
	<i>Massachusetts Bay Transportation Authority</i>
	Procurement Manual POLICIES & PROCEDURES
	<i>September 2019</i>

# Chapter 1

## MBTA Procurement Policy

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## CHAPTER 1 - PROCUREMENT POLICY STATEMENT

### 1.1 INTRODUCTION

The purpose of this Procurement Manual is to establish uniform procedures for the Authority to use in the procurement of goods and services using a variety of FTA-approved procurement methods:

- Micro purchase (<\$3,500)
- Small Purchase (\$3,500 - <\$50,000) (Materials Management)
- Small Purchase (\$3,500 - \$100,000) (Design & Construction)
- Sealed Bid
- Competitive RFP


The Authority uses a variety of project delivery methods that require the use of specific procurement procedures such as:

- Professional Services (Brooks Act for Architecture/Engineering Services)
  - Consultants
  - Engineers
  - Architects
- Construction Services
  - Design-Bid-Build
  - Design-Build
  - Construction Manager at Risk
  - CM/GC (Construction Manager/General Contractor)

This manual does not attempt to address every conceivable situation that may arise in contracting for goods and services. Rather, its aim is to provide guidelines whereby necessary goods and services can be obtained on a competitive basis and in accordance with established Authority policies and Federal Transit Administration Circular 4220.1F Third Party Contracting. [FTA Circular 4220.1F.III.3.a; VI.2.e].

**FTA CIRCULAR 4220.1F IS IN THE PROCESS OF BEING UPDATED TO INCORPORATE THE PROVISIONS OF THE SUPER CIRCULAR, 2 CFR PART 200. UNTIL THAT UPDATE IS ISSUED, WHEN THERE IS A CONFLICT BETWEEN FTA CIRCULAR 4220.1F AND THE SUPER CIRCULAR, THE SUPER CIRCULAR CONTROLS. THESE UPDATES CONTINUE TO BE INCORPORATED INTO OUR POLICIES AND PROCEDURES.**

**THE FIXING AMERICA'S SURFACE TRANSPORTATION (FAST) ACT MADE SEVERAL CHANGES TO THE FTA'S BUY AMERICA PROGRAM. THESE ARE REFLECTED IN THIS MANUAL AS WELL.**

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**FTA CIRCULAR 4220.1F, CHAPTER VI** - The chapter within the FTA Circular 4220.1F entitled Procedural Guidance for Open Market Procurements plays a critical and integral role in writing the MBTA Procurement Policies and Procedures. This chapter stands as an integral reference and oversight when procuring any services within the Authority.

Because MBTA procurements can involve the use of FTA grant funds, these procedures adhere to the FTA Circular 4220.1F. For convenience, the MBTA has also opted to use the FTA Circular 4220.1F for procurements not involving FTA grant funds (*i.e.*, procurements solely using state funds) and, therefore, another goal of these procedures is to provide contracting guidance to all personnel throughout the MBTA when these procedures apply. For those procurements that do not involve federal FTA grant funds, it is within the MBTA's discretion to depart from the FTA Circular 4220.1F and this Procurement Manual, including, but not limited to, the FTA requirements regarding sole source procurements, and the MBTA Appeals and Protest Procedures at Exhibit 1.3.

Additionally, when the MBTA is a recipient of Federal assistance awarded by the Federal Transit Administration (FTA). The FTA Circular 4220.1F incorporates the procurement provisions of the Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users (SAFETEA-LU).


## **FULL AND OPEN COMPETITION**

The Authority shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement and complies with MBTA policy and Federal Transit Administration requirements and guidelines where applicable.

The Authority shall ensure full and open competition through the use of competitive procedures in accordance with the requirements of this manual. Some situations considered to be restrictive of competition include, but are not limited to:

Unreasonable requirements placed on firms in order for them to qualify to do business; [Circular 4220.1F, VI.2.a. (4)(a)]

Unnecessary experience and excessive bonding requirements; [Circular

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4220.1F.VI, 2, a (4) (b)

Noncompetitive pricing practices between firms or between affiliated companies;

Noncompetitive awards to any person or firm on retainer contracts.

## 1.2 REQUIRED PROCUREMENT ELEMENTS AND SUGGESTED BEST PRACTICES<sup>1</sup>

The MBTA (as a grant recipient of the FTA, also referred to as the Grantee) has a vested interest in assisting MBTA user departments and procurement officers to maintain efficient and effective procurement systems as well as a responsibility to ensure that the MBTA expends funds in accordance with FTA regulations, the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (49 CFR Part 18), and the contractual agreements between FTA and the MBTA. In order to carry out this responsibility, FTA has established an oversight framework that is comprised of grantee self - certifications, annual single audits conducted in accordance with OMB Circular A-133, and FTA oversight reviews, including the Procurement System Review (PSR).

The following 56 procurement elements comprise not only procurement best practices but are also FTA requirements. The FTA conducts triennial Procurement System Reviews (PSR) to confirm the Authority complies with these requirements. More PSR information is available on the FTA website:

[http://www.fta.dot.gov/grants/12900\\_1243.html](http://www.fta.dot.gov/grants/12900_1243.html)

### 1.2.1 SYSTEMWIDE ELEMENTS

#### 1) Written Standards of Conduct

(1) “The Common Grant Rules require each recipient to maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts.” All MBTA employees are subject to the MBTA Employee Code of Conduct contained in **Exhibit 1.2** of this manual.

(a) “...no employee, officer, agent, or board member, or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing may participate in the selection, award, or administration of a contract supported with FTA assistance if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when any of those previously listed has a financial or other interest in the firm selected for award.”

(b) “The recipient’s officers, employees, agents, or board members may

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neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements. The recipient may set minimum rules when the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.”

- (c) “To the extent permitted by State or local law or regulations, such standards of conduct will provide for penalties, sanctions, or other disciplinary action for violation of such standards by the recipient’s officers, employees, agents, board members, or by contractors or subrecipients or their agents.” [FTA C 4220.1E, III, 1.a, b, c.]

## 2) Contract Administration System

“The Common Grant Rules require the recipient to maintain a contract administration system to ensure that it and its third party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders and applicable Federal, State and local responsibilities.” [FTA C 4220.1E, III, 3.] In addition to this Procurement Manual and Departmental standard operating procedures the Authority also uses the Capital Management System (CMS) and the Financial Management Information System (FMIS) for contract administration, reporting and monitoring.


## 3) Written Protest Procedures

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. [FTA C 4220.1E, VII, 1.a. b.] Please refer to **Exhibit I.3** of this manual for MBTA written protest procedures.

## 4) Prequalification System

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

- (a) ...lists used in acquiring property and services are current.
- (b) ...lists include enough qualified sources to ensure maximum full and open competition.
- (c) The recipient permits potential bidders or proposers to qualify during the solicitation period (from the issuance of the solicitation to its closing date), as set forth in the Common Grant Rule for governmental recipients. Evaluations for prequalification, however, need not be accelerated or truncated. FTA does not require a recipient to hold a particular solicitation open to accommodate a potential bidder or proposer that submits a person, firm, or product for approval before or during that solicitation.” [FTA C 4220.1E, VI, 1.c]

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

The Authority does pre-qualify construction contractors for contracts with a value greater than \$1 million. Please refer to the Construction Pre-Qualification Procedures available on the MBTA Intranet/Internet.

### **5) Procedures for Ensuring Most Efficient and Economic Purchase**

“Proposed procurements should be reviewed to avoid the purchase of property and services the recipient does not need (including duplicative items and unnecessary options)... Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase... To obtain the best value, lease versus purchase alternatives for acquiring property should be reviewed and, if necessary, an analysis should be obtained to determine the more economical alternative.” FTA requires the recipient to make a written determination of the cost of leasing the asset compared with the cost of purchasing or constructing it.” [FTA C 4220.1E, IV, 1.b. c. e.]

### **6) Procurement Policies and Procedures**

“Each recipient and subrecipient may use its own procurement procedures, provided that its procurements conform to applicable Federal law and regulations.” [FTA C 4220.1E, III, 3.a.]

“...the guidance within this circular applies to each Federal Transit Administration (FTA) recipient of Federal assistance....” [FTA C 4220.1E, II, 1.]

