations, "Transportation Services for Individuals with Disabilities (ADA)" using facilities and equipment that comply with 49 CFR Part 37; and Joint ATBCB/DOT regulations, "Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles," 36 CFR Part 1192 and 49 CFR Part 38. Private entities must comply with the requirements of 49 CFR Part 37 applicable to public entities with which they contract to provide public transportation services. The recipient should advise its third party contractors operating public transportation services to review the requirements for public entities in this context.
- (4) **Protection of Animals.** A third party contractor providing services involving the use of animals must comply with the Animal Welfare Act, 7 U.S.C. Sections 2131 *et seq.* and Department of Agriculture regulations, "Animal Welfare," 9 CFR Subchapter A, Parts 1, 2, 3, and 4.
- (5) **Charter Service Restrictions.** A third party contractor performing services using FTA assisted facilities or equipment may not use those facilities or that equipment to support any charter

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service operations except as permitted by 49 U.S.C. Section 5323(d) and FTA regulations, “Charter Service,” 49 CFR Part 604.

- (6) School Bus Restrictions. A third party contractor performing services using FTA assisted facilities or equipment may not use those facilities or that equipment to support exclusive school bus operations except as permitted by 49 U.S.C. Sections 5323(f) or (g) and FTA regulations, “School Bus Operations,” 49 CFR Part 605, to the extent consistent with 49 U.S.C. Sections 5323(f) or (g).

g. Art. FTA recommends the following principles be used in procuring art works or the services of artists:

- (1) Choosing Art Works and Services of Artists. The appropriate selection process should vary among projects, depending upon the nature and scope of the project, characteristics of the site, resources of the community, and State and local laws and regulations. The recipient’s procedures should consist of the following:
- (a) Process. A justifiable process demonstrating appropriate use of public funds that gives serious consideration to a variety of artists available and capable of working on the project.
 - (b) Nondiscrimination. Artists, regardless of race, color, creed, national origin, sex, or age, are eligible for consideration.
 - (c) Community Participation. The community surrounding the future facility participates in the selection process. This could include all levels of participation, including supplying information, attending panel meetings, and being voting members of the panel. The extent and type of participation should be determined by the commissioning entity and be appropriate to both the project and the community.
 - (d) Selection. Selection of art works or artists, or both, recommended to the recipient is determined by a panel of art and design professionals that may include, but need not be limited to, art administrators, artists, curators, and architects, and may include members of the community.
- (2) Criteria for Art in Federally Assisted Transit Projects. When artists are involved in the planning and design of transit projects and/or when individual works of art are commissioned, the following should be considered:
- (a) Quality. Quality of the art or design,
 - (b) Effect. Impact on the public,
 - (c) Relationship. Connection to the site or the adjacent community, or both; art that relates, in form or substance, to the cultures, people, natural or built surroundings, or history of the area in which the project is located,
 - (d) Suitability. Appropriateness for the site, including safety and scale,
 - (e) Resilience. Durability of materials and fabrication,

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(f) Indestructibility. Resistance to vandalism, and

(g) Preservation. Minimum maintenance.

(3) Compensation of Artists. Artists may be paid a fixed fee or an hourly wage with a cap, similar to other FTA standard fees or wages for procurement of design professional services, in addition to other federally approved costs that may be recognized under the contract.

(4) Prohibition. Artistic undertakings that promote specific private or corporate business interests are ineligible for FTA funding.

h. Architectural Engineering (A&E) and Related Services—Special Requirements. Federal laws and regulations impose the following requirements on A&E and related procurements:

(1) Qualifications-Based Requirements. For projects related to or leading to construction, an FTA recipient must use the qualifications-based procurement procedures of 40 U.S.C. Chapter 11 (“Brooks Act” procedures) when contracting for A&E services and other services described in 49 U.S.C. Section 5325(b), which include program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related services.

(2) Relation to Construction. The nature of the services to be performed and its relationship to construction, not the nature of the prospective contractor, determines whether qualifications-based procurement procedures may be used.

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

(b) Requirements in the Context of a Construction Project. A project involving construction (including an ITS project) does not always require the use of qualifications-based procurement procedures. Whether qualifications-based procurement procedures may be used depends on the actual services to be performed in connection with the construction project. For example:

1 End Products Used in Construction. The design or fabrication of message signs, signals, and movable barriers that will become off-the-shelf items or will be fabricated and delivered as final end products for installation in an FTA assisted construction project,

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including an (ITS) construction project, are not services for which qualifications-based procurement procedures may be used.

- 2 Services Related to Design of Construction Projects. In contrast, services of a program manager, project designer, construction manager, or engineer in which the contractor would select the finished products to be acquired for an FTA assisted construction project are services for which qualifications-based procurement procedures must be used.
- 3 Actual Construction. The actual construction or improvement to the real property to be used in an FTA assisted construction project, however, are not services for which qualifications-based procurement procedures may be used.

(c) Type of Contractor Not Determinative. The nature of the firm performing the services does not determine whether it will be selected through the use of qualifications-based procurement procedures. For example, if a well-known A&E firm offers to provide mapping services not related to construction, alteration, or repair of real property, the recipient may not use qualifications-based procurement procedures to evaluate that contractor's offer. In contrast, if a firm that does not generally provide A&E services offers to provide mapping services that are directly in support of, directly connected to, or directly related to or lead to construction, alteration, or repair of real property, the recipient must evaluate that offer using qualifications-based procurement procedures.

(3) Equivalent State Law. SAFETEA-LU also divided the former 49 U.S.C. Section 5325(b) by separating procurement requirements for FTA assisted A&E services from audit requirements for FTA assisted A&E services. As amended by the SAFETEA-LU Technical Corrections Act, 49 U.S.C. Section 5325(b)(1) requires A&E services to be procured using either "Brooks Act" procedures or an equivalent qualifications-based requirement adopted by a State before August 10, 2005.

(4) Special Requirements for Indirect Cost Rates. In addition, SAFETEA-LU amended 49 U.S.C. Section 5325 to require the acceptance of FAR indirect cost rates for applicable one-year accounting periods if those rates are not currently in dispute. After the indirect cost rates are accepted as required, the recipient must use those indirect cost rates for contract estimates, negotiation, administration, reporting, and payments, with administrative or de facto ceiling limitations. *See*, 49 U.S.C. Section 5325(b)(2) and subparagraph 2.j(2)(c) of this Chapter.

i. Construction—Special Requirements. The following Federal laws and regulations impose requirements that may affect FTA assisted construction projects:

(1) Bonding. The Common Grant Rules require bonds for all construction contracts exceeding the simplified acquisition threshold (*see*, Chapter II, Subsection 3.b) unless FTA determines that other arrangements adequately protect the Federal interest. FTA's bonding policies are as follows:

- (a) Bid Guarantee. Both FTA and the Common Grant Rules generally require each bidder to provide a bid guarantee equivalent to 5 percent of its bid price. The "bid guarantee" must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid to ensure that the bidder will honor its bid upon acceptance.

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- (b) Performance Bond. Both FTA and the Common Grant Rules generally require the third party contractor to obtain a performance bond for 100 percent of the contract price. A “performance bond” is obtained to ensure completion of the obligations under the third party contract.
- (c) Payment Bond. The Common Grant Rules generally require the third party contractor to obtain a standard payment bond for 100 percent of the contract price. A “payment bond” is obtained to ensure that the contractor will pay all people supplying labor and material for the third party contract as required by law. FTA, however, has determined that payment bonds in the following amounts are adequate to protect FTA’s interest and will accept a local bonding policy that meets the following minimums:
- 1 Less Than \$1 Million. Fifty percent of the contract price if the contract price is not more than \$1 million,
 - 2 More Than \$1 Million but Less Than \$5 Million. Forty percent of the contract price if the contract price is more than \$1 million but not more than \$5 million, or
 - 3 More Than \$5 Million. Two and one half million dollars if the contract price is more than \$5 million.
- (d) Acceptable Sureties. The Common Grant Rule for non-governmental recipients requires the non-governmental recipient to obtain construction bonds from companies holding certificates of authority as acceptable sureties under Department of the Treasury regulations, “Surety Companies Doing Business with the United States,” 31 CFR Part 223. For a current list of approved sureties, see Department of the Treasury’s Listing of Approved Sureties (Department Circular 570), <http://fms.treas.gov/c570/c570.html>. FTA encourages each governmental recipient to require similarly acceptable sureties.
- (e) Reduced Bonding. FTA recognizes that bonding costs can be expensive. FTA will accept a local bonding policy that conforms to the minimums described in this subparagraph 2.h(1) of this Chapter. FTA reserves the right to approve bonding amounts that do not conform to these minimums if the local bonding policy adequately protects the Federal interest. A recipient that wishes to adopt less stringent bonding requirements, for a specific class of projects, or for a particular project should submit its policy and rationale to the Regional Administrator for the region administering the project.
- (f) Excessive Bonding. Compliance with State and local bonding policies that are greater than FTA’s bonding requirements do not require FTA approval. FTA recognizes that in some situations bond requirements can be useful if the recipient has a material risk of loss because of a failure of the prospective contractor. This is particularly so if the risk results from the likelihood of the contractor’s bankruptcy or financial failure when the work is partially completed. Nevertheless, if the recipient’s “excessive bonding” requirements would violate the Common Grant Rules as restrictive of competition, FTA will not provide Federal assistance for procurements encumbered by those requirements. Consequently, if the recipient’s bonding policies far exceed those described in this subsection; FTA reminds the recipient that it may find it useful to submit its policy and rationale to the Regional Administrator for the region administering the project.

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- (2) Seismic Safety. The recipient must include seismic safety provisions in its third party contracts for the construction of new buildings or additions to existing buildings as required by 42 U.S.C. Sections 7701 *et seq.*, and DOT regulations, “Seismic Safety,” 49 CFR Part 41 at Sections 41.117 and 41.120, implementing the Earthquake Hazards Reduction Act of 1977, as amended, 42 U.S.C. Sections 7701 *et seq.*
- (3) Value Engineering. The Common Grant Rule for governmental recipients encourages them to use value engineering provisions in contracts for construction projects, and cautions that value engineering can be a pre-requisite for some Federal assistance awards. FTA generally will not approve a New Starts grant application for final design funding or a full funding grant agreement until value engineering is complete. It is important to note that some contractual arrangements (for example, design-build contracts) may inherently include value engineering. When this is the case, FTA does not require separate value engineering proposals, contract changes, or other processes. From a procurement view, the concept of value engineering is more important than the form it takes.
- (4) Equal Employment Opportunity. The Common Grant Rules require that third party construction contracts include provisions ensuring compliance with DOL regulations, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor,” 41 CFR Chapter 60, which implement Executive Order No. 11246, “Equal Employment Opportunity,” September 24, 1965, as amended by Executive Order No. 11375, “Amending Executive Order No. 11246 Relating to Equal Employment Opportunity,” October 13, 1967.
- (5) Prevailing Wages. Under 49 U.S.C. Section 5333(a), Davis-Bacon Act prevailing wage protections apply to laborers and mechanics employed on FTA assisted construction, alteration, or repair projects. The Common Grant Rules require third party contracts for construction, alteration, or repair at any contract tier exceeding \$2,000 to include provisions requiring compliance with the Davis-Bacon Act, 40 U.S.C. Sections 3141 *et seq.*, and implementing DOL regulations “Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction,” 29 CFR Part 5. The Davis-Bacon Act requires that contractors pay wages to laborers and mechanics at a rate not less than the minimum wages specified in the wage determination made by the Secretary of Labor. The Davis-Bacon Act also requires contractors to pay wages not less than once a week. The recipient must include a copy of the current prevailing wage determination issued by DOL in each contract solicitation and must condition contract award upon the acceptance of that wage determination. These requirements are in addition to the separate Wage and Hour Requirements addressed in paragraph 2.c(1) of this Chapter IV.
- (6) Anti-Kickback. Section 1 of the Copeland “Anti-Kickback” Act, at 18 U.S.C. Section 874, prohibits anyone from inducing, by any means, any person employed on construction, prosecution, completion, or repair of a federally assisted building or work, to give up any part of his or her compensation to which he or she is otherwise entitled. Section 2 of that Act, at 40 U.S.C. Section 3145, as amended, and implementing DOL regulations, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States,” 29 CFR Part 3, impose record keeping requirement on all third party contracts for construction, alteration, or repair exceeding \$2,000. The Common Grant Rules also requires provisions for compliance with the Copeland “Anti-Kickback” Act, as amended, and implementing DOL regulations.

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- (7) Construction Safety. The Common Grant Rules require provisions to ensure safety at construction sites so that no laborer or mechanic shall be required to work in surroundings or under working conditions that are unsanitary, hazardous, or dangerous as prohibited by the safety requirements of Section 107 of the Contract Work Hours and Safety Standards Act, 40 U.S.C. Section 3704, and its implementing DOL regulations, “Safety and Health Regulations for Construction,” 29 CFR Part 1926. Notably, Section 4104(c) of the Federal Acquisition Streamlining Act of 1994, 40 U.S.C. Section 3701(b)(3)(A)(iii), increased the threshold for construction safety protections to \$100,000 from \$2,000 as set forth in the Common Grant Rules, so that a federally assisted construction contract must exceed \$100,000 before these construction safety requirements apply to that contract.
- (8) Labor Neutrality. Executive Order No. 13502, “Use of Project Labor Agreements for Federal Construction Projects,” February 6, 2009, rescinds Executive Order No. 13202, “Preservation of Open Competition and Government Neutrality Towards Government Contractors’ Labor Relations on Federal and Federally Funded Construction Projects,” February 17, 2001, as amended by Executive Order No. 13208, April 6, 2001, 41 U.S.C. Section 251 note. Consequently, a recipient may now require the use of a project labor agreement (PLA) in its third party contract, and a third party contractor or subcontractor may continue to use a PLA should it choose to do so.
- (9) Preference for U.S. Property—Buy America. For any FTA assisted project having third party construction contracts exceeding \$100,000, FTA’s Buy America law and regulations require the third party contractor to provide property produced or manufactured in the United States for use in the construction project that the recipient acquires, unless FTA has granted a waiver authorized by those regulations. If FTA funds are used for the project, Buy America requirements apply to all third party procurement contracts under the project irrespective of whether a recipient decides to fund a discrete part of the project without FTA funds. Only if an activity is outside the FTA project and is financed entirely without funds to which FTA’s Buy America regulations would apply may the recipient disregard FTA’s Buy America requirements. FTA cautions that its Buy America regulations are complex and different from the Federal “Buy American Act” regulations in the Federal Acquisition Regulation (FAR) at 48 CFR Chapter 1, Subchapter D, Part 25, Subparts 25.1 and 25.2.

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

- (10) Accessibility. Facilities to be used in public transportation service must comply with 42 U.S.C. Sections 12101 *et seq.*; DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 CFR Part 37; and Joint ATBCBDOT regulations, “Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 CFR Part 1192 and 49 CFR Part 38. Notably, DOT incorporated by reference into Appendix A of its regulations at 49 CFR Part 37 the ATBCB’s “Americans with Disabilities Act Accessibility Guidelines” (ADAAG), revised July 2004, which include accessibility guidelines for buildings and facilities.

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DOT also added specific provisions to Appendix A of 49 CFR Part 37 modifying the ADAAG, with the result that buildings and facilities must comply with both the ADAAG and the DOT amendments.

