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| **Issue Date:****April 2012****Effective Date: June 2017**LOGO1 | ***Massachusetts Bay Transportation MBTA*** |
| MATERIALS MANAGEMENTPROCUREMENT MANUALPOLICIES & PROCEDURES  |
|  |

Chapter 3

Materials Procurement

(Goods and Services)

# June 2017

**Chapter 3**

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# Chapter 3

**Procurement Planning**

Planning ahead for your acquisition needs will save time and reduce delays in the procurement process. The benefits of procurement planning include:

* Having the product or service when you need it.
	+ Planning ahead will reduce the potential for delays in the procurement process and help insure that you will receive your supply or service when you need it.
* Better pricing.
	+ Vendors may have to incur overtime charges or pay extra to have raw materials express shipped to them in order to fulfill your order if they aren’t given ample time to plan for your need. Planning ahead will reduce a vendor’s need to place a premium price on a product to cover his extra expenses on your behalf.
* Increase competition.
	+ Many vendors plan their production runs and may not be able to participate in your procurement if they aren’t given ample time to plan their production schedules and raw material requirements in advance of the delivery date.

**What factors do I need to consider when I plan for my procurement?**

Time! Initiate procurement activities early enough so that the supply or service is ready when you require it. Last minute procurement activities can frequently lead to a premium cost paid or a reduction in the number of vendors who can participate in the procurement, leading to a reduction in competition.

Pre-procurement planning activities can take a significant amount of time. However, the time investment during the planning phase is worth it and pays dividends throughout the procurement process. Some of the items that will require attention at this phase include:

* Planning/Timing – making sure your plan includes sufficient lead time in order to have a new contractor in place before the existing contract ends or expires.
* Specification Development – Specifications describe the product or service you require in detail so vendors will be able to submit a well-considered price or proposal.
* Independent Cost Estimate (ICE) Development – FTA requires a written ICE for all procurement actions. An ICE is required in order to establish a base-line for the cost of the product or service, giving you a point of comparison when the bids are opened. If a bid is much higher than the ICE, it could indicate that the vendor is taking advantage of the Authority or that market conditions have changed since the ICE was developed. A low bid does not always indicate a bargain is in the offering. If bids come in significantly lower than the ICE, it can indicate changes in the marketplace or lead to questions; did the vendor fully understand the quality, quantity, or service level we were asking for?
* Requisitions - Purchasing Requisitions are entered into FMIS and are routed through a series of budget approvals, depending on their total value. The higher the dollar value, the higher the number of approvers required to release the requisition to Materials Management. This process can take a week or more, especially if a high-level approver is away from the office on vacation.
* The procurement funding source must be identified when the end user enters the requisition. Materials Management does not see the requisition until it has been fully approved and cannot initiate the procurement process until a fully approved requisition has been executed.

Once the requisition is fully approved, the Buyer can begin to act on it. Their activities include coordinating the following activities.

* Disadvantaged Business Enterprise (DBE) Goal – if the procurement value equals or exceeds $50,000 the Buyer will send it to the Office of Diversity and Civil Rights (ODCR) for review in order to set a DBE goal. ODCR reviews the specifications to determine if there are “subcontractable” scopes that can potentially be handled by a DBE, and sets a goal based upon the identified scopes and the number of DBE’s certified to perform the type of work identified as subcontractable.
* Advertising – How long should a procurement opportunity be advertised? There is no set-in-stone rule that determines the length of the advertisement period. However, common sense dictates that a procurement opportunity should be advertised long enough to give the vendor community sufficient time to prepare and submit well considered proposals or bids.
* Pre-Bid Meetings and Site Visits – Some procurements may require hosting a pre-bid meeting to give the vendor community an opportunity to ask questions about the procurement or to meet DBE businesses that they can potentially partner with. These meetings are often held in conjunction with a site visit to the location where the activity of the subject procurement will occur. For example, if a new roof is being procured, a site visit to the building where it will be installed may be appropriate.

After the procurement has been advertised for a sufficient period, bid responses are opened and a winner is determined. The award is made to the lowest responsive and responsible bidder.

Once the winning bidder has been determined, a purchase order or contract is created. This can take several days, depending on the value or complexity of the purchase. A proposal that has only solicited a single response requires a written summary and an analysis of the costs, which adds time to the process. The signature process can also take additional time. Generally speaking, the higher the procurement dollar value, the longer the approval process. Section 3.19 of the Procurement Policies and Procedures lists the signature authority of the various approvers. It should be noted that large procurements requiring the approval of the Board of Directors can take quite a bit longer to fully approve.

# METHODS OF SOLICITATION AND SELECTION

## 3.0 Specifications

Specifications describe the items and services MBTA wishes to purchase.

They deal with things such as quality or what the item is supposed to do, i.e,

its functionality. They may also specify design, capacity, performance,

reliability, required manufacturing processes, ease of use, durability and

installation requirements. Adaptability and flexibility, or environmental-friendliness and disposal, can also be specified.

Those responsible for the technical definition of purchased items should ensure that the specified quality levels are sufficient for the finished product to meet its required performance. Any acceptable deviations in quality must be stated.

In addition to specifying the performance requirements, in order to ensure that the delivered product will perform as intended, specify testing and inspection requirements and explain the need for quality assurance documents. This is necessary where the consequences of failure of the product or service are significant or if the vendor’s quality performance is unknown or insufficient.