All Authority procurements must comply with the policy and procedures set forth in this manual.

## **1.2.2 INDIVIDUAL PROCUREMENT ELEMENTS**

The following individual procurement elements are applicable to each procurement action. Please refer to the Chapters within this manual for procedures to comply with these elements and sample checklists and templates where applicable.

### **7) Independent Cost Estimate (ICE)**

“The Common Grant Rules require the recipient to perform a cost or price analysis in connection with every procurement action ...as a starting point, the recipient must make independent estimates before receiving bids or proposals” [FTA C 4220.1E, VI, 6.; BPPM § 2.3.2] These estimates may be prepared by Authority personnel, design consultants or independent cost

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estimators hired by the Authority. The ICE should be signed and dated.

FTA Circular 4220.1.F (VI, 6) provides that grantees must perform a cost or price analysis in connection with every procurement action, including all contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, **grantees MUST make independent estimates for all procurements before receiving bids or proposals.**

These estimates may be obtained from the following sources:

- Published competitive prices, such as those found in catalogs
- Results of previous procurements of the same items, with inflation factored in
- Estimates by in-house or external estimators.

#### Purpose

The intent of receiving an ICE in advance of the offer:

- Ensures a clear basis for the Authority’s determination that the benefits of the procurement warrant its cost;
- Provides essential procurement and financial planning information; and
- Provides a basis for a price analysis, which may assist in obviating the need for a more burdensome cost analysis.

### **8) A&E Geographic Preference**

Geographic location may be a selection criterion in procurements for architectural and engineering (A&E) services provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract. Geographical preference may not be an evaluation criterion in other types of procurements. [FTA C 4220.1E, VI, 2.a. (4) (g); BPPM § 6.5].

### **9) Unreasonable Qualification Requirements**

An example of a situation that may be considered restrictive of competition may be the inclusion of “Unreasonable requirements placed on bidders or offerors in order for them to qualify to do business” [FTA C 4220.1E, VI, 2.a. (4) (a); BPPM § 2.4.2.1]

### **10) Unnecessary Experience and Excessive Bonding**

An example of a situation that restricts competition is “Unnecessary experience” and

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“excessive bonding requirement. FTA does not require any bonding for rolling stock, services, maintenance operations, or any contracts other than construction....” [FTA C 4220.1E, IV, 2.b.h. (1); BPPM § 2.4.2.1.]

### **11) Organizational Conflict of Interest**

An organizational conflict of interest occurs when any of the following circumstances arise:

- a. Lack of Impartiality. When the contractor is unable, or potentially unable, to render impartial assistance or advice to the recipient due to other activities, relationships, contracts, or other circumstances.
- b. Impaired Objectivity. When the contractor’s objectivity in performing the contract work is or might be otherwise impaired due to other activities, relationships, contracts, or other circumstances.
- c. Unfair Competitive Advantage. The contractor has an unfair competitive advantage.” [FTA C 4220.1E, VI, 2.a. (4) (h); BPPM § 2.4.2.2.]

### **12) Arbitrary Action**

FTA Circular 4220.1.F, VI, 4 (j) prohibits taking any arbitrary action in the procurement process. Arbitrary actions are considered restrictive of competition. It is difficult to identify all of the actions that could be considered arbitrary, but here are some examples:

- Adding incongruous classifications of work together when developing a specification. For example, seeking a contractor to install signs and requiring the same contractor to perform landscaping work. These are two separate trades or areas of expertise that are not traditionally performed by a single vendor.
- Awarding a contract to a bidder who did not provide the lowest price without adding a written justification to the procurement file.
- Adding out-of-scope work to an existing contract.(Cardinal Changes)


[FTA C 4220.1E, VI, 2.a. (4) (j); BPPM § 2.4.2.1]

### **13) Brand Name Restrictions**

“Specifying only a ‘brand name’ product instead of allowing an ‘or equal’ product to be offered or failing to specify the brand name product’s salient characteristics” [FTA C 4220.1E, VI, 2.a. (4) (f); BPPM § 2.4.2.1 and 2.4.2.2.1] is restrictive of competition.

- (a) “Detailed product specifications should be avoided if at all possible in favor of



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performance specifications.” [FTA C 4220.1F, VI, 2.a. (1)]

- (b) “When it is impractical or uneconomical to make a clear and accurate description of the technical requirements of the property... a ‘brand name or equal’ description may be used as a means to define the performance or other salient characteristics of a specific type of property. The recipient, however, must state the salient characteristics of the named brand that offerors must provide.” [FTA C 4220.1F, VI, 2.a. (3); BPPM § 4.3.2, 4.4.1, 4.5.1, and 4.5.2]

#### **14) Geographic Preferences**

The Authority shall conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. However, geographic location **may be** a selection criterion in procurements for architectural and engineering (A&E) services provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract. [FTA Circular 4220.1F.VI.2.a(4)(g)]

#### **15) Contract Term Limitation**

##### **Rolling Stock: 5 Year (Bus) or 7 Year (Railcar) Limitation**

- (a) “To comply with 49 U.S.C 5325 (e)(1), a multi-year third party contract to purchase additional rolling stock and replacement parts may not have options that extend more than five years (for bus) or seven years (for railcar) after the date of the original contract.”
- (b) “FTA interprets this five or seven-year period as covering the recipient’s rolling stock and replacement needs from the first day when the contract becomes effective to those at the end of the fifth or seventh year. This means that the contract may not encompass more rolling stock and replacement parts than the recipient needs within five years (bus) or seven years (railcar). The five or seven-year rule does not mean delivery, acceptance, or even fabrication must be completed in five or seven years – only that a contract is limited to purchasing no more than the recipient’s rolling stock or replacement parts needs for five or seven years based on the effective date of the contract.” [FTA C 4220.1F, IV, 2.e.(10)]

#### **PROCUREMENT OTHER THAN ROLLING STOCK**

The MBTA will use sound business judgment and be judicious in establishing and extending a contract’s period of performance.

**General Standards.** The period of performance generally should not exceed the time necessary to accomplish the purpose of the contract. The Project Office and procurement staff should also consider competition, pricing, fairness, and public perception. The MBTA’s procurement files should document its rationale for

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determining the performance period designated for each contract.

**Federal Restrictions.** Except for procurements of rolling stock and replacement part contracts as mentioned above, the MBTA'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 MBTA's other contracts must be reasonable.

**Time Extensions.** Consistent with the general tone of the FTA circular, contract time extensions will be considered in light of whether they are permissible changes or impermissible cardinal changes. Once the MBTA awards the third party contract, an extension of the contract term length that amounts to a cardinal change will require a sole source justification.

## 16) Written Procurement Selection Procedures

To ensure that all procurements are awarded in a fair and equitable manner, all solicitations shall:


- a.) A clear and accurate description of the technical requirements for the material, product or service to be procured. Such description shall not contain features that unduly restrict competition. The description may however include a statement of the qualitative nature of the material, product or service to be procured and when necessary, set forth those minimum essential characteristics to which it must conform if it is to satisfy its intended use.
- b.) All requirements that offerors must fulfill and all other factors to be used in evaluating bids or proposals.

All evaluators and reviewers must follow the established criteria when rating the proposals submitted by bidders.