- j. Research, Development, Demonstration, Deployment, and Special Studies—Special Requirements. Procurements of research-type services can involve circumstances that bring special Federal requirements into effect. Among these are:
- (1) Patent Rights. Irrespective of the status of the recipient, subrecipient, or third party contractor (for example, a large business, small business, State government, State instrumentality, local government, Indian tribe, non-profit organization, institution of higher education, individual, and so forth) the Common Grant Rules require provisions consistent with Department of Commerce regulations, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms,” 37 CFR Part 401 (implementing the Bayh-Dole Act, 35 U.S.C. Sections 200 *et seq.*), unless the Federal Government requires otherwise. Except in the case of an “other agreement” in which the Federal Government has agreed to take more limited rights, the Federal Government is entitled to a non-exclusive, royalty free license to use the resulting invention, or patent to the invention, for Federal Government purposes.
 - (2) Rights in Data. In general, FTA does not seek greater rights in data or copyright than described in the Common Grant Rules when it provides FTA capital assistance to support acquisitions. But when FTA provides Federal assistance to support the costs of a research, development, demonstration, or a special studies project, FTA generally seeks sufficient rights in the data developed so that the resulting data can be made available to any FTA recipient, subrecipient, third party contractor, or third party subcontractor. FTA’s general purpose in providing Federal assistance for a research, development, demonstration, or special studies project is to increase transportation knowledge, rather than limit the benefits of the project to project participants. Therefore, unless FTA determines otherwise in writing, FTA expects the following conditions to apply to rights in data requirements for FTA assisted research, development, demonstration, or special studies projects.
 - (a) Publication Restrictions. Except for its own internal use, the FTA Master Agreement provides that neither the recipient nor the third party contractor may publish or reproduce subject data in whole or in part, or in any manner or form, without the advance written consent of the Federal Government, unless the Federal Government has released or approved the release of that data to the public. These restrictions do not apply to an institution of higher education.
 - (b) Distribution of Data. Except for contracts for adaptation of automatic data processing equipment or data provided in support of an FTA capital project, each recipient and third party contractor must agree that, in addition to the rights in data and copyrights that it must provide to FTA under the Common Grant Rules, FTA may make available to any FTA recipient, subrecipient, third party contractor, or third party subcontractor, either FTA’s license in the copyright to the subject data or a copy of the subject data. If, for any reason, the project is not completed, all data developed under the project is expected to be delivered as FTA may direct.

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In certain circumstances, however, FTA may determine that it is in the public interest to take only those rights in data identified in the Common Grant Rules.

- (3) Export Control. If data developed in the course of a third party contract is subject directly or indirectly to U.S. Export Control regulations, that data may not be exported to any countries or any foreign persons, without first obtaining the necessary Federal license or licenses and complying with any applicable Department of Commerce, Export Administration Regulations, 15 CFR Part 730.
 - (4) Protection of Human Subjects. A third party contractor providing services involving the use of human subjects must comply with the National Research Act at 42 U.S.C. Sections 289 *et seq.*, and DOT regulations, "Protection of Human Subjects," 49 CFR Part 11.
 - (5) Protection of Animals. A third party contractor providing services involving the use of animals must comply with the Animal Welfare Act, 7 U.S.C. Sections 2131 *et seq.*, and Department of Agriculture regulations, "Animal Welfare," 9 CFR Subchapter A, Parts 1, 2, 3, and 4.
- k. Audit Services. In general, the procedures of this circular apply to the acquisition of audit services financed with FTA assistance. The following considerations, however, are especially important in procurements of audit services:
- (1) Single Audit Act. Each recipient that spends \$500,000 or more in Federal awards in a single year must obtain an audit as required by the Single Audit Act of 1984, as amended, 31 U.S.C. Sections 7501 *et seq.*, and must ensure compliance with OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations," as revised.
 - (a) Organizational Conflicts of Interest. The auditor selected must be independent of the recipient.
 - (b) Eligibility of Costs. The recipient may charge the costs for audits required by the Single Audit Act to its project as direct or indirect costs as permitted by applicable Federal Cost Principles. A recipient that spends less than \$500,000 in Federal awards in a single year is not required to obtain this audit. Nor may a recipient spending less than \$500,000 in Federal awards in a single year finance the costs of such an audit with Federal assistance.
 - (2) Other Project Audits. Before procuring audit services for a specific contract or project, the recipient should be aware of the following:
 - (a) Organizational Conflicts of Interest. In general, the recipient must select an auditor that is independent of the third party contractor to be audited.
 - (b) Verification of Indirect Costs. Federal verification of a contractor's indirect cost rates, such as provisional overhead (burden) and General & Administrative (G&A) rates may be required. To the extent possible, relevant information available through undisputed audits of the contractor by other recipients should be used.
 - (c) Duplication of Services. To prevent duplication and ensure the eligibility of particular audit services for Federal participation, a recipient seeking a third party contract audit should contact FTA before undertaking or contracting for the audit. This is particularly important in

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connection with the procurement of A&E services, because 49 U.S.C. Section 5325(b)(2) requires that FAR Part 31 cost principles be used to audit A&E contracts. In addition, 49 U.S.C. Section 5325(b)(2) requires the recipient and its A&E contractors and subcontractors to accept indirect cost rates established under FAR cost principles if those rates are not under dispute. Thus, the recipient should not obtain duplicative audits because they are likely to produce disparate indirect cost rates and the costs of those audits may be ineligible for Federal assistance. Accordingly, FTA recommends that the recipient seek guidance from the cognizant Federal auditor or agency that approved the third party contractor's indirect cost rates before entering into contracts for audits.

- (d) Obtaining Indirect Cost Rates. Recipients and third party contractors may obtain indirect cost rates based on FAR cost principles from the following sources:
- 1 Governmental Entities. Government entities may obtain indirect cost rates through negotiations with OMB. *See*, OMB Guidance for Grants and Agreements, "Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A-87)," 2 CFR Part 225, App. E, "State and Local Indirect Cost Rate Proposals."
 - 2 Indian Tribes. Indian tribes may obtain indirect cost rates with the Department of the Interior. *See*, OMB Guidance for Grants and Agreements, "Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A-87)," 2 CFR Part 225, App. E, "State and Local Indirect Cost Rate Proposals."
 - 3 Educational Institutions. Educational institutions may obtain facilities and administrative rates (indirect cost rates) from the Department of Health and Human Services (HHS) or the Department of Defense's Office of Naval Research (DOD), usually depending on which of the two agencies (HHS or DOD) has provided more funds to the educational institution for the most recent three years. *See*, OMB Guidance for Grants and Agreements, "Cost Principles for Educational Institutions (OMB Circular A-21)," 2 CFR Part 220, App. A, "Principles for Determining Costs Applicable to Grants, Contracts, and Other Agreements With Educational Institutions."
 - 4 Non-Profit Entities. Non-profit entities may obtain indirect cost rates from the Federal agency with the largest dollar value of awards with an organization, unless different arrangements are agreed to by the agencies concerned. *See*, OMB Guidance for Grants and Agreements, "Cost Principles for Non-Profit Organizations (OMB Circular A-122)," 2 CFR Part 230, App. A, "General Principles."
 - 5 Private For-Profit Entities. Private for-profit entities may obtain indirect cost rates from the Defense Contract Audit Agency. *See*, the DCAA Web site: <http://www.dcaa.mil>.
- (e) Eligibility of Costs. Costs of third party contract audits and proposal evaluations are eligible for reimbursement by FTA as a direct or indirect charge as permitted by applicable Federal cost principles. FTA reserves the right to disallow payments for duplicative audit charges.

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CHAPTER V

SOURCES

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

1. FORCE ACCOUNT. As used in this circular, “force account” means the recipient’s own labor forces and equipment. The use of force account labor is a project management function, rather than a procurement and contract administration function, except in the general sense of the recipient’s ability to perform work with its own forces rather than contracting with another entity to acquire the property or services it needs, and the cost implications of the recipient’s decision. Although rarely exercised, FTA’s grant or cooperative agreement secures FTA the right to determine the extent to which Federal assistance may be used to participate in force account costs. FTA’s concern is to assure that the recipient will have adequate technical capacity to perform the work it undertakes reasonably economically and prudently. The third party contracting guidance of this circular does not apply to a recipient’s use of its own forces to perform project work.
2. SHARED USE. The Common Grant Rule for governmental recipients encourages recipients and subrecipients to enter into agreements for shared use of property and services. FTA encourages non-governmental recipients to consider shared use if economical and feasible.
3. JOINT PROCUREMENTS. FTA uses the term “joint procurement” to mean a method of contracting in which two or more purchasers agree from the outset to use a single solicitation document and enter into a single contract with a vendor for delivery of property or services in a fixed quantity, even if expressed as a total minimum and total maximum. Unlike a State or local government purchasing schedule, a joint procurement is not drafted for the purpose of accommodating the needs of other parties that may later want to participate in the benefits of that contract.
 - a. Use Encouraged. The Common Grant Rules and FTA encourage recipients to procure goods and services jointly with other recipients to obtain better pricing through larger purchases. Joint procurements offer the advantage of being able to obtain goods and services that may match each participating recipient’s requirements better than those likely to be available through an assignment of another recipient’s contract rights. If economical and feasible, FTA also participates in the costs of joint procurements by non-governmental recipients.
 - b. All FTA and Federal Requirements Apply. When obtaining goods or services in this manner, recipients participating in the joint procurement must ensure compliance with all applicable FTA and Federal requirements and include all required clauses and certifications in the joint solicitation and contract documents.
4. STATE OR LOCAL GOVERNMENT PURCHASING SCHEDULES OR PURCHASING CONTRACTS. FTA uses the term “state or local government purchasing schedule” to mean an arrangement that a State or local government has established with several or many vendors in which those vendors agree to provide essentially an option to the State or local government, and its subordinate government entities, to acquire specific property or services in the future at established prices. These arrangements are somewhat similar to the General Services Administration’s (GSA) Cooperative Purchasing Program available for Federal Government use. If the State or local government wishes to

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permit others to use its schedules, the State or local government might seek the agreement of the vendor to provide the listed property or services to others with access to the schedules, or it may permit the vendor to determine whether or not it wishes to do so. **CAUTION:** The term “State or local government purchasing schedule” does not include intergovernmental purchasing schedules to be the type of State or local intergovernmental agreements.

a. Use.

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

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

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

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

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

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

c. All FTA and Federal Requirements Apply. When obtaining property or services in this manner, the recipient must ensure all Federal requirements, required clauses, and certifications (including Buy America) are properly followed and included, whether in the master intergovernmental contract or in the recipient's purchase document. One way of achieving compliance with FTA requirements is for all parties to agree to append the required Federal clauses in the purchase order or other document that effects the recipient’s procurement. When buying from these schedules, the recipient should obtain Buy America certification before entering into the purchase order. If the product to be purchased is Buy America compliant, there is no problem. If the product is not Buy America compliant, the recipient will need to obtain a waiver from FTA before proceeding.

5. **FEDERAL EXCESS AND SURPLUS PROPERTY.** The Common Grant Rule for governmental recipients encourages recipients to use Federal excess and surplus property managed by GSA when feasible and economical rather than procuring new property. The GSA Federal Property Management Regulations, 41 CFR Parts 101-42 through 101-46, 101-48, and 101-49 govern the eligibility of recipients

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and subrecipients, as well as others, to acquire supplies and services through GSA's personal property utilization and disposal programs.

6. **FEDERAL SUPPLY SCHEDULES.** A recipient must be specifically authorized by Federal law before it may use a GSA Federal Supply Schedule.
 - a. **Full Use of Federal Supply Schedules.** Appendix B of GSA Order ADM 4800.2E, "Eligibility to Use GSA Sources of Supply and Services," explains that FTA recipients eligible for full use of GSA Schedules are limited by the Federal Property and Administrative Services Act of 1949, as amended, at 40 U.S.C. Section 502(a)(3) to the Washington Metropolitan Area Transit Authority and the District of Columbia Department of Mass Transportation. The Government of American Samoa, the Government of Guam, Virgin Islands Department of Public Works, and the Commonwealth of the Northern Marianas are similarly authorized access to GSA schedules by 48 U.S.C. Section 1469e.
 - b. **Limited Use of Federal Supply Schedules.** Federal laws authorize State and Local Governments (including institutions of higher education) to use Federal Supply Schedules to acquire information technology (IT) and to purchase products and services to facilitate recovery from a major disaster. In both circumstances, GSA defines the term "State and Local Government" broadly to include many FTA governmental recipients and others as follows:

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

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

- (1) **Information Technology.** Section 211 of the E-Government Act of 2002, 40 U.S.C. Section 502(c)(1), authorizes "State and local governments," within limits established by law, to acquire IT of various types through GSA's Cooperative Purchasing Program, Federal Supply Schedule 70.
- (2) **Major Disaster or Emergency Recovery.** Since February 1, 2007, Section 833 of the John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364, amended 40 U.S.C. Section 502(d), to authorize State and local government entities to use any GSA Federal Supply Schedule to acquire property and services in advance of a major disaster declared by the President of the United States, as well as in the aftermath of an emergency event. The State or local government is then responsible for ensuring that the property or services acquired will be used for recovery. More information about major disaster and emergency recovery acquisition is available at GSA's Web site:

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http://www.gsa.gov/Portal/gsAEp/contentView.do?faq=yes&pageTypeId=8199&contentId=22410&contentType=GSA_OVERVIEW.

- (3) Local Preparedness Acquisition. Section 2 of the Local Preparedness Acquisition Act, Pub. L. 110-248, June 26, 2008, amended 40 U.S.C. Section 502(c) by adding paragraph (2) authorizing “State and local governments” within limits established by law, to acquire law enforcement, security and certain related items of various types through GSA’s Cooperative Purchasing Program Federal Supply Schedule 84 or any amended or later version of that Federal supply classification group. Information about cooperative purchasing is available at GSA’s Web site: **<http://www.gsa.gov/Portal/gsAEp/channelView.do?pageTypeId=8199&channelPage=%252Fep%252Fchannel%252FgsaOverview.jsp&channelId=-13528>**.

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

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(c) Awards Treated as Sole Source Procurements. The following actions constitute sole source awards:

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

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

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

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

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

- (a) Acquisition Through Assigned Contract Rights. Although FTA does not encourage the practice, a recipient may find it useful to acquire contract rights through assignment by another recipient. A recipient that obtains contractual rights through assignment may use them after first determining 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. See, FTA's "Best Practices Procurement Manual" for further information about procurements through assignment of another's contract rights. The recipient using assigned contract rights

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is responsible for ensuring the contractor's compliance with FTA's Buy America requirements and execution of all the required Buy America preaward review and post-delivery review certifications. For further details, please refer to FTA's Pre-Award and Post-Delivery Handbook for buses and railcars, which contain copies of those certifications. The recipient seeking to use assigned contract rights will not usually be able to determine whether the assigning recipient originally procured unreasonably large quantities. Before proceeding with the assignment, however, FTA does expect the recipient seeking the assignment to review the original contract to be sure that the quantities the assigning recipient acquired, coupled with the quantities the acquiring recipient seeks, do not exceed the amounts available under the assigning recipient's contract.