Product and service specifications vary in the degree to which they prescribe what is required. Highly prescriptive specifications give the vendor a lot of detail on how to achieve what is required. Although appropriate in certain circumstances, explicit specifications limit the ability of the vendor to offer more cost-effective solutions. When highly prescriptive specifications are used, MBTA bears the risk if the product or service does not perform as intended.

Less prescriptive specifications might describe only the essential performance requirements, and leave it to the vendor to establish the best way to achieve them. In this case, the vendor will be liable if the product or service does not perform as required.

Over-specifying – or specifying something to a point that it will greatly restrict competition – is a common problem that is a challenge for Purchasing Agents. It does not make sense to spend time and effort developing your own product/service specifications if there are standard products, parts or services that are available to meet the requirements. Purposely crafting a specification that is too restrictive to eliminate or reduce competition is prohibited by the FTA.

## There are different types of product specifications, including those shown on the table below:

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| **Specification Type** | **Use When:** |
| **Brand or Trade Name** | There is no other way to describe the item except by specifying the brand name. Always followed by “…or equal.” |
| **Demonstrations and Samples** | It is difficult to assess quality prior to purchase. Showing (or seeing) what is required is easier than describing it in writing or otherwise specifying it. |
| **Technical Specification** | Vendors do not possess the required design expertise. The Buyer wishes to maintain the design expertise and data rights in-house. There are complex interfaces with existing equipment. MBTA is prepared to accept the risk of the design not resulting in the required performance. |
| **Composition Specification** | Purchasing products such as raw materials, commodities, and food products. Safety or environmental considerations are critical.Performance depends on adherence to composition requirements. |
| **Functional / Performance Specification** | Vendors have greater expertise than MBTA. Innovation is valued.Technology is changing rapidly in the supplying industry. |

## 3.1 END USER RESPONSIBILITIES

Information on specifications can be obtained from a number of sources, including:

* Business contacts (e.g., vendors and other agencies/authorities);
* Special events such as fairs, exhibitions and symposia;
* Technological research institutes, government institutions and other transit agencies; and
* Published sources such as directories, “state of the art” surveys and technical handbooks, consumer reports (for branded products) and patents.

### 3.1.1 Purchase Requests

An electronic purchase requisition (PR) will be prepared by the end users (operations or inventory replenishment), and approved by the appropriate management level before the buyer initiates a purchase action, as set forth in the Procurement Activity Flowchart.

### 3.1.2 Requesting Department’s Responsibilities

A successful procurement begins with a complete description of the supplies or services

required. The information needed to determine adequacy of a PR includes, but is not limited to, the following:

* **PR Number**: PR numbers are assigned by the user Department in PeopleSoft and can be used for tracking the status of the requirement through the procurement process.
* **Adequate Description of the Requirement**. The supplies/services must be described in a manner that will encourage maximum competition and eliminate any restrictive features that limit acceptable quotes to one vendor’s product. (FTA Circular 4220.1F Ch. VI, 2.a.)
* **Funding.** A funding source and amount must be identified in the PR.
* **Approvals**. The PR must have appropriate level approval before it is sent to Procurement for action.

### 3.1.3 Requirements Checklist

The following elements describe how the requesting department can meet its responsibilities to think about the business aspects of what they are asking to buy.

* **Purchase Description**. An adequate purchase description should set forth the essential physical and functional characteristics of the supplies/services required . (FTA Circular 4220.1F Ch. VI, 2.a.). It should not be unduly restrictive nor specify a product peculiar to one manufacturer (e.g., by manufacturer, brand name and part number (P/N) only) unless it is essential to the MBTA's requirement and other similar products lack the particular feature necessary to meet the MBTA's minimum requirements. A purchase description should include the following characteristics, as necessary, to describe the MBTA's minimum requirements:
* Common nomenclature;
* Kind of material (i.e., type, grade, alternatives, etc.):
* Electrical data, if any;
* Dimensions, size, or capacity;
* Principles of operation;
* Restrictive environmental conditions;
* Material Safety Data Sheet requirements (MSDS);
* Intended use, including location within an assembly and essential operating conditions;
* Equipment with which the item is to be used;
* End item application;
* Original Equipment Manufacturer’s (OEM) Part Number, if applicable; and other pertinent information that further describes the item, material, or service required.

### 3.1.4 Brand Name or Equal (FTA Circular 4220.1F Ch.III, 3.a.(1)(e))

The minimum acceptable competitive purchase description is the identification of a requirement by use of a brand name followed by the words "or equal." All known brand name items meeting the requirement should be included. Brand name or equal descriptions must also set forth those salient physical, functional, or other characteristics of the brand name product that are essential to the MBTA's needs. These characteristics must be provided by the customer in the PR. For routine spare parts purchases where all that is required is the specific part manufactured by a legitimate company, include a list of salient physical and functional characteristics of that item, as follows:

* The item is designed and manufactured to serve the same function and purpose as the part specified.
* The item offered is regularly available commercially and is manufactured by a company that is regularly engaged in the manufacture of this and/or similar parts for commercial sale.
* Specific characteristics that are important to the MBTA such as reparability, finish, color, material, maintainability, access, etc., must be specified. If no such salient characteristics are listed, the MBTA MUST take the part offered if it is made for the purpose intended by a legitimate company.