- (a) "The Common Grant Rule...requires the recipient to have written procurement procedures." [FTA C 4220.1F, III, 3. a.; BPPM § 4.3.2, 4.4.1, 4.5.1, and 4.5.2]
- (b) "The Common Grant Rules require that each solicitation provide for the following...Identify all factors to be used in evaluating bids or proposals." FTA C 4220.1F, VI, 2.e.; BPPM § 4.3.2, 4.4.1, 4.5.1, and 4.5.2]

## 17) Solicitation Prequalification Criteria

As discussed in Section 1.2 (System wide Elements) above, a recipient may prequalify people, firms, or products for participation in its procurements provided that:

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- (1) “**Lists.** The recipient ensures that all its prequalification lists used in acquiring property and services are current. [FTA C 4220.1E, VI, 1.c.(1)]
- (2) “**Sources.** The recipient ensures that all its prequalification lists include enough qualified sources to ensure maximum full and open competition.” [FTA C 4220.1E, VI, 1.c.(2)]
- (3) “**Qualification Periods.** The recipient permits potential bidders or proposers to qualify during the solicitation period from the issuance of the solicitation to its closing date.” [FTA C 4220.1E, VI, 1.c.(3)]

### **18) Award to Responsible Contractors**

“A recipient may award a contract ...only to a ‘responsible’ contractor capable of successfully performing under the terms and conditions of the contract. To determine responsibility, the recipient must consider the following criteria before awarding the contract:


- Integrity
- Public Policy Compliance
- Past Performance
- Financial and Technical Resources
- Debarment/Suspension. Contractor’s status with respect to DOT regulations, ‘Government wide Debarment and Suspension (Non procurement),’ 49 CFR Part 29.” [FTA C 4220.1E, VI, 8.b.] Authority personnel shall confirm that the provider of goods or services is not listed on the System for Award Management (SAM). Please refer to later Chapters of this manual for specific information and checklists to address this requirement.

### **19) Sound and Complete Agreement**

- (a) “The Common Grant Rules require that all third party contracts include provisions adequate to form a sound and complete agreement.” [FTA C 4220.1E, III, 3.b.]
- (b) “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.” [FTA C 4220.1E, IV, 2.b. (6) 2]
- (c) “For contracts exceeding \$10,000, there must be termination for cause and termination for convenience provisions.” [FTA C 4220.1E, IV, 2.b. (6) 4]

### **20) No Splitting [Micro-purchase]**

“...there should be ... no splitting of procurements to avoid competition.” [FTA C 4220.1E, VI, 3.a.; BPPM § 4.1]

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The FTA expects the Authority to ensure that it contracts only for its current and reasonably expected needs. Absent efforts to foster greater opportunities for DBE, small and minority firms, and women’s business enterprises, the Authority should not split a larger procurement merely to gain the advantages of small purchase procedures available for federally assisted procurements of \$150,000 or less (\$150,000 is the current Federal “simplified acquisition” threshold) or to skirt MBTA authorization levels.

**21) Fair and Reasonable Price Determination [Micro-purchase]**

“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 this determination.” [FTA C 4220.1E, VI, 3.a. (2) (c); BPPM § 4.1]

**22) Micro-Purchase Davis Bacon**

“Davis - Bacon prevailing wage and hour restrictions apply to construction contracts exceeding \$2,000.” [FTA C 4220.1E, VI, 3.a.; BPPM § 4.1]

**23) Price Quotations [Small Purchase]**

“Price or rate quotations shall be obtained from an adequate number of qualified sources” [FTA C 4220.1E, VI, 3.b.; BPPM § 4.2]

**24) Clear, Accurate, and Complete Specification**

- (a) “Each solicitation must provide a clear and accurate description of the technical requirements for the property or services to be procured.” [FTA C 4220.1E, VI, 2.a.; BPPM § 3]
- (b) “In competitive procurements, the description may not contain features that unduly restrict competition.” [FTA C 4220.1E, III, 3.a.(1) (b)]
- (c) “The Common Grant Rule ... 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.’” [FTA C 4220.1E, III, 3.a.(1) (d)]
- (d) “In order for sealed bidding to be feasible, the following conditions should be present: A complete, adequate, and realistic specification or purchase description is available.” [FTA C 4220.1E, VI, 3.c. (1) (a)]
- (e) “If this procurement method is used . . . the invitation for bids will include any specifications and pertinent attachments...in order for the bidder to properly respond.” [FTA C 4220.1E, VI, 3.c. (2) (c)]

**25) Adequate Competition - Two or More Competitors**

- (a) “In order for sealed bidding to be feasible, the following conditions should be present: . . . Two or more responsible bidders are willing and able to compete effectively for the business.” [FTA C 4220.1E, VI, 3.c. (b)]

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- (b) Requests for “competitive proposals is a procurement method normally conducted with more than one source submitting an offer or proposal.” [FTA C 4220.1E, VI, 3.d.(2)(c)]  
 “. . .the procurement lends itself to a firm fixed price contract.” [FTA C 4220.1E, VI, 3.c. (1) (c)]

The following element numbers 26 through 38 provide guidance on when to employ the various procurement procedures. Please refer to Exhibit 1.6 for a sample Procurement Method Decision Matrix for assistance in determining which procurement method to employ. Chapters 2 through 8 provide procedural guidance specific to the procurement types listed below.

**26) Firm Fixed Price [Sealed Bid]**

“. . .the procurement lends itself to a firm fixed price contract.” [FTA C 4220.1E, VI, 3.c. (1) (c)]

**27) Selection on Price [Sealed Bid]**

“. . .the selection of the successful bidder can be made on the basis of price and those price - related factors included in the solicitation.” [FTA C 4220.1E, VI, 3.c. (1) (d)]

**28) Discussions Unnecessary [Sealed Bid]**

“No discussion with bidders is needed” [FTA C 4220.1E, VI, 3.c. (1) (e)]


**29) Advertised/Publicized [Sealed Bid] [RFP] [FTA C 4220.1E, VI, 3.c.]**

IFBs and RFPs with values estimated at greater than \$50,000 must be publicly advertised. In addition to increasing competition, advertising procurement actions also broadens industry participation and meeting industry requirements, as well as provides assistance to small businesses and DBE firms interested in obtaining contracts and subcontracts.

**30) Adequate Number of Sources Solicited [Sealed Bid] [RFP]**

Bids and proposals shall be solicited from an adequate number of known suppliers. [FTA. C 4220.1E, VI, 3]

Please refer to the specific procurement procedures in the Chapters within this manual for a list of media in which the Authority publicly advertises solicitations. If the procurement is seeking a specialty good or service, the Authority should consider advertising in specialty media such as trade publications in order to attract competition.

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### **31) Sufficient Bid Time [Sealed Bid]**

“Bids shall be solicited from an adequate number of known suppliers, providing time to prepare bids prior to the date set for opening the bids.” [FTA C 4220.1E, VI, 3.c. (2) (d)]

### **32) Bid Opening [Sealed Bid]**

“All bids will be publicly opened at the time and place prescribed in the invitation for bids.” [FTA C 4220.1E, VI, 3.c. (2) (e)] The Authority does not consider bids or proposals submitted after the date and time stated in the solicitation/RFP.

### **33) Responsiveness [Sealed Bid]**

“A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder.” Procedures for determining responsiveness are provided in the subsequent chapters.

### **34) Lowest Price [Sealed Bid]**

“A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder.” [FTA C 4220.1E, VI, 3.c. (2) (f)]

### **35) Rejecting Bids [Sealed Bid]**

“Any or all bids may be rejected if there is a sound, documented business reason.” [FTA C 4220.1E, VI, 3.c. (2) (g)]

### **36) Evaluation [RFP]**

“If this procurement method is used the following requirements apply: . . .

- (a) All evaluation factors will be identified in the procurement documents along with their relative importance; numerical or percentage ratings or weights, however, need not be disclosed... [FTA C 4220.1E, VI, 3.d. (2) (b)]
- (b) The recipient will have a method in place for conducting technical evaluations of the proposals received and for selecting awardees.” [FTA C 4220.1E, VI, 3.d. (2) (d)]

Please refer to subsequent Chapters in this manual for example score sheets applicable to differing procurement types.

### **37) Price and Other Factors [RFP]**

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“If this procurement method is used the following requirements apply: . . . Award will be made to the responsible firm whose proposal is most advantageous to the recipient’s program with price and other factors considered.” [FTA C 4220.1E, VI, 3.d. (2) (e)]

**38) Sole Source if Other Award is Infeasible**

“Procurement by noncompetitive proposals may be used 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:” [FTA C 4220.1E, VI, 3.i. (1)]

- (a) “When the supplies or services are available from only one responsible source, and no other type of supplies or services will satisfy the recipient’s requirements; or” [FTA C 4220.1E, VI, 3.i. (b)]
- (b) “When the recipient’s need for the supplies or services is of such unusual and compelling urgency that the recipient would be seriously injured unless the recipient is permitted to limit the number of sources from which it solicits bids or proposals, or when the public exigency or emergency for the requirement will not permit a delay resulting from a competitive solicitation;” or [FTA C 4220.1E, VI, 3.i.2(c)]
- (c) “FTA authorizes noncompetitive negotiations;” or [FTA C 4220.1E, VI, 3.i.2(e)]
- (d) “After solicitation of a number of sources, competition is determined to be inadequate” [FTA C 4220.1E, VI, 3.i.2]
- (e) For the avoidance of doubt, for procurements not involving the use of FTA grant funds, the MBTA determines that a sole source award is in the public interest, maximizes effectiveness, or promotes general economic and social well-being of the MBTA’s service area and the Commonwealth.