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

- 1 Joint Procurements. Recipients should consider combining or "pooling" their procurements to obtain better pricing. In general, joint procurements are often more desirable than procurements through assignment because an assignment does not represent the combined buying power of more than one purchaser at the time when prices are established. A joint procurement may also offer the advantage of permitting the parties to acquire property and services more closely responsive to each purchaser's material requirements than would be available through assignment of existing contract rights. FTA cautions, however, that if two or more parties jointly solicit and award an IDIQ contract, total minimum and maximum quantities are expected to be stated in the solicitation and contract.
- 2 Intergovernmental Procurements. As discussed in sections 4, 5, and 6 of this Chapter, Federal, State, and local governmental resources may provide attractive procurement opportunities.

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

- (1) Improper Contract Expansion. A contract has been improperly expanded when it includes a larger scope, greater quantities, or options beyond the original recipient's reasonably anticipated needs. A contract has also been improperly expanded when excess capacity has been added primarily to permit assignment of those contract rights to another entity. The Common Grant Rules requires the recipient to have procurement procedures that preclude the recipient from acquiring property or services it does not need.
- (2) Cardinal Changes. A significant change in contract work (property or services) that causes a major deviation from the original purpose of the work or the intended method of achievement, or causes a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract, is a cardinal change. Such practices are sometimes informally referred to as "tag-ons." A change within the scope of the contract (sometimes referred to as an "in-scope" change) is not a "tag-on" or cardinal change.

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- (a) Identifying Cardinal Changes. Although FTA has provided additional guidance in its Best Practices Procurement Manual, FTA has not developed a finite list of acceptable contract changes. Recognizing a cardinal change to a third party contract can be difficult. A cardinal change cannot be identified easily by assigning a specific percentage, dollar value, number of changes, or other objective measure that would apply to all cases.
- (b) Changes in Quantity. To categorize virtually any change in quantity as a prohibited cardinal change (sometimes referred to as an “out-of-scope” change) fails to account for the realities of the marketplace and unnecessarily restricts a recipient from exercising reasonable freedom to make minor adjustments contemplated fairly and reasonably by the parties when they entered into the contract. The U.S. Supreme Court decision in *Freund v. United States*, 260 U.S. 60 (1922) supports FTA’s policy.
- (c) Tests. Among other things, customary marketing practices can influence the determination of which changes will be “cardinal.” Other tests involve the nature and extent of the work to be performed, the amount of effort involved, whether the change was originally contemplated at the time the original contract was entered into, or the cumulative impact on the contract’s quantity, quality, costs, and delivery terms.
- (d) Rolling Stock. In the case of rolling stock, a major change in quantity or a substitution of major end items not contemplated when competition for the original award took place would generally be a cardinal change. Another cardinal change would, at this time, include a change from a high-floor to a low-floor vehicle. Changing an engine might result in a cardinal change depending on the circumstances surrounding the project and whether a compatible replacement could be obtained through competition. FTA, however, considers changes to seating, fabrics, and colors, exterior paint schemes, signage, and floor covering, and other similar changes to be permissible changes.
- (e) Federal Procurement Standards. The broader standards applied in Federal contracting practice reflected in Federal court decisions, Federal Boards of Contract Appeals decisions, and U.S. Comptroller General Decisions provide guidance in determining whether a change would be treated as a cardinal change. FTA does not imply that these Federal procurement decisions are controlling. FTA intends to consider the collective wisdom within these decisions in determining the nature of third party contract changes along the broad spectrum between permissible changes and impermissible cardinal changes. Other guidance can be found in FTA’s Best Practices Procurement Manual and “Frequently Asked Questions” at the FTA Web site:
http://www.fta.dot.gov/funding/thirdpartyprocurement/grants_financing_6039.html.

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

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

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CHAPTER VI

PROCEDURAL GUIDANCE FOR OPEN MARKET PROCUREMENTS

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

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

- c. **Prequalification.** Prequalification lists are most commonly used in procurements of property involving lengthy evaluations needed to determine whether it satisfies the recipient's standards. The Common Grant Rule for governmental recipients permits a recipient to prequalify people, firms, and property for procurement purposes under the following standards:
 - (1) **Lists.** The recipient ensures that all prequalification lists it uses are current.

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- (2) Sources. The recipient ensures that all prequalification lists it uses include enough qualified sources to provide maximum full and open competition.
- (3) Qualification Periods. The recipient permits potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date). FTA, however, does not require a recipient to hold a particular solicitation open to accommodate a potential supplier that submits property for approval before or during that solicitation. Nor must a recipient expedite or shorten prequalification evaluations of bidders, offerors, or property presented for review during the solicitation period.

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

2. SOLICITATION REQUIREMENTS AND RESTRICTIONS. The Common Grant Rules require that each solicitation provide the following information:

- a. Description of the Property or Services. The solicitation and the contract awarded must include a clear and accurate description of the recipient's technical requirements for the property or services to be acquired in a manner that provides for full and open competition.
 - (1) What to Include. The description may include a statement of the qualitative nature of the property or services to be acquired. When practicable, the recipient should describe its requirements in terms of functions to be performed or level of performance required, including the range of acceptable characteristics or minimum acceptable standards. The Common Grant Rules for governmental recipients states that "Detailed product specifications should be avoided if at all possible." Both Common Grant Rules express a preference for performance or functional specifications, but do not prohibit the use of detailed technical specifications when appropriate.
 - (2) Quantities Limited to the Recipient's Actual Needs. FTA limits Federal assistance to the amount necessary to support the quantity of property or extent of services the recipient actually needs at the time of acquisition. The recipient may not add quantities or options to contracts solely to allow assignments at a later date. FTA will not knowingly support the additional cost of contract rights to property or services excess to the recipient's immediate needs, even though the recipient may assign its excess contract rights to others.
 - (3) Brand Name or Equal. When it is impractical or uneconomical to provide a clear and accurate description of the technical requirements of the property to be acquired, a "brand name or equal" description may be used to define the performance or other salient characteristics of a specific type of property. The recipient must identify the salient characteristics of the named brand that offerors must provide. When using a "brand name" specification, the recipient does not need to reverse-engineer a complicated part to identify precise measurements or specifications in order to describe its salient characteristics. FTA's "Best Practices Procurement Manual," (BPPM) contains additional information on preparation of specifications including examples with specific language.
 - (4) Prohibitions. The Common Grant Rules prohibits solicitation requirements that contain features that unduly restrict competition. FTA recipients are also prohibited by 49 U.S.C. Section 5325(h) from using FTA assistance to support an exclusionary or discriminatory specification. Some

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situations considered to be impermissibly restrictive of competition include, but are not limited to, the following, all of which are identified in one or both Common Grant Rules:

- (a) Excessive Qualifications. Imposing unreasonable business requirements for bidders or offerors.
- (b) Unnecessary Experience. Imposing unnecessary experience requirements for bidders and offerors.
- (c) Improper Prequalification. Using prequalification procedures that conflict with the prequalification standards described in subsection 1.c of this Chapter.
- (d) Retainer Contracts. Making a noncompetitive award to any person or firm on a retainer contract with the recipient if that award is not for the property or services specified for delivery under the retainer contract.
- (e) Excessive Bonding. To encourage greater contractor participation in FTA assisted projects, FTA does not require the recipient to impose bonding requirements on its third party contractors other than construction bonding specified by the Common Grant Rules and this circular for construction. FTA discourages unnecessary bonding because it increases the cost of the contract and restricts competition, particularly by disadvantaged business enterprises. Bond companies exercise their discretion and assure their profits primarily by declining to undertake excessive risks. Consequently many bidders have limited “bonding capacity.” Unnecessary performance bonding requirements reduce a prospective bidder’s or offeror’s capability to bid or offer a proposal on bonded work. Small businesses with short histories may have particular difficulty obtaining bonds as may be specified.

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

- (f) Brand Name Only. Specifying only a “brand name” product without allowing offers of “an equal” product, or allowing “an equal” product without listing the salient characteristics that the “equal” product must meet to be acceptable for award.
- (g) In-State or Local Geographic Restrictions. Specifying in-State or local geographical preferences, or evaluating bids or proposals in light of in-State or local geographic preferences, even if those preferences are imposed by State or local laws or regulations. In particular, 49 U.S.C. Section 5325(i) prohibits an FTA recipient from limiting its bus purchases to in-State dealers. Exceptions expressly mandated or encouraged by Federal law include the following:

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- 1 Architectural Engineering (A&E) Services. Geographic location may be a selection criterion if an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project.
 - 2 Licensing. A State may enforce its licensing requirements, provided that those State requirements do not conflict with Federal law.
 - 3 Major Disaster or Emergency Relief. Federal assistance awarded under the Stafford Act, 42 U.S.C. Section 5150, to support contracts and agreements for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities permits a preference, to the extent feasible and practicable, for organizations, firms, and individuals residing or doing business primarily in the area affected by a major disaster or emergency.
- (h) Organizational Conflicts of Interest. Engaging in practices that result in organizational conflicts of interest as prohibited by the Common Grant Rules:
- 1 Occurrence. An organizational conflict of interest occurs when any of the following circumstances arise:
 - a Lack of Impartiality or Impaired Objectivity. When the contractor is unable, or potentially unable, to provide impartial and objective assistance or advice to the recipient due to other activities, relationships, contracts, or circumstances.
 - b Unequal Access to Information. The contractor has an unfair competitive advantage through obtaining access to nonpublic information during the performance of an earlier contract.
 - c Biased Ground Rules. During the conduct of an earlier procurement, the contractor has established the ground rules for a future procurement by developing specifications, evaluation factors, or similar documents.
 - 2 Remedies. FTA expects the recipient to analyze each planned acquisition in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible, and avoid, neutralize, or mitigate potential conflicts before contract award.
- (i) Restraint of Trade. Supporting or acquiescing in noncompetitive pricing practices between firms or between affiliated companies. Questionable practices would include, but not be limited to submissions of identical bid prices for the same products by the same group of firms, or an unnatural pattern of awards that had the cumulative effect of apportioning work among a fixed group of bidders or offerors.
- (j) Arbitrary Action. Taking any arbitrary action in the procurement process.
- b. Evaluation Factors. The solicitation must identify all factors to be used in evaluating bids or proposals.
 - c. Contract Type Specified. The recipient's specifications should state the type of contract that will be awarded.

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(1) Typical Contract Types. Contract types may include, but are not limited to, the following:

- (a) Firm Fixed Price. A firm fixed price contract includes a price that remains fixed irrespective of the contractor's cost experience in performing the contract. A firm fixed price contract may include an economic price adjustment provision, incentives, or both.
- (b) Cost Reimbursement. A cost-reimbursement contract provides for payment of the contractor's allowable incurred costs, to the extent prescribed in the contract. Allowable costs may include incentives if the recipient believes they can prove helpful. Cost-reimbursement contracts are suitable for use only when the uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed price contract.

(2) Prohibited or Restricted Contract Types. The Common Grant Rule for governmental recipients provides more guidance on contract type than does the Common Grant Rule for non-governmental recipients, which merely authorizes the recipient to select the type of contract it will use (for example, fixed price, cost reimbursement, purchase order, or incentive contract) if it is appropriate for the particular procurement and promotes the best interests of the program or project involved.

The following contract types are restricted or prohibited:

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

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

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

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

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

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

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

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

- (a) Competition. The recipient should distribute micro-purchases equitably among qualified suppliers.
- (b) Prohibited Divisions. The recipient may not divide or reduce the size of its procurement merely to come within the micro-purchase limit.
- (c) Documentation. FTA's only documentation requirement for micro-purchases is a determination that the price is fair and reasonable and a description of how the recipient made its determination. FTA does not require the recipient to provide its rationale for the procurement method used, selection of contract type, or reasons for contractor selection or rejection.

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

(1) When Appropriate. Small purchase procedures may be used to acquire services, supplies, or other property valued at more than the micro-purchase threshold (currently, \$3,000) but less than the Federal simplified acquisition threshold at 41 U.S.C. Section 403(11), currently \$100,000. (FTA recognizes the small purchase threshold to be the same as the simplified acquisition threshold.) *Also see*, Chapter II, Subsection 3.b. These purchases are also exempt from FTA's Buy America requirements. FTA does not intend to imply that any purchase of \$100,000 or less must be treated as a small purchase. The recipient may set lower thresholds for small purchases in compliance with State and local law, or otherwise as it considers appropriate.

(2) Procedures. When using small purchase procedures:

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

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- (e) Public Opening. All bids are publicly opened at the time and place prescribed in the invitation for bids.
- (f) Fixed Price Contract. A firm fixed price contract is usually awarded in writing to the lowest responsive and responsible bidder, but a fixed price incentive contract or inclusion of an economic price adjustment provision can sometimes be appropriate. When specified in the bidding documents, factors such as transportation costs and life cycle costs affect the determination of the lowest bid; payment discounts are used to determine the low bid only when prior experience indicates that such discounts are typically taken.
- (g) Rejection of Bids. Any or all bids may be rejected if there is a sound, documented business reason.

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

- d. Competitive Proposals (Request for Proposals). The Common Grant Rule for governmental recipients acknowledges the use of competitive proposals to be a generally accepted procurement method when the nature of the procurement does not lend itself to sealed bidding and the recipient expects that more than one source will be willing and able to submit an offer or proposal.

- (1) When Appropriate. Competitive proposals should be used when any of the following circumstances are present:

- (a) Type of Specifications. The property or services to be acquired are described in a performance or functional specification; or if described in detailed technical specifications, other circumstances such as the need for discussions or the importance of basing the contract award on factors other than price alone are present.
- (b) Uncertain Number of Sources. Uncertainty about whether more than one bid will be submitted in response to an invitation for bids and the recipient lacks the authority or flexibility under State or local law to negotiate the contract price if it receives only a single bid.
- (c) Price Alone Not Determinative. Due to the nature of the procurement, contract award need not be based exclusively on price or price-related factors. In different types of negotiated acquisitions, the relative importance of cost or price may vary. When the recipient's material requirements are clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirements, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection and supersede low price.
- (d) Discussions Expected. Separate discussions with individual offeror(s) are expected to be necessary after they have submitted their proposals. This contrasts with Sealed Bids (Formal Advertising) procedures in which discussions with individual bidders are not likely to be necessary, as award of the contract will be made based on price and price-related factors alone.

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(2) Procurement Procedures. The following procedures apply to procurements by competitive proposals:

- (a) Publicity. The request for proposals is publicly advertised.
- (b) Evaluation Factors. All evaluation factors and their relative importance are specified in the solicitation; but numerical or percentage ratings or weights need not be disclosed.
- (c) Adequate Sources. Proposals are solicited from an adequate number of qualified sources.
- (d) Evaluation Method. A specific method is established and used to conduct technical evaluations of the proposals received and to determine the most qualified offeror.
- (e) Price and Other Factors. An award is made to the responsible offeror whose proposal is most advantageous to the recipient's program with price and other factors considered.
- (f) Best Value. If permitted under its State or local law, the recipient may award the contract to the offeror whose proposal provides the greatest value to the recipient. To do so, the recipient's solicitation must inform potential offerors that the award will be made on a "best value" basis and identify what factors will form the basis for award. The evaluation factors for a specific procurement should reflect the subject matter and the elements that are most important to the recipient. Those evaluation factors may include, but need not be limited to, technical design, technical approach, length of delivery schedules, quality of proposed personnel, past performance, and management plan. The recipient should base its determination of which proposal represents the "best value" on an analysis of the tradeoff of qualitative technical factors and price or cost factors. Apart from the statutory requirement that the contract must support the recipient's public transportation project consistent with applicable Federal laws and regulations, FTA does not require any specific factors or analytic process.