When a “brand name or equal” description is used to describe the requirement, the clause, “Brand Name or Equal” must be included in the request for quotation. Any vendor who submits a quotation on an “equal product” is required to clearly identify the item by brand name, if any, make or model number, and provide literature (e.g., catalog description, cut sheet, etc.) which shows that the offered product meets the salient physical, functional, and essential characteristics required. This data is then furnished to the customer who must determine if the offered product is in fact equal. If the product is not equal, the end user shall submit a written determination explaining why the “or equal” product is not acceptable.

The MBTA, in its sole discretion, has the final say in determining whether a product is an acceptable substitute.

### 3.1.5 Quantity and Unit of Issue

The quantity desired and the unit of issue must be indicated. Normally the exact quantity stipulated on the PR is purchased. When an upward adjustment in quantity is desirable (e.g., in order to obtain the most economical purchase, when the vendor’s packaging configuration requires an adjustment in the quantity, or where it is otherwise advantageous) the Buyer may make such adjustment, provided the adjustment does not exceed funding restrictions annotated on the face of the requisition. In addition, adjustments may be handled:

* On a case-by-case basis when the PR end user is contacted for MBTA to adjust the requested quantity; or
* The end user has a pre-established written agreement with the buyer, which automatically allows the buyer to make changes to the PR quantity.

### 3.1.6 Delivery Information

Required delivery information should include: required delivery date (as a specific calendar date) or period of performance, place of delivery, and whether partial shipments will be accepted. All purchases are shipped FOB Destination, unless otherwise indicated on the purchase order.

### 3.1.7 Unique Requirements

Any other unique requirements such as marking, packing/packaging, or special delivery instructions shall be included as necessary.

### 3.1.8 Cost Estimate (FTA Circular 4220.1F Ch.VI,6.)

A cost estimate and the basis upon which the estimate was developed must be provided, i.e. previous buys and prices paid for the same or similar item, catalog prices, newspaper advertisements, internet search, etc. See section 3.11.1 for a more in depth discussion of Independent Cost Estimates.

### 3.1.9 Funding

Each PR must contain adequate funding to support the requirement. This is shown by approved accounting and appropriation data and an estimated dollar amount. The estimated cost shown on the PR is the amount that has been committed by the requiring office to cover the purchase of the requested supplies or services. Responsibility for controlling the obligations of funds and the limitations of such funds is vested exclusively in the requiring office. However, this does not relieve the Buyer of ensuring that all existing policy and all other applicable procedures have been satisfied.

### 3.1.10 Restrictions on Availability of Cited Funds

If the PR contains a cutoff date for obligation of the cited funds or receipt of material to comply with fiscal year accounting requirements, every effort shall be made to schedule procurement actions to meet the established deadline. However, meeting the established deadline does not relieve the Buyer of compliance with established procurement policies including adequate competition and fair and reasonable pricing. Any known or anticipated delays which may prevent the obligation of funds or receipt of material by the deadline date shall be reported promptly to the requisitioner. When the purchase price will exceed the monetary ceiling amount of the PR, no obligation action shall occur until additional funds are authorized and obtained. These funds may be authorized and obtained by any of the following methods:

* An increase may be requested and authorized by another PR containing additional funding;
* Authorization may be obtained by telephone, but must be confirmed in writing; or
* Customer activities which place a high volume of purchase actions with their contracting office may establish written agreements to permit the contracting office to exceed the amount committed on an individual purchase requisition within specific amounts or limitations.

### 3.1.11 Approvals and / or Signatures

Purchase requests should include all necessary justifications and signatures approving the requirement. Other approvals may be included for items, such as: Original Equipment Manufacturer (OEM) justifications, HAZMAT certifications, Material Safety Data Sheets (MSDS) indications, urgent requirements, etc.

### 3.1.12 Sole Source Requirements (FTA C. 4220.1F CH.VI, 3.(i))

For requirements that exceed the micro-purchase ceiling of $3,500, a memorandum signed by the user/projects office and attached to the automated PR initiates the approval process. The adequacy and sufficiency of the justification is determined by the buyer who affixes his/her signature to the document. A concurring signature is required by the respective Procurement manager of the applicable procurement group.

### 3.1.13 Inspection and Acceptance RequirementsSupplies obtained are normally inspected and accepted at destination. Any special inspection and acceptance procedures deemed necessary by the requiring activity shall be noted on the purchase request. A point of contact with telephone number is needed in case additional information is required. This is normally the PR originator or supervisor.

## 3.2 Methods of Solicitation

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| **REQUIREMENT** |
| The methods of solicitation and selection allowed are listed in FTA Circular 4220.1F. Buyers may choose:1. Micro-purchases only for contract amounts less than $3,500;
2. Small purchase procedures only for contract amounts less than the simplified acquisition threshold (currently $150,000). (Please note that the MBTA adheres to the Commonwealth’s procurement guidelines and publicly advertises all procurements with a value greater than $50,000);
3. Sealed bids where:
* There is a complete, adequate, and realistic specification or purchase description;
* The value of the procurement is estimated to be greater than $50,000;
* Two or more responsible bidders are willing and able to compete;
* The procurement lends itself to a firm fixed price contract and the selection can be made primarily on the basis of price, and
* No discussion with bidders is needed after receipt of offers;
1. Competitive proposals; or
2. Non-competitive proposals (sole source) procurement only if not soliciting additional competition in the manner explicitly defined in FTA Circular 4220.1F can be justified.