Please refer to Chapters for specific guidance and procedures for sole source procurement.

**39) Cost Analysis Required [Sole Source]**

“A cost analysis will be necessary when adequate price competition is lacking and for sole source procurements, including contract modifications or change orders...” [FTA C 4220.1E, VI, 6.a.]

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The sole source justification and determination must include language explaining the cost analysis conducted. All sole source procurements must be approved in accordance with MBTA authorization levels.

#### **40) Evaluation of Options**


“Options may be included in contracts to assure the future availability of property or services. An option is a unilateral right in a contract by which, for a specified time, a recipient may elect to purchase additional equipment, supplies, or services called for by the contract, or may elect to extend the term of the contract.” [FTA C 4220.1F, IV, 1.d.]

- (a) “In awarding the basic contract ... the recipient shall evaluate offers for any option quantities or periods contained in a solicitation when it has been determined prior to soliciting offers that the recipient is likely to exercise the options.” [FTA C 4220.1F, VI, 7.b.]
- (b) “When options have not been evaluated as part of the award, the exercise of such options will be considered a sole source procurement.” [FTA C 4220.1F, V, 7.a. (1) (c) 1]

#### **41) Cost or Price Analysis**

- (a) Cost analysis
  - (i) “The Common Grant Rules require the recipient to perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation . . . .” [FTA C 4220.1F, VI, 6.]
  - (ii) “A cost analysis must be performed when the offeror is required to submit the elements (i.e., labor hours, overhead, materials, etc.) of the estimated cost, (e.g., under professional consulting and architectural and engineering services contracts, etc.)” [FTA C 4220.1F, VI, 6.a.]
  - (iii) “A cost analysis will be necessary when adequate price competition is lacking . . . 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 . . . .” [FTA C 4220.1F, VI, 6.a.]
  - (iv) “A cost analysis will be necessary when adequate price competition is lacking . . . unless price reasonableness can be established on the basis of . . . prices set by law or regulation”. [FTA C 4220.1F, VI, 6.a.]



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- (v) “A cost analysis will be necessary . . . for sole source procurements, including 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 . . .” [FTA C 4220.1E, VI, 6.a.]
  
- (vi) “A cost analysis will be necessary . . . for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of . . . prices set by law or regulation.” [FTA C 4220.1E, VI, 6.a.]
  
- (b) “A price analysis may be used in all other instances to determine the reasonableness of the proposed contract price.” [FTA C 4220.1E, VI, 6.b.]
  
- (c) Profit
  - (i) “The recipient will negotiate profit as a separate element of the price for each contract in which there is no price competition . . .” [FTA C 4220.1E, VI, 6.a. (3)]
  
  - (ii) “The recipient will negotiate profit as a separate element of the price for each contract ...in all cases where cost analysis is performed.” [FTA C 4220.1E, VI, 6.a.(3)]
  
  - (iii) “To establish a fair and reasonable profit, consideration will be given to:
    - a. complexity of the work to be performed,
    - b. risk being borne by the contractor,
    - c. contractor’s investment,
    - d. amount of subcontracting,
    - e. quality of its record of past performance, and
    - f. industry profit rates in the surrounding geographical area for similar work.” [FTA C 4220.1E, VI, 6.a. (3)]

**42) Written Record of Procurement History**

**File Documentation**

<b>REQUIREMENT</b>
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FTA Circular 4220.1F, III, 3.d - *Written Record of Procurement History* requires grantees to maintain records detailing the history of procurement. As a minimum, these records shall include:

- The rationale for the method of procurement;
- Selection of contract type;
- Reasons for contractor selection or rejection; and
- The basis for the contract price.


### **DISCUSSION**

A properly documented procurement file provides an audit trail from the initiation of the acquisition process to the beginning of the contract. The file provides the complete background, including the basis for the decisions at each step in the acquisition process. A well-documented file speaks for itself, without need of interpretation from the contract administrator. A well-documented file also supports actions taken, provides information for reviews and investigations, and furnishes essential facts in the event of litigation or legislative inquiries.

### **Purpose**

Documents recording the key steps of each procurement are important for a number of reasons, including the following:

- Procurement entails taking legally and financially significant actions on behalf of the Authority and the public. Information relating to these actions needs to be readily retrievable in the event that contract personnel are personally unavailable or their memory is not precise enough to assist the Authority in moving forward with the administration of its program. Colleagues of the procurement staff may routinely be expected to take actions based on the file.
- The key steps in a procurement, including those listed under "Requirement," above, are frequently material elements in financial (e.g., payment or withholding) determinations or legal disputes. Written documentation will have great value to the Authority under those circumstances.
- The Authority's process may be reviewed, audited, and/or may be the subject of in-depth investigation. This documentation is the history of the public procurement. Many hours of reconstructing events and decisions, stretching memories, and evaluating scenarios can be saved with a concise file that factually answers the questions typically raised.


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- Finally, you reduce the likelihood of additional supervision or burdensome restrictions being placed on the Authority or the procurement process with concise documentation of the decisions being made.

Many procurement reviews, while finding few problems with the underlying decisions or procurement results, may reach negative conclusions and make unwanted recommendations simply because well considered decisions were not well documented. Noting briefly why certain decision were made may help the process and the Authority, as well as satisfy the requirements of the “Third Party Contracting Requirements” Circular.

Where appropriate, the procurement documentation file should contain:

- Purchase request, acquisition planning information, and other pre-solicitation documents;
- Evidence of availability of funds;
- Rationale for the method of procurement (negotiations, formal advertising);
- List of sources solicited; (vendor/bidder’s list)
- Independent cost estimate;
- Statement of work/scope of services;
- Copies of published notices of proposed contract action;
- Copy of the solicitation, all addenda, and all amendments;
- Liquidated damages determination;
- An abstract of each offer or quote;
- Contractor's contingent fee representation and other certifications and representations;
- Source selection documentation;
- Contracting Officer's determination of contractor responsiveness and responsibility;
- Cost or pricing data;
- Determination that price is fair and reasonable including an analysis of the cost and price data, required internal approvals for award;
- Notice of award;
- Notice to unsuccessful bidders or offerors and record of any debriefing;
- Record of any protest;

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- Bid, Performance, Payment, or other bond documents, and notices to sureties;
- Required insurance documents, if any; and
- Notice to proceed.

#### **43) Exercise of Options**


“Options may be included in contracts to assure the future availability of property or services. An option is a unilateral right in a contract by which, for a specified time, a recipient may elect to purchase additional equipment, supplies, or services called for by the contract, or may elect to extend the term of the contract.” [FTA C 4220.1E, IV, 1. d.]

- (a) “Consistency with the Contract. A recipient must ensure that the exercise of an option is in accordance with the terms and conditions of the option stated in the initial contract awarded.” [FTA C 4220.1E, V, 7. a. (1) (a)]
- (b) “Price. An option may not be exercised unless the recipient has determined that the option price is better than prices available in the market or that the option is the more advantageous offer at the time the option is exercised.” [FTA C 4220.1E, V, 7. a. (1) (b)]
- (c) “Negotiating a Lower Option Price. Exercising an option after a lower price has been negotiated constitutes a sole source procurement.” [FTA C 4220.1E, V, 7. a. (1) (c) 2]

#### **44) Out of Scope Changes**

“A contract change that is not within the scope of the original contract is considered a sole source procurement...” [FTA C 4220.1E, VI, 3.i.(1)(b)]. If an out of scope change is required, a sole source justification and determination is required and must comply with FTA requirements. Proper MBTA authorization must be granted to process a sole source.