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

- e. Two-Step Procurement Procedures. If permitted by State and local law, the recipient may use two-step procurement procedures in both sealed bid and competitively negotiated procurements, provided the opportunity for full and open competition is retained.
 - (1) Review of Technical Qualifications and Approach. The first step is a review of the prospective contractors' technical approach to the recipient's request and technical qualifications to carry out that approach. The recipient then may narrow the competitive range to prospective contractors that demonstrate a technically satisfactory approach and have satisfactory qualifications.
 - (2) Review of Bids and Proposals Submitted by Qualified Prospective Contractors. The second step consists of soliciting and reviewing complete bids (sometimes referred to as "two-step sealed bidding") or proposals (as in "competitive negotiations"), including price, submitted by each prospective contractor determined to be qualified. Absent exceptional circumstances, the recipient should attempt to solicit bids or proposals from at least three qualified prospective contractors. Unlike qualifications-based procurement procedures required for A&E services, and other contracts covered by 49 U.S.C. Section 5325(b) discussed in subsection 3.f of this Chapter,

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FTA expects the recipient to consider all bid or proposal prices submitted as well as other technical factors, rather than limiting reviews to the most qualified bidder or offeror.

- f. Architectural Engineering (A&E) Services and Other Services. FTA's enabling legislation at 49 U.S.C. Section 5325(b)(1) requires the use of the qualifications-based procurement procedures contained in the "Brooks Act," 40 U.S.C. Sections 1101 through 1104, to acquire A&E services, but also for program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping and related services. The nature of the work to be performed and its relationship to construction, not the nature of the prospective contractor, determine whether qualifications-based procurement procedures may be used as described below.

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

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

- (3) Qualifications-Based Procurement Procedures. The following procedures apply to qualifications-based procurements:
 - (a) Qualifications. Unlike other two-step procurement procedures in which price is an evaluation factor, an offeror's qualifications are evaluated to determine contract award.
 - (b) Price. Price is excluded as an evaluation factor.
 - (c) Most Qualified. Negotiations are first conducted with only the most qualified offeror.

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- (d) Next Most Qualified. Only after failing to agree on a fair and reasonable price may negotiations be conducted with the next most qualified offeror. Then, if necessary, negotiations with successive offerors in descending order may be conducted until contract award can be made to the offeror whose price the recipient believes is fair and reasonable.
 - (e) Effect of State Laws. To the extent that a State has, before August 10, 2005, adopted by law, an equivalent State qualifications-based-procurement requirement for acquiring architectural, engineering, and design services, State procedures, rather than Federal “Brooks Act” procedures (40 U.S.C. Sections 1101 through 1104), may be used.
- (4) Audits and Indirect Costs. As required by 49 U.S.C. Section 5325(b)(2), the following requirements apply to a third party contract for program management, architectural engineering, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related services:
- (a) Performance of Audits. The third party contract or subcontract must be performed and audited in compliance with FAR Part 31 cost principles.
 - (b) Indirect Cost Rates. The recipient and the third party contractor, its subcontractors and subrecipients, if any, must accept FAR indirect cost rates for the one-year applicable accounting periods established by a cognizant Federal or State government agency, if those rates are not currently under dispute.
 - (c) Application of Rates. After a firm’s indirect cost rates established as described in subparagraph 3.f(4)(b) above are accepted, those rates will apply for purposes of contract estimation, negotiation, administration, reporting, and payments, not limited by administrative or de facto ceilings.
 - (d) Prenotification; Confidentiality of Data. Before requesting or using cost or rate data described in subparagraph 3.f(4)(c) above, a recipient must notify the affected firm(s). That data must be kept confidential and may not be accessible by or provided by the agency or group of agencies that share cost data under this subparagraph, except by written permission of the audited firm. If prohibited by law, that cost and rate data may not be disclosed under any circumstances. FTA recognizes that many States have “Open Records” laws that may make it difficult to maintain confidential cost or rate data. As a result, before requesting or using a firm’s cost or rate data, not only should a recipient notify the affected firm, but it must also obtain permission to provide that data in response to a valid request under applicable State law. The confidentiality requirements of 49 U.S.C. 5325(b)(2)(D) cannot be waived, even if those confidentiality requirements conflict with State law or regulations.
- g. Design-Bid-Build. The design-bid-build procurement method requires separate contracts for design services and for construction.
- (1) Design Services. For design services, the recipient must use qualifications-based procurement procedures, in compliance with applicable Federal, State and local law and regulations.
 - (2) Construction. Because the recipient may not use qualifications-based procurement procedures for the actual construction, alteration or repair of real property, the recipient generally must use

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competitive procedures for the construction. These may include sealed bidding or competitive negotiation procurement methods, as appropriate.

- h. Design-Build. The design-build procurement method consists of contracting for design and construction simultaneously with contract award to a single contractor, consortium, joint venture, team, or partnership that will be responsible for both the project's design and construction. FTA's enabling legislation expressly authorizes the use of FTA capital assistance to support design-build projects "after the recipient complies with Government requirements," 49 U.S.C. Section 5325(d)(2).

- (1) Procurement Method Determined by Value. First, the recipient must separate the various contract activities to be undertaken and classify them as design or construction, and then calculate the estimated total value of each. Because both design and construction are included in a single procurement, the FTA expects the recipient to use the procurement method appropriate for the services having the greatest cost, even though other necessary services would not typically be procured by that method.

- (a) Construction Predominant. The construction costs of a design-build project are usually predominant so that the recipient would be expected to use competitive negotiations or sealed bids for the entire procurement rather than the qualification-based "Brooks Act" procurement procedures. Specifically, when construction costs will be predominant, unless FTA determines otherwise in writing, an FTA recipient may not use qualifications-based procurement procedures to acquire architectural engineering, program management, construction management, feasibility studies, preliminary engineering, design, architectural and engineering, surveying, mapping, or related A&E services unless required by State law adopted before August 10, 2005.

- (b) Design Services Predominant. In the less usual circumstance in which the cost of most work to be performed will consist of costs for architectural and engineering, program management, construction management, feasibility studies, preliminary engineering, design, architectural engineering, surveying, mapping, or related A&E services, FTA expects the recipient to use qualifications-based procurement procedures based on the "Brooks Act," 40 U.S.C. Sections 1101 through 1104, as described in subsection 3.e of this Chapter.

- (2) Selection Processes. The recipient may structure its design-build procurement using one or more steps as described below:

- (a) One-Step Method. The recipient may undertake its design-build procurement in a single step.
- (b) Two-Step Method. Another procurement method the recipient may use for large design-build projects is a two-step selection process as authorized for Federal Government use by 41 U.S.C. Section 253m. This method consists of:

- 1 Review of Technical Qualifications and Approach. The first step is a review of the prospective contractors' technical qualifications and technical approach to the project. The recipient may then narrow the competitive range to those prospective contractors with satisfactory qualifications that demonstrate a technically satisfactory approach.

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- 2 Review of Complete Proposals. The second step consists of soliciting and reviewing complete proposals, including price, submitted by prospective contractors first determined to be qualified.

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

- i. Other Than Full and Open Competition. Normally, the recipient must provide for full and open competition when soliciting bids or proposals. The Common Grant Rule for governmental recipients, however, acknowledges that under certain circumstances, a recipient may conduct procurements without providing for full and open competition.
 - (1) When Appropriate. A recipient may use noncompetitive proposals only when the procurement is inappropriate for small purchase procedures, sealed bids, or competitive proposals, and at least one of the following circumstances are present:
 - (a) Adequate Competition. After soliciting several sources, FTA expects the recipient to review its specifications to determine if they are unduly restrictive or if changes can be made to encourage submission of more bids or proposals. After the recipient determines that the specifications are not unduly restrictive and changes cannot be made to encourage greater competition, the recipient may determine the competition adequate. A cost analysis must be performed in lieu of a price analysis when this situation occurs.
 - (b) Sole Source. When the recipient requires supplies or services available from only one responsible source, and no other supplies or services will satisfy its requirements, the recipient may make a sole source award. When the recipient requires an existing contractor to make a change to its contract that is beyond the scope of that contract, the recipient has made a sole source award that must be justified.
 - 1 Unique Capability or Availability. The property or services are available from one source if one of the conditions described below is present:
 - a Unique or Innovative Concept. The offeror demonstrates a unique or innovative concept or capability not available from another source. Unique or innovative concept means a new, novel, or changed concept, approach, or method that is the product of original thinking, the details of which are kept confidential or are patented or copyrighted, and is available to the recipient only from one source and has not in the past been available to the recipient from another source.
 - b Patents or Restricted Data Rights. Patent or data rights restrictions preclude competition.
 - c Substantial Duplication Costs. In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in substantial duplication of costs that are not expected to be recovered through competition.

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- d Unacceptable Delay. In the case of a follow-on contract for the continued development or production of a highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in unacceptable delays in fulfilling the recipient's needs.
- 2 Single Bid or 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.
- (c) Unusual and Compelling Urgency. The Common Grant Rule for governmental recipients permits the recipient to limit the number of sources from which it solicits bids or proposals when a recipient has such an unusual and urgent need for the property or services that the recipient would be seriously injured unless it were permitted to limit the solicitation. The recipient may also limit the solicitation when the public exigency or emergency will not permit a delay resulting from competitive solicitation for the property or services.
- (d) Associated Capital Maintenance Item Exception Repealed. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) repealed the special procurement preference previously authorized for associated capital maintenance items. Thus, any sole source procurement of associated capital maintenance items must qualify for an exception under the same standards that would apply to other sole source acquisitions.
- (e) Authorized by FTA. The Common Grant Rules provides Federal agencies authority to permit a recipient to use noncompetitive proposals. Under this authority, FTA has made the following determinations:
 - 1 Team, Consortium, Joint Venture, Partnership. With some exceptions, when FTA awards a grant agreement or enters into a cooperative agreement with a team, consortium, joint venture, or partnership, or provides FTA assistance for a research project in which FTA has approved the participation of a particular firm or combination of firms in the project work, the grant agreement or cooperative agreement constitutes approval of those arrangements. In such cases, FTA expects the recipient to use competition, as feasible, to select other participants in the project. It can sometimes be difficult to determine whether a bidder or offeror is submitting its bid or offer as a team or other group with committed

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parties. The Recipient should clarify with the bidder or offeror how other entities included in its bid or offer are to be treated.

- 2 FAR Standards. To ensure that the recipient has flexibility equal to that of Federal contracting officers, FTA authorizes procurement by noncompetitive proposals in all of the circumstances authorized by FAR Part 6.3. In addition to circumstances discussed in the Common Grant Rules, the FAR authorizes less than full and open competitive procurements in one or more of the following circumstances:
 - a Statutory Authorization or Requirement. To comply with Department of Transportation (DOT) appropriations laws that include specific statutory requirements, with the result that only a single contractor can perform certain project work.
 - b National Emergency. To maintain a facility, producer, manufacturer, or other supplier available to provide supplies or services in the event of a national emergency or to achieve industrial mobilization.
 - c Research. To establish or maintain an educational or other non-profit institution or a federally funded research and development center that has or will have an essential engineering, research, or development capability.
 - d Protests, Disputes, Claims, Litigation. To acquire the services of an expert or neutral person for any current or anticipated protest, dispute, claim, or litigation.
 - e International Arrangements. When precluded by the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or when prohibited by the written directions of a foreign government reimbursing the recipient for the cost of the acquisition of the supplies or services for that government.
 - f National Security. When the disclosure of the recipient's needs would compromise the national security.
 - g Public Interest. When the recipient determines that full and open competition in connection with a particular acquisition is not in the public interest.
- (2) When Prohibited. Less than full and open competition is not justified based on:
 - (a) Failure to Plan. The recipient's lack of advance planning, or
 - (b) Limited Availability of Federal Assistance. Concerns about the amount of Federal assistance available to support the procurement (for example, expiration of Federal assistance previously available for award).
- (3) Procurement Procedures. When less than full and open competition is available to the recipient, the Common Grant Rule for governmental recipients directs the recipient to:
 - (a) Potential Sources. Solicit offers from as many potential sources as is practicable under the circumstances.

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- (b) Sole Source Justification. If the recipient decides to solicit an offer from only one source, the recipient must justify its decision adequately in light of the standards of subparagraph 3.i(1)(b) of this Chapter. FTA expects this sole source justification to be in writing.
 - (c) Cost Analysis. Prepare or obtain a cost analysis verifying the proposed cost data, the projections of the data, and the evaluation of the costs and profits.
 - (d) Preaward Review. Submit the proposed procurement to FTA for preaward review if FTA so requests.
4. ELIGIBLE COSTS. Property and services must be eligible for Federal participation under the standards of the Federal cost principles applicable to the recipient before the recipient may use FTA assistance to support its costs (2 CFR Part 220, 2 CFR Part 225, 2 CFR Part 230, or FAR Part 31). A recipient may use its own cost principles that comply with applicable Federal cost principles. FTA assistance may support contract costs or prices based on estimated costs only if the costs incurred or cost estimates included in negotiated prices comply with applicable Federal cost principles, and the property or services are eligible for Federal assistance under the terms of the underlying grant or cooperative agreement.
5. ADJUSTMENTS TO PROJECT COSTS. MAP-21 amended 49 U.S.C. Section 5309(1) to permit FTA to approve an adjustment of the final net capital project cost of a new fixed guideway capital project or core capacity improvement project to include the cost of eligible activities not included in the original project if FTA determines that the original project has been completed at a cost that is significantly below the original estimate.
6. COST ANALYSIS AND PRICE ANALYSIS. The Common Grant Rules requires the recipient to perform a cost analysis or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis depends on the facts and circumstances surrounding each procurement, but as a starting point, the recipient must make independent estimates before receiving bids or proposals.
- a. Cost Analysis. The recipient must obtain a cost analysis when a price analysis will not provide sufficient information to determine the reasonableness of the contract cost. The recipient must obtain a cost analysis when the offeror submits elements (that is, labor hours, overhead, materials, and so forth) of the estimated cost, (such as professional consulting and A&E contracts, and so forth). The recipient is also expected to obtain a cost analysis when price competition is inadequate, when only a sole source is available, even if the procurement is a contract modification, or in the event of a change order. The recipient, however, need not obtain a cost analysis if it can justify price reasonableness of the proposed contract based on a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation.
- (1) Federal Cost Principles. Federal cost principles contain many requirements about the allowability and allocability of costs.
 - (2) Profit. FTA expects the recipient to negotiate profit as a separate element of the cost for each contract in which there has been no price competition, and in all acquisitions in which the recipient performs or acquires a cost analysis. To establish a fair and reasonable profit, the recipient needs to consider the complexity of the work to be performed, the risk undertaken by the contractor, the contractor's investment, the amount of subcontracting, the quality of the

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contractor's record of past performance, and industry profit rates in the surrounding geographical area for similar work.