State law usually restricts the method of procurement more tightly than these Federal requirements. |

## 3.3 MICRO‑PURCHASES (FTA C 4220.1F Ch.VI,3.a(2)(b))

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| **REQUIREMENT** FTA Circular 4220.1F authorizes the use of micro‑purchases as a method of procurement, when appropriate. If used, the following apply:1. Micro-purchases are defined as those purchases under $3,500.2. Micro-purchases may be made without obtaining competitive quotations if the grantee determines that the price to be paid is fair and reasonable.3. Micro‑purchases are exempt from the Buy America requirements.  |
| 4. Micro-purchases should be equitably distributed among qualified suppliers in the local area and purchases should not be split to avoid the requirements for competition above the $3,500 micro purchase threshold.5. The requirements of the Davis Bacon Act apply to construction contracts between $2,000 and $3,500.6. Other than the Davis-Bacon Act clauses for construction contracts between $2,000 and $3,500, no other Federal clauses are required.7. Minimal documentation is required: (a) a determination that the price is fair and reasonable and (b) how this determination was derived. |

**PROCEDURE**

The buyer receives a requisition for less than $3,500 and determines that the purchase can be made using the micro-purchase procedures.

### 3.3.1 Purchase Requisition Approvals

Approvals for purchase requisitions are as follows:

* All Capital & Operating Purchase Requisitions must be authorized / approved by the Budget Office & Environmental Affairs in FMIS.
* All Personal Services & Legal Purchase Requisitions must be authorized / approved by Human Resources, Legal, & Budget Office in FMIS.
* Each Department/Office/Group/Function determines their Purchase Requisitions authorization levels (individuals) in FMIS.

### 3.3.2 Items Needed in a Purchase Requisition

1. Part number for the item;
2. Quantity;
3. Unit of Measure, e.g., gallons, case, barrel, bottle, feet, inches, pallet, box, etc.;
4. Description (as much information as possible facilitates the procurement);
5. MBTA contact person's name and telephone number;
6. Reference to previous purchase, e.g., purchase order number, previous vendor's name and contact information, etc.; and
7. Suggested list of vendors. Note: Providing this will not guarantee the vendors will be used.

### 3.3.3 Fair and Reasonable Determination

Purchases under $3,500, or micro-purchases, require determination that the price paid is fair and reasonable. "Fair and reasonable price" determination must be documented in the file to support micro purchases. Rotating through a list of the suppliers is one method to equitably distribute the micro-purchases among qualified suppliers.

For inventory purchases, the following variables should be considered:

1. Quantity on hand at base stock locations and satellite stockrooms;
2. Economies of scale;
3. Space limitations at base stock locations and satellite stockrooms;
4. Rate of consumption; and
5. Lead time.

This method of procurement is intended to minimize the paperwork that is inherent in other procurement practices.

### 3.3.4 Micro-Purchase Purchase Order Approvals

Junior Buyers, Buyers, and Senior Buyers have authorization to approve purchases less than, or equal to, $3,500.

### 3.3.5 Documentation

Final file documentation should include:

1. Properly Approved Requisition;
2. Prior FMIS price OR catalog print-out of price;
3. Inflation calculation (if FMIS price is older than 6 months); and
4. Purchase Order, with a fair and reasonable stamp and a written determination on how the price was determined to be fair and reasonable.

### 3.3.6 Process Flow for Micro-Purchases

The micro-purchase process flow is as follows:



## 3.4 SMALL PURCHASES

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| **REQUIREMENT** Small purchase procedures may be used if the services, supplies, or other property, costs less than $50,000[[1]](#footnote-1). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources. FTA Circular 4220.1F requires two or more responsive and responsible vendors.FTA Circular 4220 1.F (VI, 6) requires grantees to secure independent estimates for all procurements before receiving bids or proposals exceeding the micro-purchase limit of $3,500.  |

**PROCEDURES**

### 3.4.1 Adequate Number of Qualified Sources for Small Purchases

### (FTA C 4220.1F Ch.VI, 3.c(2))

This procedure requires obtaining competition from an "adequate" number of "qualified" sources.

* For purchases over $3,500 but less than $50,000, buyers should secure *at least two written quotes* by facsimile or e-mail; three to five are preferred. Other acceptable sources for quotes include, but are not limited to, the GSA website (can only be used for Schedule 70 and 84 items); printed catalogs; or vendor websites.

The following information needs to be obtained and documented:

* Name of Company
* Name of person contacted
* Telephone Number
* Date
* Item, service description, and/or part number (specification)
* Quantity
* Price per unit
* Unit of Measure, e.g., gallons, case, barrel, bottle, feet, inches, pallet, box, etc.
* Total quote value

If the item or service is only available from one vendor, please see Section 3.7 Non-Competitive Proposals (Sole Source).