#### **45) Advance Payments**

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FTA Circular 4220.1F states:

“FTA does not authorize and will not participate in funding payments to a contractor prior to the incurrence of costs by the contractor unless prior written concurrence is obtained from FTA. There is no prohibition on a grant recipient’s use of local funds for advance payments. However, advance payments made with local funds before a grant has been awarded, or before the issuance of a letter of no prejudice or other pre-award authority, are ineligible for reimbursement.”

Advance payments are actually a method of financing and not a method of paying for work completed or items delivered. They are made prior to a contractor’s incurrence of costs in order to enable the contractor to perform the contract. The Federal Government places severe restrictions on its own use of advance payments. As indicated below in the paragraph “Exceptions to the Prior Approval requirement,” when advance payments are generally accepted industry practice, FTA does not require prior approval.

The FTA Circular requires FTA approval before grantees may use this form of financing on third-party contracts. However, the Circular clearly restricts the advance payment prohibition to those contracts where the grantee is using FTA funds for the advance payment. If the advance payments are being made with non-FTA funds, then FTA has no involvement in the decision and need not approve of it. Grantees are free to use local funds to finance their contractors in this manner if they deem it appropriate. The Circular also covers the situation where a grantee may wish to use local funds for advance payments before a grant has been awarded or before FTA has issued a letter of no prejudice to the grantee. In these cases FTA will not reimburse the grantee later for such payments.

Exceptions to the Prior Approval Requirement – The FTA requirement for prior approval of advance payments does not apply to transactions where it is “generally accepted industry practice” to pay in advance. In these situations, grantees may make advance payments without prior FTA approval. These situations would include (but not necessarily be restricted to) the following types of transactions:

- Rent
- Tuition
- Insurance premiums
- Subscriptions to publications
- Software licenses
- Construction mobilization costs
- Public utility connections

#### **46) Progress Payments**



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*FTA Circular 4220.1F states:*

- b. Progress Payments. Grantees may use progress payments provided the following requirements are followed:
1. Progress payments are only made to the contractor for costs incurred in the performance of the contract.
  2. The grantee must obtain adequate security for progress payments. Adequate security may include taking title, letter of credit or equivalent means to protect the grantee's interest in the progress payment.

#### **Discussion**

Progress payments are a means of financing contractors that are performing *fixed-price* contracts (a) under unusual circumstances where a contractor cannot get private financing at a reasonable cost, or (b) where the commercial practice for the item being procured is for the buyer to provide financing (e.g., rolling stock procurements). There are two major types of progress payments: those based on costs and those based on a percentage of completion of work. Both types are considered contract-financing methods. Progress payments may be appropriate if:

- The contractor will not be able to bill for the first-delivery of products, or other performance milestones, for a substantial time after work begins. In Federal contracting practice, the usual contract duration for using progress payments is four months or more for small businesses and six months or more for others, and
- The contractor's expenditures prior to delivery of the first items will have a significant impact on the contractor's working capital.

*Progress payments* are to be distinguished from *partial payments*. *Partial payments* are payments made, as authorized by the contract, upon delivery and acceptance of one or more complete units (or one or more distinct items of service) in accordance with the contract specifications, even though other quantities remain to be delivered. Note that *partial payments are for completed units*, whereas *progress payments are for uncompleted work-in-progress*.

Because the grantee is making payments for uncompleted, non-functional units, FTA requires that adequate security be obtained from the contractor protecting the grantees (and FTA's) investment in case the contractor fails to complete the deliverable units. The form of security is to be determined by the grantee based on what is in the best interests of the grantee in the particular circumstances.


Progress Payments Based on Percentage of Completion - The Federal Government authorizes progress payments on its contracts based on a percentage or stage of

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completion of the work. This type of progress payment is standard for construction contracts for all Federal agencies. 49 CFR Part 18.21(d) allows grantees and sub grantees to use the percentage of completion method to pay their construction contractors, which is consistent with the regulations for Federal contracts. *However, grantees may not use the percentage of completion method for non-construction contracts. For those contracts, progress payments based on costs incurred must be used.*

Contract Clause – Managers should refer to the FAR clause at FAR 52.232-16 for guidance on the specific issues that need to be addressed in the progress payments clause and ensure that the Authority’s clause adequately covers the important issues, including:

- Computation of amounts – percentage of total costs, definition of “costs” to be included in the calculation (i.e., only those actually paid by the contractor, incurred but not paid, etc.).
- Liquidation – the method of linking value received to payments made.
- Reduction or suspension of payments – the circumstances under which the grantee may reduce or suspend progress payments.
- Title – this provision should define the property considered allocable to the contract (parts, materials, special tooling, special test equipment, drawings and technical data, etc.) and the party that retains title to the property/work-in-process for which the progress payments are made.
- Risk of loss – the contract should be clear as to which party assumes the risk of loss to contract property and work-in-progress before final acceptance of the units. *In the Federal clause, the contractor assumes the risk of loss even though title to all property acquired under the contract vests in the Government.*
- Progress payments to subcontractors – this provision needs to define the circumstances under which the prime contractor must make progress payments to fixed-price subcontractors, and the subcontract terms to be included (covering the same issues as the prime contract’s progress payment clause).
- Adequate accounting system/reports – the contract must require an adequate job-order accounting system to be maintained that properly accounts for the costs of the job even though the contract is fixed-price. This provision should also give the grantee the right to require certain reports or other data in support of the contractor’s invoices.
- Access to records - this provision must give the grantee the right to conduct audits of costs claimed in progress payment invoices.

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#### 47) Time and Materials Contracts

FTA Circular 4220.1F states:

Use of Time and Materials Contracts. Grantees will use time and materials contracts only:


1. After a determination that no other type of contract is suitable; and
2. If the contract specifies a ceiling price that the contractor shall not exceed except at its own risk.

#### DISCUSSION

Time-and-materials (T&M) contracts may be used for acquiring supplies or services. These contracts provide for the payment of labor costs on the basis of fixed hourly billing rates which are specified in the contract. These hourly billing rates would include wages, indirect costs, general and administrative expense, and profit. There is a fixed-price element to the T & M contract - the fixed hourly billing rates. But these contracts also operate as cost-type contracts in the sense that labor hours to be worked, and paid for, are flexible. Materials are billed at cost, unless the contractor usually sells materials of the type needed on the contract in the normal course of their business. In that case the payment provision can provide for the payment of materials on the basis of established catalog or list prices in effect when the material is furnished. These contracts also may provide for the reimbursement of material handling costs, which are indirect costs, such as procurement, inspection, storage, payment, etc. These indirect costs are billed as a percentage of material costs incurred (similar to the billing of overhead costs as a percentage of direct labor). Such material handling costs must be segregated in a separate indirect cost pool by the contractor's accounting system and must not be included in the indirect costs included as part of the fixed hourly billing rate for direct labor. It would always be prudent to obtain a pre-award audit of the contractor's accounting system to determine the adequacy of the system to properly segregate material handling costs from other overhead costs being billed with the fixed hourly rates for labor.

**Use Only When No Other Type Will Work** - *The FTA Circular requires that you make a determination, before using this type of contract, that no other type of contract is suitable.* The reason why this type of contract is the least preferable of all allowable types is that it creates a disincentive for the contractor to complete the contract in a timely manner. Since each labor hour expended carries with it a profit (and a predetermined overhead charge) built into the fixed hourly rate, the contractor is motivated to work as many hours as possible. There is no incentive to complete the contract quickly, and thus minimize total costs to the buyer. (In a Cost Plus Fixed



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Fee (CPFF) contract the fee is fixed in dollar terms at the outset of the contract, allowing the contractor to earn the fee whenever the work is complete, thus providing some incentive to finish the contract as quickly as possible.)

**Ceiling Price** – it will be necessary to specify the Authority's maximum obligation (ceiling price) in the contract; i.e., the limitation of the Authority's financial obligation which the total funds allotted to the contract will allow. The contractor may not exceed this funding limitation without a written authorization in the form of a contract modification adding more funds.

**Proper Agency Surveillance** - This type of contract requires a high degree of Authority surveillance during performance in order to provide reasonable assurance that efficient methods and cost controls are used by the contractor.