- b. Price Analysis. If the recipient determines that competition was adequate, a price analysis, rather than a cost analysis, is required to determine the reasonableness of the proposed contract price. As discussed previously in subsection 3.a of this Chapter, the price analysis for micro-purchases may be limited. Similarly, the recipient may use an abbreviated price analysis for small purchases in most cases. One method to record this price analysis is through the use of a preprinted form on which a contracting officer (or other responsible person) can annotate a finding of fair and reasonable pricing and check off the most common reasons why this would be so, such as catalog or market prices offered in substantial quantities to the general public, regulated prices (for example, for many utilities purchases), or a comparison with recent prices for similar goods and services.
- c. Guidance on Cost and Price Analysis. FTA recognizes that some recipients may have difficulty obtaining the information necessary to conduct a proper cost or price analysis. Although neither FTA nor DOT may change the Common Grant Rules' requirements for cost or price analysis, FTA continues to seek a fair, practical solution to this problem consistent with the flexibility provided to Federal contracting officers under the FAR. The recipient may use the following resources as guidance in preparing cost or price analyses:

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

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

7. EVALUATIONS. The following standards apply:

- a. General. When evaluating bids or proposals submitted, FTA expects the recipient to consider all evaluation factors specified in its solicitation documents, and evaluate the bids or offers only on the evaluation factors included in those solicitation documents. The recipient may not modify its evaluation factors after bids or proposals have been submitted without re-opening the solicitation.
- b. Options. In awarding the contract that will include options, the following standards apply:
 - (1) Evaluation Required. In general, FTA expects the recipient to evaluate bids or offers for any option quantities or periods contained in a solicitation if it intends to exercise those options after the contract is awarded.
 - (2) Evaluation Not Required. The recipient need not evaluate bids or offers for any option quantities when the recipient determines that evaluation would not be in its best interests. An example of a

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circumstance that may support a recipient's determination not to evaluate bids or offers for option quantities is when the recipient is reasonably certain that funds will not be available to permit it to exercise the option.

- c. Evaluators. In addition to evaluators with experience in technical or public policy matters related to the procurement, other evaluators may also include auditors and financial experts to the extent that the recipient determines would be necessary or helpful. Although many FTA recipients assign evaluation duties to their own personnel, a recipient lacking qualified personnel within its organization may contract for the evaluation services it needs. If the recipient does contract for evaluation services, the procurement standards of this circular will apply to those contracts and to those contractors selected to perform procurement evaluation functions on behalf of the recipient.

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

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

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

- (1) Integrity and Ethics. Have a satisfactory record of integrity and business ethics, in compliance with 49 U.S.C. Section 5325(j)(2)(A),
- (2) Debarment and Suspension. Be neither debarred nor suspended from Federal programs under DOT regulations, "Nonprocurement Suspension and Debarment," 2 CFR Parts 180 and 1200, or under the FAR at 48 CFR Chapter 1, Part 9.4,
- (3) Affirmative Action and DBE. Be in compliance with the Common Grant Rules' affirmative action and FTA's Disadvantaged Business Enterprise requirements,
- (4) Public Policy. Be in compliance with the public policies of the Federal Government, as required by 49 U.S.C. Section 5325(j)(2)(B),

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

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

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

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

CHAPTER VII

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

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

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

1. PROTESTS.

- e. The Recipient's Role and Responsibilities. The Common Grant Rules charges the recipient with the initial responsibility to resolve protests of third party contract awards.
- (1) Protest Procedures. Apart from other methods the recipient may have to resolve third party contract issues, such as mediation or arbitration, the Common Grant Rule for governmental recipients requires the recipient to have protest procedures. While the Common Grant Rule for non-governmental recipients does not impose a similar requirement on a non-governmental recipient, FTA expects each recipient to have appropriate written protest procedures, as part of its requirement to maintain or acquire adequate technical capacity to implement the project.

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(2) Responsibilities to FTA. The recipient's minimum responsibilities to FTA consist of the following:

(a) Notify FTA Expeditiously. The Common Grant Rule for governmental recipients requires a governmental recipient to notify FTA when it receives a third party contract protest to which this circular applies, and to keep FTA informed about the status of the protest. A non-governmental recipient involved in a protest is similarly expected to notify FTA when it receives a third party contract protest to which the circular applies, and to similarly keep FTA informed about the status of the protest. The recipient is expected to provide the following information:

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

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

2 Details. The following information about each protest:

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

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

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

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

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

(a) Access to Information. FTA expects the recipient to disclose information about any third party procurement protest to FTA upon request. FTA reserves the right to require the

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recipient to provide copies of a particular protest or all protests, and any or all related supporting documents as FTA may determine necessary.

- b. FTA's Role and Responsibilities. FTA has developed an appeals process for reviewing protests of a recipient's procurement decisions.

(1) Requirements for the Protester. The protester must:

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

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3 Has not reviewed the protest when presented an opportunity to do so.

- (b) Violations of Federal Law or Regulations. FTA will not consider every appeal filed by a protestor of an FTA recipient's protest decision merely because a Federal law or regulation may be involved. Instead, FTA will exercise discretionary jurisdiction over those appeals involving issues important to FTA's overall public transportation program. FTA will refer violations of Federal law for which it does not have primary jurisdiction to the Federal authority having proper jurisdiction.
- (c) Violations of State or Local Law or Regulations. FTA will refer violations of State or local law to the State or local authority having proper jurisdiction.

(3) FTA Determinations to Decline Protest Reviews. FTA's determination to decline jurisdiction over a protest does not mean that FTA approves of or agrees with the recipient's decision or that FTA has determined the contract is eligible for Federal participation. FTA's determination means only that FTA does not consider the issues presented to be sufficiently important to FTA's overall program that FTA considers a review to be required.

2. CHANGES AND MODIFICATIONS.

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

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

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

3. DISPUTES.

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

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- (1) Notify FTA. FTA expects the recipient to provide the following information in connection with third party contract disputes in which it is involved:
- (a) Subjects. A list of disputes involving third party contracts and potential third party contracts that:
 - 1 Have a value exceeding \$100,000,
 - 2 Involve a controversial matter, irrespective of amount, or
 - 3 Involve a highly publicized matter, irrespective of amount.
 - (b) Details. The following information about each dispute:
 - 1 A brief description of the dispute,
 - 2 The basis of disagreement, and
 - 3 If open, how far the dispute has proceeded, or
 - 4 If resolved, the agreement or decision reached, and
 - 5 Whether an appeal has been taken or is likely to be taken.
 - (c) When and Where. The recipient should provide this information:
 - 1 In its next quarterly Milestone Progress Report, and
 - 2 At its next Project Management Oversight review, if any.

Small recipients may report less frequently if no disputes are outstanding.
 - (d) FTA Officials to Notify. FTA also encourages the recipient to keep its FTA project manager informed about disputes with which it is involved. In particular, the recipient should contact its project manager about any unusual activity.
- (2) Adequate Documentation. FTA expects the recipient to include adequate documentation in its project files of the facts, events, negotiations, applicable laws, and a legal evaluation of the likelihood of success in any potential litigation involving the dispute as may be needed to justify FTA's concurrence in any compromise or settlement, should FTA concurrence become necessary.
- (3) Audit. An audit can help the recipient demonstrate that any settlement costs, if incurred, are necessary, reasonable, adequately documented, and appropriate for FTA support. The recipient should consider conducting or obtaining a formal audit to substantiate each part of a large contract dispute before entering into a settlement. The audit should be conducted in accordance with "Generally Accepted Auditing Standards" as defined by the American Institute of Certified Public Accountants. FTA also encourages the recipient to undertake an audit or similar analysis before settlement of a small dispute.

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- b. FTA's Role and Responsibilities. FTA generally does not become involved in negotiating the resolution of a recipient's disputes. However, FTA does reserve the right to become involved as follows:

- (1) Determine Reasonableness. FTA may review the reasonableness of a negotiated settlement to determine the extent of its participation in the costs of the settlement.
- (2) Review Documents. When FTA considers necessary, FTA may review the recipient's files and history pertaining to the dispute or experience under a particular grant or cooperative agreement. If the recipient has already disbursed amounts determined to be ineligible through subsequent audit or FTA review, the recipient must return those amounts to FTA, unless FTA determines otherwise. FTA reserves the right to defer participation in settlement costs until it receives an adequate audit.

4. CLAIMS AND LITIGATION.

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

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

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

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

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

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

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

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

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

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

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

b. FTA's Role and Responsibilities. In support of its financial interest in the settlement of claims and litigation involving any federally assisted third party contracts, FTA has retained its discretion to assert the following rights:

- (1) Proceeds Recovered. FTA retains a right to a share of any net proceeds recovered through a third party contract claim or litigation, in proportion to the amount FTA has committed to the project, unless FTA permits other uses of the proceeds recovered.
- (2) Liquidated Damages. If the third party contract includes a liquidated damages provision, FTA expects the recipient to credit any liquidated damages recovered to the project, unless FTA permits other uses of the liquidated damages. For example, in negotiating the terms of a claim or litigation settlement, it may be reasonable for the recipient to exchange some or all liquidated damages that may be due the recipient for additional property or services.

5. FTA PARTICIPATION IN SETTLEMENTS, ARBITRATION AWARDS, AND COURT AWARDS.

a. The Recipient's Responsibilities.

- (1) Settlement Arrangements Must Be Reasonable. FTA recognizes that a settlement may require the recipient to relinquish its rights to amounts it would otherwise be due, including amounts for liquidated damages and other matters, were it to prevail on all matters at issue. Still, FTA expects the recipient to enter into a settlement only if the recipient can justify its terms as reasonable. Reasonable settlement arrangements can take many forms. In certain situations, an agreement by the contractor to provide extra property or services in lieu of payments or reduced payments for damages, including liquidated damages, may be reasonable.
- (2) Maintain Sufficient Records. To justify FTA's participation in settlements, arbitration awards, or court awards, the recipient's records must be sufficient to demonstrate that the recipient has taken reasonable and prudent measures to prevent or offset the actions or circumstances resulting in the underlying protest, dispute, claim, or litigation.
- (3) Obtain FTA Concurrence. When the recipient incurs costs due to binding arbitration or court decision, FTA expects the recipient to secure FTA review and its written concurrence in a proposed or final settlement involving a dispute, claim, or litigation before using Federal assistance to support its costs if one of the following circumstances is present:

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- (a) Exceeds \$100,000. When the settlement exceeds \$100,000.
- (b) Insufficient Funds. When the approved project lacks sufficient funds to cover the settlement costs.
- (c) Special Federal Interest or Federal Concern. When a special Federal interest or Federal concern is declared due to program management concerns, possible mismanagement, impropriety, waste, or fraud.

b. FTA's Prerogatives.

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

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APPENDIX A**REFERENCES**

1. Federal Transit Laws, Title 49, United States Code, Chapter 53; also public transportation provisions of Title 23, United States Code.
2. Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. 112-141, July 6, 2012|
3. Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, (SAFETEA-LU), Public Law 109-59, August 10, 2005, as amended by the SAFETEA-LU Technical Corrections Act, 2008, Public Law 110-244, June 6, 2008.
4. Transportation Equity Act for the 21st Century 1998 (TEA-21), Public Law 105-178 as amended by TEA-21 Restoration Act 1998, Public Law 105-206.
5. 7 U.S.C. Sections 2131 *et seq.*—Animal Welfare Act, as amended.
6. 15 U.S.C. Sections 205a *et seq.*— Omnibus Trade and Competitiveness Act (Amendments to the Metric Conversion Act), 15 U.S.C. §§ 205a *et seq.*
7. 15 U.S.C. Section 644 note—Section 7101(a) of the Federal Acquisition Streamlining Act of 1994 (Repeal of Labor Surplus Area Programs).
8. 18 U.S.C. Section 874—Section 1 of the Copeland Anti-Kickback Act, as amended.
9. 18 U.S.C. Section 1001—Criminal Fraud.
10. 20 U.S.C. Sections 1681 *et seq.*—Title IX of the Education Amendments of 1972, as amended (Nondiscrimination on the Basis of Sex).
11. 23 U.S.C. Section 101 note—Section 451 of the Hiring Incentives to Restore Employment Act (HIRE Act), Pub. L. 111-147, Title IV, Section 451, March 18, 2010.
12. 23 U.S.C. Section 512 note—Section 5307(c) of SAFETEA-LU (Intelligent Transportation Systems).
13. 29 U.S.C. Sections 201 *et seq.*—Fair Labor Standards Act, as amended (Wage and Hour Restrictions).
14. 29 U.S.C. Sections 621 through 634—Age Discrimination in Employment Act (Prohibitions).
15. 29 U.S.C. Section 794—Section 504 of the Rehabilitation Act of 1973, as amended (Nondiscrimination under Federal Grants on the Basis of Disability).
16. 29 U.S.C. Section 794d—Section 508 of the Rehabilitation Act of 1973, as amended (Electronic and Information Technology acquired with Federal funding to be Accessible).
17. 31 U.S.C. Section 1352—Limitation on Use of Appropriated Funds to Influence Certain Federal Contracting and Financial Transactions (Byrd “Anti-Lobbying” Amendment).
18. 31 U.S.C. Sections 3801 *et seq.*—Program Fraud Civil Remedies Act of 1986, as amended.

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19. 31 U.S.C. Section 5112(p)—Section 104 of the Presidential \$1 Coin Act of 2005 (Use of Coins in Transit Facilities and Equipment).
20. 31 U.S.C. Sections 7501 *et seq.*—Single Audit Act of 1984, as amended (Audits of Federally Funded Programs).
21. 33 U.S.C. Sections 1251 through 1377—Clean Water Act.
22. 35 U.S.C. Sections 200 *et seq.*—Bayh-Dole Act (Patent Rights).
23. 40 U.S.C. Section 502(a)(3)—Federal Property and Administrative Services Act of 1949, as amended (General Services Administration (GSA) Schedule Use by the District of Columbia).
24. 40 U.S.C. Section 502(c)(1)(A)—Section 211 of the E-Government Act of 2002 (GSA Schedule Use for Information Technology).
25. 40 U.S.C. Section 502(c)(1)(B)—Section 2 of the Local Preparedness Acquisition Act (GSA Schedule Use for Safety or Security Emergency Preparedness) 40 U.S.C. Section 502(c)(1)(B)—Section 2 of the Local Preparedness Acquisition Act (GSA Schedule Use for Safety or Security Emergency Preparedness).
26. 40 U.S.C. Section 502(d)—Section 833 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (GSA Schedule Use for Major Disaster or Emergency Relief).
27. 40 U.S.C. Chapter 11—Architectural Engineering Procurement Requirements (“Brooks Act”).
28. 40 U.S.C. Sections 3141 *et seq.*—Davis-Bacon Act (Prevailing Wages).
29. 40 U.S.C. Section 3145—Section 2 of the Copeland Anti-Kickback Act, as amended.
30. 40 U.S.C. Section 3701(b)(3)(A)(iii)—Section 4104(c) of the Federal Acquisition Streamlining Act of 1994 (Increased Wage and Hour Thresholds for Contract Work Hours and Safety Standards Act).
31. 40 U.S.C. Section 3702—Section 102 of the Contract Work Hours and Safety Standards Act (Wage and Hour Restrictions).
32. 40 U.S.C. Section 3704—Section 107 of the Contract Work Hours and Safety Standards Act (Construction Safety).
33. 41 U.S.C. Section 253m—(Two-Step Selection Procedures Process [for Federal Procurements]).
34. 41 U.S.C. Section 403(11)—Federal Acquisition Streamlining Act of 1994 (Definition of the [Federal] Simplified Acquisition Threshold).
35. 42 U.S.C. Sections 289 *et seq.*—National Research Act, as amended (Protection of Humans).
36. 42 U.S.C. Sections 2000d *et seq.*—Title VI of the Civil Rights Act of 1964, as amended (Nondiscrimination).
37. 42 U.S.C. Section 2000e *et seq.*—Title VII of the Civil Rights Act of 1964, as amended (Equal Employment Opportunity).