### 3.4.2 Documentation

Final file documentation should include:

1. Properly Approved Requisition (please see Micro-Purchase for items needed in a Requisition);
2. Independent Cost Estimate (ICE), including but not limited to: prior FMIS price and inflation calculation (if FMIS price is older than 6 months), catalog print-out of price, etc.;
3. Specifications;
4. Federal System for Award Management (SAM);
5. Appropriate number of bidder quotes
6. Purchase Order;
7. Federal Clauses;
8. Appropriate correspondence to support purchase;
9. Appropriate Buyers Checklist(s); and

## 3.5 SEALED BIDS (INVITATION FOR BIDS/IFB’s)

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| **REQUIREMENT** |
| 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 the lowest in price.(1) In order for sealed bidding to be feasible, the following conditions should be  present: (a) A complete, adequate, and realistic specification or purchase description; |
| (b) Two or more responsible bidders are willing and able to compete effectively for the business;(c) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price; and(d) No discussion with bidders is needed. (2) If this procurement method is used, the following requirements apply:(a) Invitation for bids will be publicly advertised;(b) Bids are solicited from an adequate number of known suppliers, which have been provided sufficient time to prepare bids (prior to the date set for opening the bids);(c) Invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services sought in order for the bidder to properly respond;(d) All bids will be publicly opened at the time and place described in the invitation for bids;(e) A firm fixed price contract award will be made in writing to the lowest responsive and responsible bidder (when specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest); and(f) Any or all bids may be rejected if there is a sound documented reason. |

**PROCEDURES**

Sealed Bids are required for purchases greater than $50,000. After the purchase requisition and specification are received, they must be sent to the Office of Diversity and Civil Rights (ODCR) to set a Disadvantaged Business Enterprise (DBE) goal. Please see DBE section for additional information on this process.

After receipt of the DBE goal from ODCR, the solicitation must follow the following steps:

### 3.5.1 Preparation of the Invitation

The invitation must describe the requirements as completely, clearly, and accurately as possible. Stated another way, the invitation should define the items or services sought in order for the bidders to properly respond. (FTA C. 4220.1F Ch.VI (2)(c))

Requirements that restrict or act as restraints on full and open competition should be avoided. (FTA C. 4220.1F Ch.VI, 2.a.(4)(a))

The invitation typically includes all documents (whether actually attached or incorporated by reference) furnished to all prospective bidders for the purpose of bidding.

### 3.5.2 Publicizing the Invitation (FTA C 4220.1F Ch.VI, 3.c.(2))

The invitation must be publicly advertised and distributed to prospective bidders. This can be accomplished via various methods, such as: mbta.com; newspapers of general distribution; trade journals; magazines; and other appropriate internet websites, etc.

The amount of time after publication and distribution of the invitation to prepare and submit bids, and prior to the time and date set for opening of bids, is important to ensure bidders have adequate time to submit.

### 3.5.3 Receipt of Bids (FTA C 4220.1F Ch.VI, 3.c.(2)(e))

Bids are usually opened at 2 pm, unless otherwise noted in the solicitation. When bids are received via mail, they must be logged in the IFB Log Book, time, and date stamped.

### 3.5.4 Submission and Opening of Bids (FTA C 4220.1F Ch.VI, 3.c.(2)(e))

Bid openings must be open to the general public. Sealed bids must be submitted, and publicly opened, at the time and place stated in the invitation.

* Circulate an attendance sheet with the date, requiring everyone in attendance's first and last name, and organization they represent;
* Announce to those in attendance that the time set for receipt of bids has arrived and that no further bids will be received;

● Publicly open the bids and read them aloud to those persons present, and recorded on Bid Tabulation Sheet, which is available for public inspection;

* Unless it unduly interferes with the conduct of business, it may be necessary to allow time after the bids are read for interested members of the public to review the bids submitted under supervision, and under conditions that preclude the possibility of a destruction, substitution, addition, deletion, or alteration of the bid.
* If irregularities or discrepancies are discovered during this review process, or if something irregular is noticed during the public reading, it is best to simply note them and not discuss these in public. These matters are best discussed only with appropriate MBTA personnel, including the appropriate procurement, engineering, maintenance, and legal staff members.

### 3.5.5 Late bids (FTA C. 4220.1F Ch.VI, 3.c.(2)(g))

Any offer received at the Materials Management Department after the exact time specified for receipt as designated will not be considered, unless it is received before the award is made, and:

* Package was sent by certified or registered US Mail, no later than the 5th calendar date before the due date; or
* Package was sent by mail, or other method authorized by the MBTA (e.g., facsimile), and the late receipt was due solely to the mishandling of the package by the MBTA after receipt; or
* It is the only offer received by the MBTA.

### 3.5.6 Contract Award (FTA C. 4220.1F Ch.VI, 3.c.(2)(f))

A fixed price contract will be awarded to the responsible bidder whose bid, conforming to the terms and conditions of the invitation, is the lowest in price.

If stated in the invitation, price related factors may be considered in determining the lowest price. A provision in the IFB must be made to determine a clear basis of award to avoid confusion at the time of bid opening. The explanation can include options, escalators, currency issues, unit prices, etc. To preserve the right to exercise options with federal funds, FTA requires that the option prices be evaluated in both the initial selection process and again just before they are exercised to ensure that the pricing offered is still fair and reasonable. The rare instance of how tie bids will be treated can also be addressed, e.g., with the traditional coin toss.