#### **48) Cost Plus Percentage of Cost (CPPC)**

FTA Circular 4220.1F clearly prohibits the use of this contracting method.

CPPC contracts are prohibited by statute and FTA may not grant waivers for grantees to use this method of contracting. **Grantees must not only avoid using this type of contract themselves, they must also insert clauses in their cost-type contracts that prohibit their prime contractors from using CPPC subcontracts.** Care must be taken to avoid any kind of agreement whereby the contractor's fee would be increased automatically with increases in a particular cost element. Generally, any contractual arrangement whereby the contractor is assured of greater profits by incurring additional costs will be held illegal. The obvious problem with this form of contract is that profits increase in proportion to dollars spent, thus providing a positive incentive to inefficiency. *To fall within the definition of CPPC, the agreement must provide that the contractor's compensation, or some portion of it, will be computed as a percentage of some of the costs of performance.* So for example, it is not permissible to pay for overhead (indirect) costs by establishing a predetermined percentage in advance, and stipulating that overhead expense will be reimbursed as a stated percentage of some other cost such as direct labor. The problem with this arrangement is that such compensation may be greater than the contractor's actual and final overhead expenses, which means the payment becomes additional profit. In the same way, a time-and-materials contract which called for payment of overhead and profit at predetermined percentages of 15% and 10% of cost incurred was held to be illegal.

This is not to prohibit provisional overhead rates which are audited and adjusted to actuals at the end of the contract, nor does it prohibit provisional or interim fee payments based on costs being incurred, because the total fee is fixed at the inception of the contract and will not increase with increases in actual costs. It is also permissible to pay a material handling charge as a percentage of material costs incurred if the contractor has a separate material handling cost pool. This indirect cost pool should be audited after contract completion, and the billed rates should be

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adjusted to actuals based on the audit.

Another way of avoiding the problem is to include overhead and profit in fixed rates for labor. This is done in time-and-materials and labor hour contracts where contractors are paid one rate for each hour of labor performed. This type of arrangement is not illegal, but it still tends to operate as a disincentive to control cost (more hours worked equals more profits), and for this reason should be avoided whenever other contracting options exist.

#### **49) Liquidated Damages Provisions**

“Delay. FTA has determined that a recipient may use liquidated damages if the recipient reasonably expects to suffer damages through delayed contract completion and the extent or amount of such damages would be difficult or impossible to determine. The rate and measurement period must be specified in the third party contract and may not be excessive. The assessment for damages is usually established at a specific rate per day for each day beyond the contract’s delivery date or performance period, but a measurement period other than a day may be established if appropriate. Any liquidated damages recovered shall be credited to the project account involved unless the FTA permits otherwise.” [FTA C 4220.1F, IV, 2.b.(6)(b)1]

#### **50) Piggybacking**

“Assignment of Rights. A recipient may assign its contractual rights to purchase property and services to other recipients if the original contract contains an appropriate assignability clause that provides for the assignment of all or a portion of the specified deliverables as originally advertised, competed, evaluated, and awarded, or other appropriate assignment provisions. Some refer to this process as “piggybacking.”

- (a) “If the supplies or services were solicited, competed and awarded through the use of an indefinite-delivery-indefinite-quantity (IDIQ) contract, then both the solicitation and contract award must contain both a minimum and maximum quantity that represent the reasonably foreseeable needs of the party(s) to the solicitation and contract.”
- (b) “An FTA recipient that obtains these contractual rights through assignment may exercise them after first determining the contract price remains fair and reasonable, and all Federal requirements have been addressed in the contract’s clauses. The recipient is not required to perform a second price analysis if a price analysis was originally performed. However, the recipient must determine the contract price or prices originally established are still fair and reasonable.”
- (c) “The recipient is responsible for Buy America compliance with the

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transaction and assuring that they execute all of the required pre-award and post-delivery Buy America audit certifications.” [FTA C 4220.1E, V, 7. a. (2); BPPM Appendix B.16]

### **51) Qualifications Exclude Price [A&E]**

When Required. Qualifications-based proposal procedures are required for projects related to or leading to a construction project. These procedures must be used not only when contracting for architectural and engineering services, but also for program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services. Grantees shall use qualifications-based competitive proposal procedures [i.e. Brooks Act Procedures when contracting for A&E services as defined in 40 U.S.C. Sections 1101 - 1104 and 49 U.S.C. Section 5325(b)(1)]. When this procurement method is used, the following requirements apply: [FTA C 4220.1E, VI, 3.f.(3)]


- (a) Qualifications – An offeror’s qualifications must be evaluated.
- (b) Price - Price is excluded as an evaluation factor. .” [FTA C 4220.1F, VI, 3.f.(3)(b)]
- (c) “Design-Build. An FTA recipient must procure design-build services through means of qualifications-based competitive proposal procedures based on the Brooks Act...when the preponderance of the work to be performed is considered to be for architectural and engineering, program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related A&E services. (A&E) services...qualifications-based competitive proposal procedures may not be used to procure design-build services when the preponderance of the work to be performed are services other than those listed in the previous sentence, unless required by State law.” [FTA C 4220.1F, VI, 3.h.]

Please refer to Chapter II for Professional Services and A/E procurement procedures, samples and templates.

### **52) Serial Price Negotiations [A&E]**

When this procurement method is used, the following requirements apply:

- (a) Most Qualified. Negotiations are conducted with only the most qualified offeror; and
- (b) Next Most Qualified. Failing agreement on price, negotiations with the next

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most qualified offeror and, if necessary, negotiations with successive offerors in descending order must be conducted until a contract award can be made to the offeror whose price the recipient believes is fair and reasonable.” [FTA C 4220.1E, VI, 3.f.(3)]

### **53) Bid Security [Construction Over \$150,000]**

“**Bonding.** The Common Grant Rules require bonds for all construction contracts except to the extent FTA determines that the Federal interest is adequately protected through other arrangements. MBTA and FTA’s bonding policies are as follows:

- (a) **Bid Guarantee.** Both FTA and the Common Grant Rules require a bid guarantee from each bidder equivalent to 5 percent of the bid price. The ‘bid guarantee’ shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will honor its bid upon acceptance of his bid [FTA C 4220.1F, IV, 2.h.(1)(a)]

Please refer to the following Chapters for specific bonding requirements associated with different procurement types such as Materials Management, Design-Bid-Build, Design-Build, etc.

### **54) Performance Security [Construction Over \$150,000]**

“**Bonding.** The Common Grant Rules require bonds for all construction contracts except to the extent FTA determines that the Federal interest is adequately protected through other arrangements. MBTA and FTA’s bonding policies are as follows:

- (a) **Performance Bond.** Both FTA and the Common Grant Rules require a performance bond on the part of the contractor for 100 percent of the contract price. A ‘performance bond’ is one executed in connection with a contract to secure fulfillment of all the contractor’s obligations under such contract” [FTA C 4220.1F, IV, 2.h.(1)(b)]

### **55) Payment Security [Construction Over \$150,000]**

“**Bonding.** The Common Grant Rules require bonds for all construction contracts except to the extent FTA determines that the Federal interest is adequately protected through other arrangements. FTA’s bonding policies are as follows:

- (a) **Payment Bond.** A ‘payment bond’ is one executed in connection with a contract to assure payment as required by law of all people supplying labor and material in the execution of the work provided for in the contract. FTA has determined the following payment bond amounts are adequate to protect

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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 a half million dollars if the contract price is more than \$5 million." [FTA C 4220.1E, IV, 2.h.(1)(c)]

In the event the Authority wishes to adopt less stringent bonding requirements, for a specific class of projects, or for a particular project, the MBTA may submit its policy and rationale to Region I FTA Regional Office for approval." [FTA C 4220.1E, IV, 2.h.(1)(e)]

## 56) Clauses

"FEDERAL REQUIREMENTS THAT MAY AFFECT A RECIPIENT'S ACQUISITIONS. Before FTA assistance may be used to support an acquisition of property or services, all applicable Federal requirements, whether or not addressed in the Common Grant Rules, must be fulfilled." [FTA C 4220.1E, IV, 2.]