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38. 42 U.S.C. Sections 4601 *et seq.*—Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended.
39. 42 U.S.C. Section 5150—Stafford Act (Major Disaster or Emergency Relief).
40. 42 U.S.C. Sections 6101 *et seq.*—Age Discrimination Act of 1975, as amended, (Nondiscrimination on the Basis of Age in Federal or Federal Assistance Programs).
41. 42 U.S.C. Sections 6321 *et seq.*—Subchapter III, Part B, Energy Policy and Conservation Act (State Energy Conservation Plans).
42. 42 U.S.C. Section 6962—Section 4002 of the Resource Conservation and Recovery Act of 1976, as amended (Recycled Materials).
43. 42 U.S.C. Sections 7401 through 7671q—Clean Air Act.
44. 42 U.S.C. Sections 7701 *et seq.*—Earthquake Hazards Reduction Act of 1977, as amended, (Seismic Safety).
45. 42 U.S.C. Sections 12101 *et seq.*—Americans with Disabilities Act of 1990, as amended (Accessibility for Persons with Disabilities).
46. 46 U.S.C. Section 55305—Cargo Preference Act (codified).
47. 48 U.S.C. Section 1469e—Use of GSA Supply Schedules by Insular Areas.
48. 49 U.S.C. Section 114(r)—Department of Transportation, Transportation Security Administration (Protection of Sensitive Security Information).
49. 49 U.S.C. Sections 303(b) and 303(c)—Department of Transportation (DOT) (Statutory protections for Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites).
50. 49 U.S.C. Section 40118—Section 5 of the International Air Transportation Fair Competitive Practices Act of 1974, as amended (“Fly America” Act – Persons and Property).
51. 49 U.S.C. Section 40119(b)—(Protection of Sensitive Security Information).
52. DOT regulations, “Nonprocurement Suspension and Debarment,” 2 CFR Part 1200.
53. DOT regulations, “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,” 49 CFR Part 18 (Common Grant Rule for Governmental Recipients).
54. DOT regulations, “Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,” 49 CFR Part 19 (Common Grant Rule for Non-governmental Recipients).
55. DOT regulations, “Protection of Human Subjects,” 49 CFR Part 11.
56. DOT regulations, “Protection of Sensitive Security Information,” 49 CFR Part 15.
57. DOT regulations, “New Restrictions on Lobbying,” 49 CFR Part 20.

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58. DOT regulations, “Nondiscrimination in Federally Assisted Programs of the Department of Transportation – Effectuation of Title VI of the Civil Rights Act,” 49 CFR Part 21.
59. DOT regulations, “Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs,” 49 CFR Part 24.
60. DOT regulations, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” 49 CFR Part 25.
61. DOT regulations, “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,” 49 CFR Part 26, as amended by the “Disadvantaged Business Enterprise: Program Improvements” amendments thereto, 76 FR 5083 *et seq.* January 28, 2011.
62. DOT regulations, “Program Fraud Civil Remedies,” 49 C.F.R. Part 31.
63. DOT regulations, “Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance,” 49 CFR Part 27.
64. DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 CFR Part 37, including Appendix A, “DOT Modifications of ATBCB Standards for Accessible Transportation Facilities.”
65. Joint Architectural and Transportation Barriers Compliance Board (ATBCB)/DOT regulations, “Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 CFR Part 1192 and 49 CFR Part 38.
66. DOT regulations, “Seismic Safety,” 49 CFR Part 41 at Sections 41.117 and 41.120.
67. Federal Transit Administration (FTA) regulations, “Charter Service,” 49 CFR Part 604.
68. FTA regulations, “School Bus Operations,” 49 CFR Part 605.
69. FTA regulations, “Capital Leases,” 49 CFR Part 639.
70. FTA regulations, “Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations,” 49 CFR Part 655.
71. FTA regulations, “Buy America,” 49 CFR Part 661.
72. FTA regulations, “Pre-Award and Post-Delivery Audits of Rolling Stock Purchases,” 49 CFR Part 663.
73. FTA regulations, “Bus Testing,” 49 CFR Part 665.
74. Joint Federal Highway Administration (FHWA)/FTA regulations, “Environmental Impact and Related Procedures,” 23 C.F.R. Part 771 and 49 C.F.R. Part 622.
75. Joint FHWA/FTA regulations, “Parks, Recreation Areas, Wildlife and Waterfowl Refuges, and Historic Sites,” 23 CFR Parts 771 and 774, and 49 CFR Part 622.
76. Federal Acquisition Regulation (FAR), 48 CFR Chapter 1.

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77. FAR Subpart 6.3, 48 CFR Chapter 1, Subpart 6.3 (Federal Procurement by Noncompetitive Proposals).
78. FAR Subparts 25.1 and 25.2, 48 CFR Chapter 1, Subparts 25.1 and 25.2 (Federal Buy American Regulations).
79. FAR Part 31, 48 CFR Chapter 1, Part 31 (Federal Cost Principles).
80. FAR Subpart 31.2, 48 CFR Chapter 1, Subpart 31.2 (Contracts with Commercial Organizations).
81. Department of Homeland Security regulations, "Protection of Sensitive Security Information," 49 CFR Part 1520.
82. Department of Labor (DOL) regulations, "Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in part by Loans or Grants from the United States," 29 CFR Part 3.
83. DOL regulations "Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction (also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act)," 29 CFR Part 5.
84. DOL guidelines, "Section 5333(b), Federal Transit Law," 29 CFR Part 215.
85. DOL regulations "Safety and Health Regulations for Construction," 29 CFR Part 1926.
86. Equal Employment Opportunity Commission regulations, "Age Discrimination in Employment Act," 29 CFR Part 1625.
87. DOL regulations, "Office of Federal Contract Compliance, Equal Employment Opportunity, Department of Labor," 41 CFR Chapter 60.
88. Department of Agriculture regulations, "Animal Welfare," 9 CFR Subchapter A, Parts 1, 2, 3, and 4.
89. Department of the Treasury regulations, "Surety Companies Doing Business with the United States," 31 CFR Part 223.
90. ATBCB regulations, "Electronic and Information Technology Accessibility Standards," 36 CFR Part 1194.
91. Department of Commerce regulations, "Rights to Inventions Made by Nonprofit Organizations and Small Business Firms," 37 CFR Part 401.
92. Department of Commerce, "Export Administration Regulations," 15 CFR Parts 730 *et seq.*
93. Environmental Protection Agency (EPA) regulations, "Comprehensive Procurement Guideline for Products Containing Recovered Materials," 40 CFR Part 247.
94. EPA regulations, "Control of Air Pollution from Mobile Sources," 40 CFR Part 85.
95. EPA regulations, "Control of Air Pollution from New and In-Use Motor Vehicles and New and In-Use Motor Vehicle Engines," 40 CFR Part 86.
96. EPA regulations, "Fuel Economy of Motor Vehicles," 40 CFR Part 600.

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97. Council on Environmental Quality regulations, “Other Requirements of NEPA,” 40 CFR Part 1506.
98. Department of Health and Human Services regulations, “Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance,” 45 CFR Part 90.
99. General Services Administration (GSA), “Federal Property Management Regulations,” 41 CFR Parts 101-42 through 101-46, and 101-48, 101-49.
100. GSA regulations, “Use of United States Flag Air Carriers,” 41 CFR Sections 301-10.131 through 301-10.143.
101. Maritime Administration regulations, “Cargo Preference U.S. Flag Vessels,” 46 CFR Part 381.
102. Executive Order No. 11246, “Equal Employment Opportunity,” September 24, 1965, as amended by Executive Order No. 11375, “Amending Executive Order No. 11246 Relating to Equal Employment Opportunity,” October 13, 1967.
103. Executive Order No. 12770, “Metric Usage in Federal Government Programs,” 15 U.S.C. Section 205a note.
104. Executive Order No. 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” February 11, 1994, 42 U.S.C. Section 4321 note.
105. Executive Order No. 13043, “Increasing Seat Belt Use in the United States,” August 16, 1997, 23 U.S.C. Section 402 note.
106. Executive Order No. 13132, “Federalism,” August 4, 1999, 5 U.S.C. Section 601 note.
107. Executive Order No. 13166, “Improving Access to Services for Persons with Limited English Proficiency,” August 11, 2000, 42 U.S.C. Section 2000d-1 note.
108. Executive Order No. 13502, “Use of Project Labor Agreements for Federal Construction Projects,” February 6, 2009, which rescinds Executive Order No. 13202, “Preservation of Open Competition and Government Neutrality Towards Government Contractors’ Labor Relations on Federal and Federally Funded Construction Projects,” February 17, 2001, as amended by Executive Order No. 13208, April 6, 2001, 41 U.S.C. Section 251 note.
109. Executive Order No. 13513, “Federal Leadership on Reducing Text Messaging While Driving,” October 1, 2009, 23 U.S.C. Section 402 note.
110. Office of Management and Budget (OMB) “Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement),” 2 CFR Part 180.
111. OMB Guidance for Grants and Agreements, “Cost Principles for Educational Institutions (OMB Circular A-21),” 2 CFR Part 220.
112. OMB Guidance for Grants and Agreements, “Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A-87),” 2 CFR Part 225.

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113. OMB Guidance for Grants and Agreements “Cost Principles for Non-Profit Organizations (OMB Circular A-122),” 2 CFR Part 230.
114. OMB Circular A-133, “Audits of States, Local Governments, and Non-Profit Organizations,” as revised.
115. GSA Order ADM 4800.2E, “Eligibility to Use GSA Sources of Supply and Services.”
116. DOT Order 5610.2, “Department of Transportation (DOT) Order To Address Environmental Justice in Minority Populations and Low-Income Populations,” 62 FR 18377, April 15, 1997.
117. DOT Order 3902.10, “Text Messaging While Driving,” December 30, 2009.
118. DOT, “Policy Guidance Concerning Recipients’ Responsibilities to Limited English Proficient (LEP) Persons,” December 14, 2005.
119. FTA Circular 4702.1A, “Title VI and Title VI-Dependent Guidelines for FTA Recipients,” 05-13-07.
120. FTA Circular 5010.1D, “Grant Management Requirements,” 11-01-08.
121. FTA Circular 9030.1C, “Urbanized Area Formula Program Grant Application Instructions” 10-01-98.
122. FTA Circular 9300.1B, “Capital Investment Program Guidance and Application Instructions” 11-01-08.
123. FTA Circular 9400.1A, “Federal Transit Administration Design and Art in Transit Projects,” 06-09-95.
124. FTA, “Notice of Final Agency Guidance on the Eligibility of Joint Development Improvements under Federal Transit Law,” 72 FR 5788, February 7, 2007.
125. FTA Notice, “FTA National ITS Architecture Policy on Transit Projects” 66 FR 1455 *et seq.*, January 8, 2001.
126. FTA, Master Agreement (PDF).
127. FTA, “Best Practices Procurement Manual”
128. FTA, “Pricing Guide for FTA Grantees.”
129. FTA Circular 4220.1F, “Third Party Contracting Guidance,” November 1, 2008, as revised.
130. Defense Contract Audit Agency Audit Manual
131. Arms Export Control Act, as amended, 22 U.S.C. Sections 2751 *et seq.*
132. Trading with the Enemy Act, 50 U.S.C. app. Sections 1 *et seq.*
133. International Emergency Economic Powers Act, as amended, 50 U.S.C. Sections 1701 *et seq.*
134. Export Administration Act of 1979, as amended, 50 U.S.C. app. Sections 2401 *et seq.*
135. Department of Commerce, “Export Administration Regulations,” 15 C.F.R. Parts 703 *et seq.*

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136. Department of State regulations, “International Traffic in Arms Regulations,” (ITAR), 22 C.F.R. Subchapter M.

137. Department of Treasury, regulations “Office of Foreign Assets Control,” (OFAC) 31 C.F.R. Chapter V.

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APPENDIX B**FTA REGIONAL AND METROPOLITAN OFFICE CONTACT INFORMATION**

Office	Area Served	Contact Information
Region I	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont	Transportation Systems Center Kendall Square 55 Broadway, Suite 920 Cambridge, MA 02142-1093 Phone: 617-494-2055 Fax: 617-494-2865
Region II	New York and New Jersey	One Bowling Green, Room 429 New York, NY 10004-1415 Phone: 212-668-2170 Fax: 212-668-2136
Region III	Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia	1760 Market Street, Suite 500 Philadelphia, PA 19103-4124 Phone: 215-656-7100 Fax: 215-656-7260
Region IV	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, Puerto Rico, South Carolina, Tennessee, and U.S. Virgin Islands	230 Peachtree St., N.W., Suite 800 Atlanta, GA 30303 Phone: 404-865-5600 Fax: 404-865-5605
Region V	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin	200 West Adams Street, Suite 320 Chicago, IL 60606 Phone: 312-353-2789 Fax: 312-886-0351
Region VI	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas	819 Taylor Street, Room 8A36 Fort Worth, TX 76102 Phone: 817-978-0550 Fax: 817-978-0575
Region VII	Iowa, Kansas, Missouri, and Nebraska	901 Locust, Suite 404 Kansas City, MO 64106 Phone: 816-329-3920 Fax: 816-329-3921
Region VIII	Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming	12300 W Dakota Avenue, Suite 310 Lakewood, CO 80228-2583 Phone: 720-963-3300 Fax: 720-963-3333
Region IX	Arizona, California, Hawaii,	201 Mission Street, Room 1650 San Francisco, CA 94105-1839

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

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APPENDIX C

Appendix C-1

THIRD PARTY CONTRACTING CHECKLISTS

CHAPTER II, Sec. 2	APPLICABILITY OF THE CIRCULAR	CHECK
Sec. 2.a	Participants in FTA Assisted Procurements	
Sec. 2.a(1)	Recipients of FTA Grants or Cooperative Agreements	
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Sec. 2.a(1)(b)	Recipients and Subrecipients that are not States	
Sec. 2.a(2)	Subrecipients of FTA Assistance	
Sec. 2.a(3)	Recipients of Both FTA Assistance and Funds Provided by Another Federal Agency	
Sec. 2.a(4)	Recipients of "Other Agreement" Assistance	
Sec. 2.a(5)	Third Party Contractors and Subcontractors	
Sec. 2.a(5)(a)	Status	
Sec. 2.a(5)(b)	Effect of Federal Requirements	
Sec. 2.b	Project Types and Third Party Contracts	
Sec. 2.b(1)	Capital Contracts	
Sec. 2.b(1)(a)	Capital Contracts Financed Without Federal Funds	
Sec. 2.b(1)(b)	Art	
Sec. 2.b(1)(c)	Over-the-Road Bus Accessibility Program	
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Sec. 2.b(4)	Revenue Contracts	
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Sec. 3.b	Federal Acquisition Regulation	
Sec. 3.c	Other Federal Requirements	
Sec. 3.c(1)	Compilation in the Master Agreement	
Sec. 3.c(2)	Conflicting Federal Requirements	
Sec. 3.d	Waivers	
Sec. 4	State and Local Laws and Regulations	
Sec. 4.a	Inadequate State and Local Requirements	
Sec. 4.b	Conflicts Between Federal Requirements and State or Local Requirements	