## 3.6 SINGLE BID

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| REQUIREMENT |
| Within the discussion of sole source contracts, the FTA Circular 4220.1F, *Procurement By Noncompetitive Proposals (Sole Source)* also deals with the situation when a number of offerors are solicited but only one response is received:*Sole Source procurements are accomplished through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.* . . FTA Circular 4220.1F requires grantees to perform a cost or price analysis in connection with every procurement action:10. a. Cost Analysis. A cost analysis will be necessary when adequate price competition is lacking and for sole source procurements . . . 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.10. b. Price Analysis. A price analysis may be used in all other instances to determine the reasonableness of the proposed contract price. |

**PROCEDURES**

### 3.6.1 Adequacy of Competition (FTA C. 4220.1F Ch.VI,3.c.(1)(b))

When only one bid is received in response to a solicitation that was issued to multiple sources, it will first have to be determined if there was adequate competition. The FTA interpretive comment in the annotated Circular 4220.1F, makes clear the fact, that when only one bid is received, this does not, in itself, mean that competition was inadequate. In order to make this determination, it may be necessary to talk to those firms solicited to find out why they did not submit bids. If the reason is a restrictive specification or a delivery requirement that only one bidder could meet, there is a situation of inadequate competition. If this is the case, then the procurement is a sole source and it must be processed as such with internal MBTA approvals, or cancel the solicitation, change the requirements to allow for more bids, and re-solicit bids. On the other hand, if the reasons given by the non-responders are unrelated to the specification and/or solicitation terms, then it may be presumed competition was adequate and proceed with the award as a competitive one (single bid). It should be documented in the contract file so that there is a clear audit trail for reviewers to understand how the determination was reached. (*Source:* FTA Best Practices Procurement Manual, Section 4.4.3, pg. 63).

### 3.6.2 Cost or Price Analysis (FTA C. 4220.1F Ch.VI,6)

If the competition is deemed to be adequate, then a *price analysis* must be performed to determine the reasonableness of the bid price. If, on the basis of a price analysis, it is possible to document the determination that the price is deemed fair and reasonable, and if the bid is responsive and the bidder responsible, it may be possible to proceed with award. If, however, the reasonableness of the bid on the basis of a price analysis cannot be determined, then a detailed breakdown of costs and profit should be requested from the bidder and a *cost analysis performed*.

A price analysis is an evaluation of the offeror’s price relative to the prices being offered by other vendors and being paid by the general public for the same or similar items. Two or more responsive and responsible proposals/bids are required to perform a price analysis.

If competition is deemed to be inadequate, and it is decided to process the award as a sole source, then it will be necessary to perform a *cost analysis* (i.e., request from the bidder a detailed breakdown of the estimated costs and profit) unless the reasonableness of the price based on the bidder’s catalog or market price can be established (note that the item must be sold in substantial quantities to the general public), or the price is set by law or regulation. If the bidder refuses to furnish a cost breakdown for the analysis, it will be necessary to request a waiver from FTA of the Circular requirement that a cost analysis be conducted on every sole source procurement or cancel the procurement and re-solicit bids.

In many contract awards, the bids alone may be adequate to assure a reasonable price.

## 3.7 COMPETITIVE PROPOSALS / REQUEST FOR PROPOSALS (RFPs)

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| REQUIREMENT |
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| Requests for proposals (RFPs) shall be publicized. RFPs shall identify all evaluation factors along with their relative importance. Proposals will be solicited from an adequate number of qualified sources. Award shall be made only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed agreement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.Awards will be made to the responsible firm whose proposal is most advantageous to the MBTA's program with price and other factors considered. In architectural and engineering services procurements, grantees shall use competitive proposal procedures based on the Brooks Act, which requires selection based on qualifications, and excludes price as an evaluation factor, provided the price is fair and reasonable. (Please see Chapter 2 for Professional Services procedures.) |

**PROCEDURES**

### 3.7.1 Solicitation & Receipt of Requests for Proposals (RFPs)

Request for proposals (RFPs) typically include all of the elements of an invitation for bids (IFB) and, in addition, shall contain the evaluation factors, and their relative importance, e.g., by stating that the factors are listed in declining order of importance. The request can specify the information needed to perform the evaluation, and may require that cost/price information be physically separated, so that the technical evaluation can be performed separately from the price evaluation. RFPs are typically publicized in newspapers and/or trade journals, and are issued to qualified mailing lists maintained in a manner similar to IFB lists.

### 3.7.2 Distinguishing Features of an RFP from an IFB

The required feature that principally distinguishes an RFP from an IFB is the listing of evaluation factors. These factors typically include not only responsibility factors (such as financial, human, and physical capacity to perform), but also technical factors (such as the degree to which the proposer is expected, based on information submitted and available, to achieve the performance objectives, to provide the quality expected, and on the relative qualifications of the proposer's personnel). Depending on the RFPs, the MBTA may go beyond listing these factors in order of importance, and also describe the evaluation process in detail, listing weights for each factor, illustrating the scoring method, and specifying the procedure for weighing price into the selection.

The purposes for disclosing of the evaluation process are so that:

* Offerors can more accurately respond to the needs, rather than solely rely on the technical specifications alone;
* Proposers will be able to clearly present the information needed to conduct the evaluation; and
* Appearance of favoritism or unethical practice in offeror selection will be diminished.