[FTA Circular 4220.1F, Appendix D, contains a matrix of federally required clauses and contractor certifications for various dollar values and types of procurements, such as construction, A&E, rolling stock, materials, etc. Instructions for these clauses and suggested clause language may be found in the FTA "Best Practices Procurement Manual," Appendix A.1] Please refer to **Exhibit I.4.1** of this manual for referenced table.

## 1.3 Revenue Contracts

49 CFR Part 18.25 *Program Income* states that *grantees are encouraged to earn income to defray program costs*.

FTA Circular 4220.1F *Third Party Contracting Requirements* requires grantees to use competitive selection procedures in the award of revenue contracts.

The FTA Administrator's *Dear Colleague Letter C-98-25*, dated October 1, 1998 defined *revenue contracts* and stipulated

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requirements regarding competitive selection procedures, five-year term limits (no longer applicable) and requests for waivers.

The FTA *Dear Colleague Letter* C-08-02, dated May 29, 2002 rescinded the requirement that grantees obtain FTA approval for contract terms longer than five years.

## DISCUSSION

If the *primary purpose is to generate revenue* then the contract is a revenue contract. Advertising, concessions (food and news-stands), use of right-of-ways, licenses, and land leasing are some examples of revenue contracts. The definition of a revenue contract developed by FTA is as follows:

***A revenue contract is any third party contract whose primary purpose is to either generate revenues in connection with a transit-related activity or to create business opportunities utilizing an FTA-funded asset.***

There are three concepts involved in the definition of a revenue contract. First, the objective of revenue contracts is to lower program costs, and thereby reduce both the federal and the grantee's financial contribution. Creative ways of generating these revenues are encouraged.

Second, revenue generation for the Authority is a business opportunity for the business community. Such business opportunities can take various forms, such as: advertising, land development, concessions, and utilization of right-of-ways.

Third, an FTA-funded asset is anything that has been purchased, in whole or in part, with FTA funds as part of an approved transportation budget. This can include funds for acquisition, operating expense or maintenance. Grantees must have a detailed familiarity with the approved budgets to know if a particular activity is included and funded by federal funds, in which case it would be governed by federal requirements.

*All revenue generated activity involving third-party contracts must follow an important requirement of FTA Circular 4220.1F:*

- The requirement for competitive selection procedures applies to all business opportunities including all revenue generating contracts.

**Competition** - The competitive process usually consists of a formal bid or proposal process but it does not always have to. Grantees may use their own judgment about how to meet the intent of the competition requirement, but they must document the record to show how competition requirements were met.

**Disadvantaged Business Enterprises** - DBEs should have the maximum opportunity to

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participate in both contracts and subcontracts that use any federal funds. The grantee is responsible for taking all necessary and reasonable steps to ensure that DBEs have maximum opportunity to compete for revenue contracts since these contracts are considered business opportunities.

Contract Term - The five-year contract term limit was rescinded by FTA's Dear Colleague Letter of May 29, 2002.

Flow-down Requirements - Generally, if federal funds (not assets) are not used to generate revenues, then there are no requirements to include federal clauses in the revenue contract itself.

Unsolicited Proposals - These may come forth when companies see an opportunity to use the transit system (an FTA-funded activity) to enhance their business interest. **It may appear from such proposals that no other company could offer the same product or service. However, this does not justify a sole source contract.** If the idea or activity is of interest to the Agency, the concept should be evaluated on its own merit and revenue producing potential. If the decision is to implement it, then a competitive process should be used to select the contractor, unless it is determined that the proposed concept itself is proprietary.

It is important to always keep in mind the requirement for competition.

#### 1.4 BROAD SOLICITATION

The Authority strives to promote the economic growth and development of vendors, consultants and contractors through broad solicitation and award of contracts. The MBTA does not allow consultants to submit qualifications statements and proposals as a prime consultant and as a subconsultant for the same contract; however, consultants may serve as a subconsultant on more than one proposing team.

#### 1.5 DISADVANTAGED BUSINESS ENTERPRISES

Disadvantaged Business Enterprises (Federally Funded Contracts) – Vendors, Consultants and Contractors shall promote affirmative action and equal employment opportunities. Offerors shall provide opportunity for participation of Disadvantaged Business Enterprises (DBE) as Prime Consultants, in joint ventures or as subconsultants so that the Authority's project-specific goal set by the Office of Diversity and Civil Rights (ODCR) is achieved. The Authority is committed to the enhancement and growth of disadvantaged business firms. As evidence of its commitment, the Authority sets participation goals on each federally funded contract to ensure that a portion of the work is performed by Supplier Diversity Office (SDO) (formerly SOWMBA)-certified DBEs. Such opportunities are provided in accordance with applicable state and federal guidelines.

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For Federal Funded Contracts, the DBE goal is set by the DBE Liaison Officer in ODCR.

For State Funded Contracts, while there is no DBE goal associated with state-funded contract, the Authority strongly encourages the use of Minority, Women and Disadvantaged Business Enterprises as prime consultants, subconsultants and suppliers in all of its contracting opportunities.

## 1.6 PRECLUSION

Due to a potential conflict of interest, a designer, programmer, consultant or key subconsultant chosen by the Authority to perform a feasibility study, master plan or program for a project, shall be ineligible for a subsequent appointment or employment to perform design development services for that project, unless sound reasons in the public interest otherwise dictate. All public announcements for services referenced above must clearly indicate this requirement.

## 1.7 CONTRACT ADMINISTRATION


### Record of Procurement History

The Authority shall maintain contract administration files that include at a minimum the documentation listed below. In addition, the Technical Project Manager or User Department is responsible for maintaining its own Project Office contract files. The Contract office Selection Documentation will differ depending on the type of procurement. The Technical Project Manager should work with the MBTA Procurement Specialist to determine what shall be kept in the contract file. Please refer to subsequent chapters in this manual for specific checklists.

In addition to the selection documentation, the contract file shall contain the following as applicable to the procurement type:

- The executed contract
- Performance and payment bonds, bond-related documentation, and correspondence with any sureties
- Contract-required insurance documentation
- Post-award (pre-performance) correspondence from or to the consultant or other government agencies
- Approvals or disapprovals of contract submittals required by the contract and requests for waivers or deviations from contractual requirements.
- Modifications/changes to the contract including the rationale for the change, change orders/amendments issued, and documentation reflecting any time and or increases to or decreases from the contract price as a result of those modifications;
- Documentation regarding settlement of claims and disputes including,



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as appropriate, results of audit and legal reviews of the claims and approval by the proper authority (i.e., Director, Assistant General Manager, Board of Directors) of the settlement amount;

- Documentation regarding stop work and suspension of work orders and termination actions (convenience as well as default); and
- Documentation relating to contract close-out

## 1.8 COST PRINCIPALS

For Consultant Services the Contract Auditor within the Contract Administration office shall perform a pre-audit evaluation of proposed cost to establish provisional indirect cost rates and billing rates and to determine the allocate-ability, allow ability and reasonableness of costs.

Federal Cost Principles Cost or prices based on estimated costs for contract under federal grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated process are consistent with Federal cost principles.

## 1.9 SOLE SOURCE PROCUREMENT

### 1.9.1 PURPOSE AND SCOPE

It is possible that the goods or services the MBTA user department desires may be obtained from only one source and, thus, the department will select its provider on the basis of a sole source (noncompetitive) method of procurement. For procurements involving the use of FTA grant funds, the MBTA must comply with the provisions of FTA Circular 4220.1F. For procurements not using FTA grant funds, however, the MBTA may depart from the FTA sole source provisions, including the FTA requirements set forth in this Section 1.9, where the Chief Procurement Officer concludes, with the concurrence of the General Counsel, that doing so is in the public interest, maximizes effectiveness, or promotes general economic and social well-being of the MBTA's service area and the Commonwealth. Regardless of the funding source, the MBTA's goal should be to obtain a price that is fair and reasonable.

Sole source procurements are accomplished through solicitation or acceptance of a proposal from only one source, or after solicitation of a number of sources, competition is determined to be inadequate. A contract amendment or change order that is not within the scope of the original contract is considered a sole source procurement and requires adequate documented justification.