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THIRD PARTY CONTRACTING CHECKLISTS

Appendix C-2

CHAPTER III	THE RECIPIENT'S RESPONSIBILITIES	CHECK
Sec. 1.	Written Standards of Conduct	
Sec. 1.a	Personal Conflicts of Interest	
Sec. 1.b	Gifts	
Sec. 1.c	Violations	
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Sec. 3.a(1)(a)	Clear Descriptions	
Sec. 3.a(1)(b)	Nonrestrictive Specifications	
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Sec. 3.a(1)(d)	Preference for Performance Specifications	
Sec. 3.a(1)(e)	Brand Name or Equal	
Sec. 3.a(2)	Necessity	
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Sec. 3.a(4)	Metric Usage	
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Sec. 3.f(3)(b)2.a	Notification)	
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Sec. 3.f(3)(b)2.c	Information Displayed During the Auction	
Sec. 3.f(3)(b)2.d	Information Not Displayed During the Auction	
Sec. 3.f(3)(b)2.e	Information Displayed at the End of the Auction	
Sec. 3.f(3)(b)2.f	Information Provided at the End of the Auction	
Sec. 4	Audit	
Sec. 4.a	The Recipient's Auditors	
Sec. 4.b	Independent Auditors	
Sec. 4.c	Federal Audit Agencies	

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THIRD PARTY CONTRACTING CHECKLISTS

Appendix C-3

CHAPTER IV, Sec. 1	DETERMINING THE RECIPIENT'S NEEDS	CHECK
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Sec. 1.b	Necessity	
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Sec. 1.b(2)	Acquisition for Assignment Prohibitions	
Sec. 1.b(1)(a)	General Prohibition	
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Sec. 1.b(1)(c)1	Joint Procurements	
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Sec. 1.c	Procurement Size	
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¹ see Procurement Intranet Home page-Procmnt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools² see METRO Intranet Home page Online Forms (Procurement, unless noted) ⁵ see Procurement Intranet Home page (Office of Economic Business Opportunity)³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

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¹ see Procurement Intranet Home page-Procmt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools² see METRO Intranet Home page Online Forms (Procurement, unless noted) ⁵ see Procurement Intranet Home page (Office of Economic Business Opportunity)³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

THIRD PARTY CONTRACTING CHECKLISTS

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¹ see Procurement Intranet Home page-Procmnt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools² see METRO Intranet Home page Online Forms (Procurement, unless noted) ⁵ see Procurement Intranet Home page (Office of Economic Business Opportunity)³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

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¹ see Procurement Intranet Home page-Procmt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools² see METRO Intranet Home page Online Forms (Procurement, unless noted) ⁵ see Procurement Intranet Home page (Office of Economic Business Opportunity)³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

APPENDIX D**PROVISIONS, CERTIFICATIONS, REPORTS, FORMS, AND OTHER -- MATRICES****A. THIRD PARTY CONTRACT PROVISIONS**

(excluding micro-purchases, except Davis-Bacon requirements apply to contracts exceeding \$2,000)

PROVISION	COMMENTS	MASTER AGREEMENT REFERENCE (based on FA MA(17) 10-1-2010)
All FTA Assisted Third Party Contracts and Subcontracts		
No Federal Government Obligations to Third Parties (Use of Disclaimer)		§ 2.f
False or Fraudulent Statements or Claims – Civil and Criminal Fraud		§ 3.f
Access to Third Party Contract Records		§ 15.t
Changes to Federal Requirements		§ 2.c(1)
Civil Rights (Title VI, ADA, EEO (except special DOL construction clause))		§ 12
Disadvantaged Business Enterprises (DBEs)	Contract awarded on the basis of a bid/proposal offering to use DBEs.	§ 12.d
Incorporation of FTA Terms	Per FTA C 4220.1F.	§ 15.a
Awards Exceeding \$10,000		
Terminations	If 49 CFR Part 18 applies.	§ 11 and § 15.a, which incorporate 49 CFR Part 18
Special EEO provision for construction contracts	If 49 CFR Part 18 or Part 19 indicate that the DOL EEOC regulations at 41 C.F.R. Chapter 60 apply.	§ 15.a, which incorporates 49 CFR Part 18 and Part 19
Awards Exceeding \$25,000		
Debarment and Suspension		§ 3.b
Awards Exceeding the Simplified Acquisition Threshold (\$100,000) (As of February 2011, OMB has not to date adopted the FAR clause 2.101 \$150,000 standard for grants.)		
Buy America	When tangible property or construction will be acquired.	§ 14.a
Resolution of Disputes, Breaches, or Other Litigation		§ 56
Awards Exceeding \$100,000 by Statute		
Lobbying	OMB Office of Federal Financial Management has not adopted the FAR clause 2.101 \$150,000 simplified acquisition threshold standard.	§ 3.d
Clean Air		§ 25.b
Clean Water		§ 25.c

¹ see Procurement Intranet Home page-Procmnt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools² see METRO Intranet Home page Online Forms (Procurement, unless noted) ⁵ see Procurement Intranet Home page (Office of Economic Business Opportunity)³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

PROVISIONS, CERTIFICATIONS, REPORTS, FORMS, AND OTHER — MATRICES**A. THIRD PARTY CONTRACT PROVISIONS (Continued)**

(excluding micro-purchases, except Davis-Bacon requirements apply to contracts exceeding \$2,000)

PROVISION	COMMENTS	MASTER AGREEMENT REFERENCE (based on FA MA(17) 10-1-2010)
Transport of Property or Persons		
Cargo Preference	When acquiring property suitable for shipment by ocean vessel.	§ 14.b
Fly America	When property or persons are transported by air between U.S. and foreign destinations, or between foreign locations.	§ 14.c
Construction Activities		
Construction Employee Protections – Davis-Bacon Act	For contracts exceeding \$2,000.	§ 24.a(1)
Construction Employee Protections – Contract Work Hours & Safety Standards Act	For contracts exceeding \$100,000. OMB Office of Federal Financial Management has not adopted the FAR clause 2.101 \$150,000 simplified acquisition threshold standard.	§ 24.a(2)
Construction Employee Protections – Sec. 1 Copeland Anti-Kickback Act – Sec. 2 Copeland Anti-Kickback Act	All contracts All construction contracts exceeding \$2,000.	§ 24.a(3)
Bonding for Construction Activities Exceeding \$100,000	5% bid guarantee bond. 100% performance bond. Payment bond equal to: – 50% for contracts < \$1M. – 40% for contracts > \$1M – < \$5M. – \$2.5M for contracts > \$5M.	§ 15.o(1)
Seismic Safety	Construction contracts for new buildings or for existing buildings.	§ 23.e
Nonconstruction Activities		
Nonconstruction Employee Protection – Contract Work Hours & Safety Standards Act	For all turnkey, rolling stock, and operational contracts (except transportation services contracts and open market contracts) exceeding \$100,000. OMB Office of Federal Financial Management has not adopted the FAR clause 2.101 \$150,000 simplified acquisition threshold standard.	§ 24.b
Transit Operations		
Transit Employee Protective Arrangements		§ 24.d
Charter Bus Operations		§ 28
School Bus Operations		§ 29
Drug Use and Testing	Safety sensitive functions.	§ 32.b
Alcohol Misuse and Testing	Safety sensitive functions.	§ 32.b

¹ see Procurement Intranet Home page-Procmnt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools² see METRO Intranet Home page Online Forms (Procurement, unless noted) ⁵ see Procurement Intranet Home page (Office of Economic Business Opportunity)³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

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PROVISIONS, CERTIFICATIONS, REPORTS, FORMS, AND OTHER—MATRICES**A. THIRD PARTY CONTRACT PROVISIONS (Continued)**

(excluding micro-purchases, except Davis-Bacon requirements apply to contracts exceeding \$2,000)

PROVISION	COMMENTS	MASTER AGREEMENT REFERENCE (based on FA MA(17) 10-1-2010)
Planning, Research, Development, and Demonstration Projects		
Patent Rights		§ 17
Rights in Data and Copyrights		§ 18
Special Notification Requirements for States		
Special Notification Requirement for States	.	§ 38
Miscellaneous Special Requirements		
Energy Conservation		§ 26
Recycled Products	Contracts when procuring \$10,000 or more per year of items designated by EPA.	§ 15.k
Conformance with National ITS Architecture	Contracts and solicitations for ITS projects.	§ 15.m
ADA Access	Contracts for rolling stock or facilities construction/renovation.	§ 12.g
Assignability Clause	Procurements through assignments.	§ 15.a, which incorporates 49 CFR Part 18 and 49 CFR Part 19

¹ see Procurement Intranet Home page-Procmt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools² see METRO Intranet Home page Online Forms (Procurement, unless noted) ⁵ see Procurement Intranet Home page (Office of Economic Business Opportunity)³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

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PROVISIONS, CERTIFICATIONS, REPORTS, FORMS, AND OTHER—MATRICES**B. APPLICABILITY OF THIRD PARTY CONTRACT PROVISIONS**

(excluding micro-purchases, except Davis-Bacon requirements apply to contracts exceeding \$2,000)

TYPE OF PROCUREMENT					
PROVISION	Professional Services/A&E	Operations/ Management	Rolling Stock Purchase	Construction	Materials & Supplies
No Federal Government Obligations to Third Parties (by Use of a Disclaimer)	All	All	All	All	All
False Statements or Claims Civil and Criminal Fraud	All	All	All	All	All
Access to Third Party Contract Records	All	All	All	All	All
Changes to Federal Requirements	All	All	All	All	All
Termination	>\$10,000 if 49 CFR Part 18 applies.	>\$10,000 if 49 CFR Part 18 applies.	>\$10,000 if 49 CFR Part 18 applies.	>\$10,000 if 49 CFR Part 18 applies.	>\$10,000 if 49 CFR Part 18 applies.
Civil Rights (Title VI, ADA, EEO except Special DOL EEO clause for construction projects)	All	All	All>\$10,000	All	All
Special DOL EEO clause for construction projects				>\$10,000	
Disadvantaged Business Enterprises (DBEs)	All	All	All	All	All
Incorporation of FTA Terms	All	All	All	All	All
Debarment and Suspension	>\$25,000	>\$25,000	>\$25,000	>\$25,000	>\$25,000
Buy America			>\$100,000 As of Feb. 2011, FTA has not adopted the FAR 2.101 \$150,000 standard.	>\$100,000 As of Feb. 2011, FTA has not adopted the FAR 2.101 \$150,000 standard.	>\$100,000 As of Feb. 2011, FTA has not adopted the FAR 2.101 \$150,000 standard.
Resolution of Disputes, Breaches, or Other Litigation	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Lobbying	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Clean Air	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Clean Water	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Cargo Preference			Transport by ocean vessel.	Transport by ocean vessel.	Transport by ocean vessel.
Fly America	Foreign air transp. /travel.	Foreign air transp. /travel.	Foreign air transp. /travel.	Foreign air transp. /travel.	Foreign air transp. /travel.

¹ see Procurement Intranet Home page-Procmt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools² see METRO Intranet Home page Online Forms (Procurement, unless noted) ⁵ see Procurement Intranet Home page (Office of Economic Business Opportunity)³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

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PROVISIONS, CERTIFICATIONS, REPORTS, FORMS, AND OTHER—MATRICES**B. APPLICABILITY OF THIRD PARTY CONTRACT PROVISIONS (Continued)**

(excluding micro-purchases, except Davis-Bacon requirements apply to construction contracts exceeding \$2,000)

TYPE OF PROCUREMENT					
PROVISION	Professional Services/A&E	Operations/ Management	Rolling Stock Purchase	Construction	Materials & Supplies
Davis-Bacon Act				>\$2,000 (also ferries).	
Contract Work Hours and Safety Standards Act		>\$100,000 (transportation services excepted).	>\$100,000	>\$100,000 (also ferries).	
Copeland Anti-Kickback Act Section 1 Section 2				All > \$2,000 (also ferries).	
Bonding				\$100,000	
Seismic Safety	A&E for new buildings & additions.			New buildings & additions.	
Transit Employee Protective Arrangements		Transit operations.			
Charter Service Operations		All			
School Bus Operations		All			
Drug Use and Testing		Transit operations.			
Alcohol Misuse and Testing		Transit operations.			
Patent Rights	R & D				
Rights in Data and Copyrights	R & D				
Energy Conservation	All	All	All	All	All
Recycled Products		EPA-selected items \$10,000 or more annually.		EPA-selected items \$10,000 or more annually.	EPA-selected items \$10,000 or more annually.
Conformance with ITS National Architecture	ITS projects.	ITS projects.	ITS projects.	ITS projects.	ITS projects.
ADA Access	A&E	All	All	All	All
Notification of Federal Participation for States	Limited to States.	Limited to States.	Limited to States.	Limited to States.	Limited to States.

¹ see Procurement Intranet Home page-Procmnt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools² see METRO Intranet Home page Online Forms (Procurement, unless noted) ⁵ see Procurement Intranet Home page (Office of Economic Business Opportunity)³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

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PROVISIONS, CERTIFICATIONS, REPORTS, FORMS, AND OTHER—MATRICES**C. CERTIFICATIONS, REPORTS, AND FORMS**

CERTIFICATIONS, REPORTS, AND FORMS	COMMENTS	REGULATORY REFERENCE
Bus Testing Certification	All procurements of new model transit buses and vans and existing models being modified with a major changeover changes.	49 CFR Part 665
TVM Certifications	All rolling stock procurements.	49 CFR Part 26
Buy America Certification	Procurements of steel, iron or manufactured products exceeding \$100,000.	49 CFR Part 661
Preaward Review	FTA Annual Certification for any rolling stock procurement.	49 CFR Part 663
Preaward Buy America Certification	Rolling stock procurements exceeding procurements exceeding \$100,000.	49 CFR Part 663
Preaward Purchaser's Requirement	All rolling stock procurements.	49 CFR Part 663
Post Delivery Review	FTA Annual Certification for any rolling stock procurement.	49 CFR Part 663
Post Delivery Buy America Certification	Rolling stock procurements exceeding procurements exceeding \$100,000.	49 CFR Part 663
Post Delivery Purchaser's Requirement	All rolling stock procurements to the extent required by Federal law and regulations.	49 CFR Part 663
On-Site Inspector's Report	Rolling Stock except for procurements of: - 10 or fewer vehicles; - 20 or fewer vehicles serving rural (other than urbanized) areas or urbanized areas or 200,000 people or fewer; - any amount of primary manufactured standard production and unmodified vans that after visual inspection and road testing meet the contract specifications.	49 CFR Part 663
Federal Motor Vehicle Safety Standards Preaward Review and Post Delivery	Motor vehicle procurements (49 CFR 571).	49 CFR Part 663
Lobbying	Procurements exceeding \$100,000.	49 CFR Part 20 OMB Office of Federal Financial Management has not adopted FAR 2.101 \$150,000 simplified acquisition threshold standard.
Standard Form LLL and Quarterly Updates (when required)	Procurements exceeding \$100,000 where contractor engages in lobbying activities.	49 CFR Part 20 OMB Office of Federal Financial Management has not adopted FAR 2.101 \$150,000 simplified acquisition threshold standard.

¹ see Procurement Intranet Home page-Procmnt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools² see METRO Intranet Home page Online Forms (Procurement, unless noted) ⁵ see Procurement Intranet Home page (Office of Economic Business Opportunity)³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

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PROVISIONS, CERTIFICATIONS, REPORTS, FORMS, AND OTHER—MATRICES**D. OTHER MATTERS**

OTHER MATTERS	COMMENTS	STATUTORY OR REGULATORY REFERENCES
Contract Administration System		49 CFR § 18.36(b)(2) 49 CFR § 19.47
Record of Procurement History		49 CFR § 18.36(b)(9) 49 CFR § 19.47
Protest Procedures		49 CFR § 18.36(b)(12)
Selection Procedures		49 CFR § 18.36(c)(3)
Cost/Price Analysis		49 CFR § 18.36(f) 49 CFR § 19.45
Justification for Noncompetitive Awards	If Applicable.	49 CFR § 18.36(b)(9) by implication 49 CFR § 19.46(b)
No Excessive Bonding Requirements		49 CFR § 18.36(h) 49 CFR § 19.48(c)(5)
No Exclusionary Specifications		49 U.S.C. § 5325(h)
No Geographic Preferences	Except for A&E Services	49 CFR § 18.36(c)(2)

¹ see Procurement Intranet Home page-Procmt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools² see METRO Intranet Home page Online Forms (Procurement, unless noted) ⁵ see Procurement Intranet Home page (Office of Economic Business Opportunity)³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

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14.5 THIRD PARTY MATRICES

The matrices shown below, Appendix D-4 and D-5 from 4220.1F provide guidance as to what information what must be included in most Federally funded contracts. Be aware that contracts for some types of procurement, such as for rolling stock, must contain additional information that is referenced in additional matrices included in 4220.1F.

FTA C 4220.1F

Rev. 4, 03/18/2013

Appendix D-4

PROVISIONS, CERTIFICATIONS, REPORTS, FORMS, AND OTHER—MATRICES

B. APPLICABILITY OF THIRD PARTY CONTRACT PROVISIONS

(excluding micro-purchases, except Davis-Bacon requirements apply to contracts exceeding \$2,000)

PROVISION	TYPE OF PROCUREMENT				
	Professional Services/A&E	Operations/ Management	Rolling Stock Purchase	Construction	Materials & Supplies
No Federal Government Obligations to Third Parties (by Use of a Disclaimer)	All	All	All	All	All
False Statements or Claims Civil and Criminal Fraud	All	All	All	All	All
Access to Third Party Contract Records	All	All	All	All	All
Changes to Federal Requirements	All	All	All	All	All
Termination	>\$10,000 if 49 CFR Part 18 applies.	>\$10,000 if 49 CFR Part 18 applies.	>\$10,000 if 49 CFR Part 18 applies.	>\$10,000 if 49 CFR Part 18 applies.	>\$10,000 if 49 CFR Part 18 applies.
Civil Rights (Title VI, ADA, EEO except Special DOL EEO clause for construction projects)	All	All	All>\$10,000	All	All
Special DOL EEO clause for construction projects				>\$10,000	
Disadvantaged Business Enterprises (DBEs)	All	All	All	All	All
Incorporation of FTA Terms	All	All	All	All	All
Debarment and Suspension	>\$25,000	>\$25,000	>\$25,000	>\$25,000	>\$25,000
Buy America			>\$100,000 As of Feb. 2011, FTA has not adopted the FAR 2.101 \$150,000 standard.	>\$100,000 As of Feb. 2011, FTA has not adopted the FAR 2.101 \$150,000 standard.	>\$100,000 As of Feb. 2011, FTA has not adopted the FAR 2.101 \$150,000 standard.
Resolution of Disputes, Breaches, or Other Litigation	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Lobbying	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Clean Air	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Clean Water	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Cargo Preference			Transport by ocean vessel.	Transport by ocean vessel.	Transport by ocean vessel.
Fly America	Foreign air transp. /travel.	Foreign air transp. /travel.	Foreign air transp. /travel.	Foreign air transp. /travel.	Foreign air transp. /travel.

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PROVISIONS, CERTIFICATIONS, REPORTS, FORMS, AND OTHER—MATRICES**B. APPLICABILITY OF THIRD PARTY CONTRACT PROVISIONS (Continued)**

(excluding micro-purchases, except Davis-Bacon requirements apply to construction contracts exceeding \$2,000)

TYPE OF PROCUREMENT					
PROVISION	Professional Services/A&E	Operations/ Management	Rolling Stock Purchase	Construction	Materials & Supplies
Davis-Bacon Act				>\$2,000 (also ferries).	
Contract Work Hours and Safety Standards Act		>\$100,000 (transportation services excepted).	>\$100,000	>\$100,000 (also ferries).	
Copeland Anti-Kickback Act Section 1 Section 2				All > \$2,000 (also ferries).	
Bonding				\$100,000	
Seismic Safety	A&E for new buildings & additions.			New buildings & additions.	
Transit Employee Protective Arrangements		Transit operations.			
Charter Service Operations		All			
School Bus Operations		All			
Drug Use and Testing		Transit operations.			
Alcohol Misuse and Testing		Transit operations.			
Patent Rights	R & D				
Rights in Data and Copyrights	R & D				
Energy Conservation	All	All	All	All	All
Recycled Products		EPA-selected items \$10,000 or more annually.		EPA-selected items \$10,000 or more annually.	EPA-selected items \$10,000 or more annually.
Conformance with ITS National Architecture	ITS projects.	ITS projects.	ITS projects.	ITS projects.	ITS projects.
ADA Access	A&E	All	All	All	All
Notification of Federal Participation for States	Limited to States.	Limited to States.	Limited to States.	Limited to States.	Limited to States.

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15 INNOVATIVE PROPOSAL PROGRAM

- 15.1** The purpose of METRO’s Innovation Proposal Policy (IPP) is to allow external and internal stakeholders to present innovative and novel ideas and provide METRO with various paths to review and potentially implement such ideas while remaining in compliance with applicable laws and procedures. Innovative processes include requests for information, proof of concepts, prototypes, demonstrations, pilot programs, unsolicited proposals and public- private partnerships.

All projects undertaken pursuant to the IPP shall be consistent with and for the advancement of METRO’s Mission as adopted by the Board of Directors.

Innovative unsolicited proposals must not exceed one year. METRO anticipates that all costs will either be covered by the proposer or offered at a substantial discount. In any event, the costs to METRO must be within METRO’s Procurement thresholds and budget. Any exceptions will be handled on a case-by-case basis.

15.2 SCOPE AND APPLICABILITY

This policy applies to all Innovative Proposals, except for unsolicited proposals related to real estate projects. (See METRO Joint Development Policy). Innovative processes include requests for information, proof of concepts, prototypes, demonstrations, pilot programs, unsolicited proposals and public-private partnerships.

The policy applies to METRO employees, departments, divisions, internal department committees, contractors and vendors. **No proof of concepts, prototypes, demonstrations or pilot programs should be undertaken outside of this policy.**

15.3 APPLICABLE LEGISLATION, REGULATIONS, BOARD RESOLUTIONS AND FORMS

This policy will comply with Texas Transportation Code chapter 451, Texas Government Code Chapter 2267, METRO’s Procurement Manual including FTA Circular 4220.1F, Intellectual Property Policy, Code of Ethics, Texas Public Information Act, Small and Disadvantaged Business Enterprise Program and any current or future related policies or programs.

15.4 TERMS AND DEFINITIONS

- A. **Demonstration** – A detailed look at visible interfaces and features of a product or service, with commentary, to inform to a deeper level than a simple presentation, providing insight into the breadth of capability a product or services offers, prompting questions about specifics of the product or service’s features.
- B. **Internal Stakeholders:** Internal stakeholders are METRO staff, departments and divisions who would like to test, pilot or demonstrate a proposal either developed by METRO staff or an external entity
- C. **Innovative Unsolicited Proposal:** Proposals that meet the definition of Innovative unsolicited proposal are described below:
 - Must be from an external source;
 - Innovative;
 - Related to METRO’s goals and objectives;

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- Independently originated and developed by the proposer;
- Prepared without METRO's supervision, endorsement, direction, or direct involvement; and Request for general, publicly available information or responses of general public data or information provided by METRO or METRO staff at the request of the proposer and later used in the development of an Innovative Proposal does not constitute supervision, endorsement, direction, or involvement.
- Innovative is defined as concepts, products, technologies, or services that are new or relatively new to market; in development; in a research and development phase; or a demonstration
- All required content and attachments include but is not limited to: any supporting documents including reports, assessments, analyses, simulations, video, lab results, demo results, safety report, third party reviews.

15.4.1 METRO will also be reviewing and encourages the proposal's use of small businesses

15.4.2 An Innovative Unsolicited Proposal is not:

15.4.2.1 An offer responding to METRO's previously published expression of need or request for proposals;

15.4.2.2 A verbal offering;

15.4.2.3 An advance proposal for property or services that METRO could acquire through competitive methods;

15.4.2.4 A replacement for an existing contract that is already in effect; or

15.4.2.5 An opportunity to circumvent the traditional procurement process, state or federal laws and regulations.

- D. **Pilot** – Any small-scale, short-term feasibility study or experimental trial conducted with or through a vendor, to learn how a large-scale project or initiative might work in practice. Such pilots may not exceed one year in length or \$50,000 in cost **unless a legal justification exists**.
- E. **Pilot Plan** – This document analyzes the opportunity to conduct a pilot project, defines the main characteristics of the pilot and identifies the activities, schedule, budget, and deliverables of the pilot project. The plan may also address resource requirements; interfaces and dependencies with other departments and divisions; identifies any interface with METRO's IT infrastructure; risks; and risk mitigation.
- F. **Proof of Concept** – This is small duration project, perhaps a couple of weeks, that allows METRO to thoroughly test the proposed solution, normally in a non-production environment, to refine acceptance criteria.
- G. **Proposer or Vendor**: Any third-party entity who is seeking to provide a good or service to METRO whether paid or unpaid and which meets the definition of an unsolicited proposal.
- H. **Prototype**: A project that tests a particular product in order to identify how the product will work upon implementation.
- I. **Public Private Partnership**: A project that allows investment and partnership with private entities to develop, operate and/or deploy projects.
- J. **Requests for Information**: A solicitation process used to obtain general information about products, services, or suppliers. It is an information request only and not binding on either the vendor or METRO and may be used as the basis for future procurements.
- K. **Staff Initiated Pilot, Demonstration or proof of concept**: A pilot or demonstration that originates from staff recommendation.

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³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

- An innovative proposal that comes solely from and that will be performed solely by staff, with no vendor involvement, does not require a procurement or solicitation.
- An innovative proposal from staff that will be performed or involve vendor involvement is subject to this policy and METRO's Procurement Manual.

L. Unsolicited Proposal: A written proposal from an external proposer for an item, service or product that does not meet the definition of Innovative as defined under C. These unsolicited proposals will be handled by the Office of Procurement and the Procurement Manual.

L.1 This policy does not apply to proposals for real estate joint developments but includes intellectual property and may include physical property as determined by METRO.

L.2 The following will be considered general unsolicited proposals to be evaluated by the Office of Procurement.

15.5 ROLES AND RESPONSIBILITIES

15.5.1 Office of Innovation (OOI) has primary responsibility for implementation and management of the Innovation Proposal Program in coordination with METRO's Office of Procurement (Procurement). OOI has the following responsibilities which include but are not limited to:

- (1) Coordinating with relevant stakeholders to determine appropriate next steps upon receiving an innovative unsolicited proposal.
- (2) Supporting, tracking and monitoring projects undertaken under this policy.
- (3) Handling any questions or concerns regarding the innovative unsolicited proposal.
- (4) Serving in project management role for any proposal in the pre-solicitation phase, i.e., research and development phase and/or pilot phase.
- (5) If it is determined by the Office of Innovation that a department stakeholder would be a more suitable project manager, OOI will share Project Management duties with the stakeholder department.
- (6) Preserving and maintaining database of pilot projects under this policy.

15.5.2 Office of Procurement's (Procurement) responsibilities include:

- A. Coordinating with OOI to analyze compliance of proposal with this policy
- B. Referral of any proposals it receives that fall under this policy to the OOI
- C. Providing contract administration for any proposal that advances to a demonstration/pilot phase to ensure compliance with applicable procurement laws, rules and regulations.

15.5.3 Office of General Counsel's (OGC) responsibilities include:

- Providing legal advice and assistance in reviewing terms and conditions and other related documents to a pilot, demonstration or exercise established pursuant to an Unsolicited Proposal.

15.5.4 Stakeholder Department responsibilities include:

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³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

- Serving as co-project manager with OO
- Providing subject matter expertise and necessary staff resources to accomplish innovative initiative.
- Providing data and information to OOI toward successful implementation and completion of goals and objectives of the innovative initiatives.

15.6 PROPOSER TYPES

15.6.1 External Proposers:

- A. External proposers may submit proposals they believe meet the criteria of the IPP by mailing a copy of proposal to both the:

Office of Innovation	Office of Procurement
c/o Innovative Proposal Program	c/o Innovative Proposal Program
1900 Main Street	1900 Main Street
Houston, TX 77002	Houston, TX 77002

- B. External Proposers should be aware that any documents submitted to METRO are subject to the Texas Public Information Act and therefore no confidential or proprietary information should be included.
- C. OOI and Procurement will determine if the proposal is subject to the IPP or the METRO Procurement non-competitive provisions will apply to the proposal.

15.6.2 Internal Innovative Unsolicited Proposals:

- A. Internal innovative proposals or requests to deploy any project as defined must be directed to the Office of Innovation.

15.7 PROJECT CLOSE OUT AND RECORD RETENTION

- 15.7.1 Upon conclusion of any Innovation Process, the project will be completed and required documents provided to OOI for retention.

15.8 OPEN RECORDS; CONFIDENTIALITY & PROPRIETARY INFORMATION

- 15.8.1 All proposals are subject to the Texas Public Information Act (TPIA), also known as Open Records, unless it meets an exception of the state law. Proposers are responsible for being familiar with TPIA. METRO assumes no responsibility for the access and/or confidentiality of a proposal, regardless of its proprietary nature.

- 15.8.2 If a TPIA request is received and the proposer believes an exception applies, the proposer is responsible for filing all paperwork required to answer a TPIA request directly to the Texas Office of the Attorney General.

15.9 REVIEW AND REVISION

Direct all inquiries to the Chief Innovation Officer who will review and update this policy as deemed appropriate in coordination with the Office of Procurement, but no less frequently than once per year.

Any changes to instructions or requirements, as described in this policy, will result in immediate revisions made to this document. Likewise, associated documents and forms will be verified at the same time to ensure consistency in related information.

¹ see Procurement Intranet Home page-Procmt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools

² see METRO Intranet Home page Online Forms (Procurement, unless noted) ⁵ see Procurement Intranet Home page (Office of Economic Business Opportunity)

³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)

15.10 EXCEPTIONS

The METRO Board of Directors or President & Chief Executive Officer reserves the right to amend, suspend, modify, or revoke the application of any policy standards as deemed necessary at any time, for any reason.

¹ see Procurement Intranet Home page-Procmt/MM/SB Dept Employees Only ⁴ see Procurement Intranet Home page-Project Manager Tools

² see METRO Intranet Home page Online Forms (Procurement, unless noted) ⁵ see Procurement Intranet Home page (Office of Economic Business Opportunity)

³ see METRO Intranet Home page Policies, Procedures & Guidelines (Procurement and Materials, unless noted)