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Procurement of services without competition is authorized under limited conditions and subject to written justification documenting the conditions that preclude competition. The need for noncompetitive procurements is recognized when the Authority's interest is best served. However, continuation of noncompetitive contracts is discouraged.

**Limited Response** - In the event the Authority receives only one response, it must comply with FTA Sole Source guidance. [FTA Circular 4220.1F.VI.3.d]

## 1.9.2 GENERAL PROVISIONS

For Sole Source procurements the Authority shall use the negotiated method of procurement. Procurement by noncompetitive proposals may be used 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:

- (a) The service is available only from a single source;
- (b) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
- (c) FTA authorizes noncompetitive negotiations; or
- (d) After solicitation of a number of sources, competition is determined inadequate.

In each instance where the sole source or emergency procurement procedures are used, the Project Officer/Project Manager shall do the following:

- (a) Prepare a written determination and findings (D&F) justifying the procurement which specifically demonstrates that procurement by competitive negotiation is not required by the provisions of this section, and
- (b) Ensure that all of the steps required under this section for the justification, documentation, and approval of the procurement are completed before the contract is awarded. A limited competition procurement shall require a Project Office/Project Manager Memorandum for the File setting forth the reasons and rationale for a less than full and open competitive procurement.

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### **1.9.3 SOLE SOURCE PROCUREMENT**

The Project Office/Project Manager shall ensure that each sole source procurement is reviewed or approved at the level in the Authority at which the action must be approved. The Project Office/Project Manager responsible for the procurement shall sign the Determination and Findings (D&F), which will be reviewed and concurred by the Office of the General Counsel for legal sufficiency and approved by the Director of Materials Management, Assistant General Manager for Design & Construction, General Manager and/or Board of Directors depending on the required authorization level.

The Project Office/Project Manager shall take reasonable steps to avoid using sole source procurement except in circumstances where it is both necessary and in the best interest of the Authority.

In each instance where the sole source procurement method is used, the Project Office/Project Manager shall:


- (a) Prepare a written justification which demonstrates that procurement by competitive bids or competitive negotiation is not required
- (b) Ensure proper justification, documentation, and approval of the procurement are completed prior to contract award.
- (c) Take action, whenever possible, to avoid the need to continue to procure the same service without competition.

Sole Source procurement as a result of inadequate planning for the procurement or lack of sufficient time to complete the process of competitive sealed bids or competitive negotiated proposals shall not be allowed unless a legitimate justification, as defined in this section, exists with respect to the need for the service being procured.

### **1.9.4 SOLE SOURCE PROCUREMENT PROCEDURES**

The Project Office/Project Manager shall not be required to publicize a solicitation for a procurement made on a sole source basis.

The Project Office/Project Manager may use a letter to request a proposal for a sole source procurement. The letter request shall refer to or attach all terms and conditions of the solicitation.

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The Project Office/Project Manager shall ensure the sole source contract contains all of the required clauses (See Exhibit 1.4 of this manual for a list of required Federal and FTA clauses), representations, and certifications in accordance with the Authority policy.

The Project Office/Project Manager shall ensure the documentation justifying the sole source procurement is inserted into the Project Office and Contract Administration contract file.

The Project Office/Project Manager shall conduct a price/cost analysis to verify the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit are appropriate.


#### **1.9.5 SOLE SOURCE DETERMINATION AND FINDINGS DOCUMENTATION**

The Determination and Findings to negotiate a sole source contract documents the reasons why a sole source procurement is justified.

Each sole source Determination and Finding (D&F) shall include the following:

- a) Specific identification of the document as a sole source D&F;
- b) A description of the proposed procurement;
- c) A description of the requirement, including estimated value and cost;
- d) An explanation of the unique circumstance of the procurement or other factors that qualify the procurement for sole source award;
- e) An explanation of the proposed consultant's unique qualifications or other factors that qualify the proposed consultant as a sole source for the procurement;
- f) A list of the potential sources contacted by the Project Office/Project Manager or which expressed, in writing, an interest in the procurement;
- g) Cost analysis
- h) Include any other pertinent facts or reasons supporting the use of a sole source procurement.

#### **1.9.6 SOLE SOURCE PROCUREMENTS NOT USING FTA GRANT FUNDS**

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For procurements not involving the use of FTA grant funds, the requirements set forth in Sections 1.9.2 through 1.9.5 do not apply, and the MBTA may make a sole source award if the Chief Procurement Officer concludes, with the concurrence of the General Counsel, that doing so is in the public interest, maximizes effectiveness, or promotes general economic and social well-being of the MBTA's service area and the Commonwealth.

## 1.10 ASSISTANCE, GUIDANCE, AND GOVERNING DOCUMENTS

### **MBTA WEBSITE**

The MBTA website [www.mbta.com](http://www.mbta.com) is a good resource for procurement, organizational, and project information.

### **FTA WEBSITE**

The FTA website <http://www.fta.dot.gov> contains procurement news and links to important FTA documents, such as Circulars, Dear Colleague Letters, Best Practices Procurement Manual, etc.

### **BEST PRACTICES PROCUREMENT MANUAL (BPPM)**

This Manual provides recipients of Federal Transit Administration (FTA) funds suggestions on conducting third party procurements to assist them in meeting the standards of FTA Circular 4220.1F. The Manual consists of required and suggested procedures, methods, and examples.

[http://www.fta.dot.gov/grants/12831\\_6037.html](http://www.fta.dot.gov/grants/12831_6037.html)


### **FTA CIRCULAR 4220.1F**

This Circular sets forth the requirements the Authority must adhere to in the solicitation, award and administration of its federally funded third party contracts. The *Annotated Circular* is available online at:

[http://www.fta.dot.gov/laws/circulars/leg\\_reg\\_4063.html](http://www.fta.dot.gov/laws/circulars/leg_reg_4063.html)

### **FTA MASTER AGREEMENT**

The FTA Master Agreement contains standard terms and conditions governing the administration of a Project supported with Federal assistance awarded by the FTA through a Grant Agreement or Cooperative Agreement with the Authority. The FTA Master Agreement is updated annually at the start of each fiscal year (October 1) and published on the FTA web site. The FTA Master Agreement contains procurement requirements that may be referenced in the Best Practices Procurement Manual.

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### **FEDERAL ACQUISITION REGULATIONS**

The Federal Acquisition Regulation is available at the following internet address: <https://www.acquisition.gov/>. MBTA follows FAR Part 31 Cost Principles.

### **FTA DEAR COLLEAGUE LETTERS**

The FTA Administrator periodically issues *Dear Colleague Letters* to the FTA grantee community. These letters affect Authority procurement operations by imposing new FTA requirements or clarifying earlier FTA policy statements. The Contract Administration office should monitor the FTA website for new Dear Colleague letters at [www.fta.dot.gov](http://www.fta.dot.gov).

### **FTA PROCUREMENT SYSTEM REVIEW (PSR)**

FTA conducts periodic reviews of its grantee's procurement systems. These reviews are conducted in accordance with the [Guide for Procurement System Reviews](#) which FTA has developed in order to evaluate the Authority's compliance with the requirements of FTA Circular 4220.1F. A self-assessment *Guide* is available on the Internet at the following FTA web site address: <http://www.fta.dot.gov/library/admin/psrg/cover.html>.

### **FTA HELPLINE**

FTA maintains a *Third Party Procurement HelpLine* to provide a means for FTA customers to get answers to their procurement questions. The goal is to answer questions within 48 hours of receiving them. The web site also contains a topical index to *Frequently Asked Questions* and helpful links to important FTA documents, the FAR, the BPPM, etc. The site is accessible through the FTA website. [http://www.fta.dot.gov/grants/13054\\_6039.html](http://www.fta.dot.gov/grants/13054_6039.html)

### **FTA WAIVERS AND APPROVALS**

The Authority is required to process requests for waivers and approvals required by [FTA Circular 4220.1F](#) through the regional FTA office. The Region 1 FTA office will instruct the Authority as to the required content and format of these requests. FTA Region 1 contact information is:

Transportation Systems Center  
Kendall Square, 55 Broadway, Suite 920  
Cambridge, MA 02142-1093  
Phone: (617) 494-2055  
Fax: (617) 494-2865