### 3.7.3 Evaluation and Award

The following is a listing of elements commonly found in the competitive proposal method of procurement/RFP:

1. 3.7.3.1 Technical and Cost Proposal. Both a technical and cost proposal are requested from bidders so that they may be evaluated, preferably by separate staff. Where the appearance of technical objectivity is important, it is a better practice to initially evaluate the technical proposals without knowledge of costs, so that an objective and impartial evaluation can be obtained.
2. 3.7.3.2 Evaluation Factors. The evaluation factors to be considered in the award are identified in the RFP along with the relative importance of each. While this requires only the ranking of the factors without quantifying the importance, or describing the process for applying the factors to proposals, the MBTA may disclose the selection process in detail.
3. 3.7.3.3 Disclosure Advantages. The full description of the process guides proposers in understanding the needs, bolsters the objectivity of the evaluation team, encourages candor from the proposers during negotiations, and encourages competition through the perception of fair treatment.
4. 3.7.3.4 Disclosure Disadvantages. Disclosing the specific weights and scoring processes may encourage proposers to distort their proposals, and may strengthen the disappointed proposer's attack on the MBTA's decision.
5. 3.7.3.5 Notifications. Many standard RFPs notify prospective offerors that award may be made on the basis of initial proposals submitted without any negotiations or discussions. The implication is clear, that the initial proposal should be their best effort.

### 3.7.4 Evaluation of Proposals

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| **REQUIREMENT**FTA Circular 4220.1F, requires the following when procuring by competitive proposals:d. Procurement By Competitive Proposal/Request for Proposals (RFP). . . . If this procurement method is used the following requirements apply:  (1) Requests for proposals will be publicized. All evaluation factors will be identified along with their relative importance;  (2) Proposals will be solicited from an adequate number of qualified sources(3) MBTA has a method in place for conducting technical evaluations of the proposals received and for selecting awardees;(4) Awards will be made to the responsible firm whose proposal is most advantageous to the MBTA's program with price and other factors considered; and (5) In determining which proposal is most advantageous, the MBTA may award (if consistent with Massachusetts State law) to the proposer whose proposals offer the greatest business value to the Agency based upon an analysis of a tradeoff of qualitative technical factors and price/cost to derive which proposal represents the “best value” to the MBTA as defined in the Section for *Definitions*. If the grantee elects to use the best value selection method as the basis for award, however, the solicitation must contain language which establishes that an award will be made on a “best value” basis.  |
| In architectural and engineering services procurements, grantees shall use competitive proposal procedures based on the Brooks Act, which requires selection based on qualifications and excludes price as an evaluation factor provided the price is fair and reasonable. (Please see Chapter 2 for Professional Services) |

**PROCEDURES**

FTA Circular 4220.1F – The most recent edition of the FTA Procurement Circular added *Procurement By Competitive Proposals/Request for Proposals (RFP)* in order to recognize the concept of best value in evaluating offerors’ proposals and selecting successful contractors in negotiated procurements. The FTA Circular defines *best value* in these terms:

*Best Value: A selection process in which proposals contain both price and qualitative components, and award is based upon a combination of price and qualitative considerations. Qualitative considerations may include technical design, technical approach, quality of proposed personnel, and/or management plan. The award selection is based upon consideration of a combination of technical and price factors to determine (or derive) the offer deemed most advantageous and of the greatest value to the MBTA.*

For purposes of this discussion it may be helpful to distinguish the concept of “best value” selections from the more traditional practice of identifying the lowest price, technically acceptable proposal (although that too actually represents what the grantee feels will be the “best value” selection given the nature of the requirements it is procuring). Both approaches will require technical evaluations and price analysis, and both will require the solicitation to clearly inform the prospective offerors of how the selection decision will be made:

* *Best value* - requires tradeoffs between price and non-price factors to select the best overall value to the MBTA.
* *Lowest price technically acceptable proposal* - requires selection of the lowest price proposal meeting the minimum RFP requirements.

The FAR describes a “best value continuum” in negotiated procurements where agencies are free to use any one of a combination of source selection approaches. For example, in acquisitions where the requirement is clearly definable and the risks of unsuccessful performance are small, cost or price may play a dominant role in source selection; i.e., the selection may be based on the lowest price technically acceptable proposal. Where, however, the MBTA's requirement is less definitive, or where there is development work, or greater performance risk, then the less important price will be, and the more important the technical, or past performance considerations, in the source selection will be.

The FAR goes on to describe both *the tradeoff process* that is used when selecting a proposal other than the lowest price technically acceptable proposal, as well as the process to be used when the lowest price technically acceptable proposal method is appropriate. Several important principles may be noted from the FAR guidance on source selection that the MBTA should consider:

1. Best value selection methodology affords the MBTA an opportunity to structure the source selection process in a way that is suitable for the nature of the MBTA's requirement. No longer is the emphasis on defining one’s “minimum needs,” with its corollary selection process of choosing the lowest price technically acceptable proposal. While that approach will probably be the one most often used by the MBTA, we are now encouraged to structure selection procedures based on the realities of their requirements, and they are not expected to force-fit all acquisitions into a lowest-price-technically-acceptable-proposal mold when that may result in unacceptable performance risks or preclude the MBTA from selecting products that are a *better value* to them than the lowest price products or services.
2. When the MBTA decides that its requirements are sufficiently defined to use the lowest price technically acceptable selection process, *the evaluation factors that establish the requirements of acceptability must be stated in the solicitation.* Solicitations must specify that award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-price factors.
3. When the MBTA decides that its requirements are not defined with sufficient precision, or where there are performance risks, so that selection of the lowest priced proposal is not in the best interests of the MBTA, then a tradeoff process should be used to select the best value proposal. In this case the importance of the non-price evaluation factors that will affect the contract award must be stated in the solicitation. The Federal approach in the solicitation is to state whether all evaluation factors, other than price, when combined, are significantly more important than, approximately equal to, or significantly less important than price. This permits the MBTA to make tradeoffs between price and technical merit. It also permits the offerors to know what is important to the MBTA - whether to focus on higher quality at the expense of cost, or lower cost at the expense of quality. It is not necessary to publish the specific weights (numerically) of the individual evaluation factors, only their relative importance (i.e., conceptually or adjectivally). Some Agencies have found through practice that the approach which gives the greatest degree of flexibility in selecting the best value proposal is to place equal weight on the price and technical factors. This then allows a choice in either direction as circumstances warrant.
4. It is important to note that the perceived benefits of the higher priced proposal must merit the additional cost, and the rationale for tradeoffs must be documented in the file. It is not sufficient to say in the file that company X received a higher total score than company Y, and therefore deserves the award. Scores, without substantive explanations of the relative strengths and weaknesses of the competitive proposals, including the perceived benefits to the MBTA, are an insufficient basis for paying a higher price. The file must explain why company X represents the best value to the MBTA. The necessity of documenting the specific reasons why proposal A offers a better value to the MBTA than proposal B is why a mathematically driven selection decision is not appropriate.

### 3.7.5 Proposal Evaluation Team

The team responsible for evaluating proposals is determined before going out to bid. The recommendation for members on the evaluation team is made by the Department Head, or designee. The General Managers Office and/or the Materials Department has final approval of members in the evaluation team. The evaluation team must consist, at a minimum of:

Voting members:

* End-User Department staff
* Other Department staff, as considered necessary, based on needed expertise, e.g., ITD, Budget, Safety, Environment

Non-voting Advisory members:

* Buyer (non-voting)
* General Counsel, or designee - Advisory (non-voting)
* Materials Management Staff. This can include but is not limited to: Materials Manager, Deputy Director, Director of Materials, Contract Compliance Manager, and/or Chief Procurement Officer (non-voting)
* ODCR (non-voting)
* Note: Consultants may be used on an advisory basis, but must have no voting authority.

ODCR should review Phase One proposals for acceptable DBE participation, and provide the list of responsive bidders to the evaluation team for further review.

### 3.7.6 Proposal Evaluation Mechanics

There are many different methods of conducting proposal evaluations to determine best value, and many opinions as to which is the best approach. The MBTA may employ any rating method or combination of methods, including: color or adjectival ratings, numerical weights and ordinal rankings. Whatever the method, the important thing is that a statement of the relative strengths, deficiencies, significant weaknesses, and risks supporting the evaluation ratings must be documented in the contract file.

Some other agencies have employed a quantitative approach of assigning scores to both technical and cost proposals, thereby compelling a source selection that is basically mathematically derived. Proponents of this method usually argue it is the most “objective,” and therefore the fairest, approach to determining a winner. On closer examination, however, all approaches are to one degree or another, subjective. The decision regarding what score to assign any given factor is subjective, and any formulas employed after the initial scoring cannot make the process an “objective” one. Further, the MBTA must be allowed the flexibility of making sound, factually based decisions that are in the organization’s best interests. Any approach that assigns a predetermined numerical weight to price, and then seeks to “score” price proposals and factor that score into a final overall numerical grade to automatically determine contract award, is a mistake. Rather, we should evaluate the prices offered but not score the price proposals. Prices should be evaluated and brought alongside the technical proposal scores in order to make the necessary tradeoff decisions as to which proposal represents the best overall value to the MBTA. Buyers should carefully consider the technical merits of the competitors and the price differentials to see if a higher price proposal warrants the award based on the benefits it offers to the MBTA as compared to a lower price proposal. This is a subjective decision-making, tradeoff process.

The difficulties in trying to assign a predetermined weight to price and then scoring price proposals is that no one is smart enough to predict in advance how much more should be paid for certain incremental improvements in technical scores or rankings (depending on what scoring method is used). For example, no one can predict the nature of what will be offered in the technical proposals until those proposals are opened and evaluated. Only then can the nature of what is offered be ascertained, and the value of the different approaches proposed be measured. It is against the actual technical offers made that the prices must be compared in a tradeoff process. The MBTA cannot predict in advance whether a rating of “Excellent” for a technical proposal will be worth X$ more that a rating of “Good,” or whether a score of 95 is worth considerably more or only marginally more than a score of 87. It is what is underneath the “Excellent” and the “Good” ratings, or what has caused a score of 95 vs. a score of 87, that is critical. The goal is to determine if more dollars should be paid to buy the improvement, and equally important, how many more dollars those improvements are perceived to be worth. It could well be that the improvements reflected in the higher ratings are worth little in terms of perceived benefits to the MBTA. In this case the organization does not want to get “locked in” to a mathematically derived source selection decision. This may very well happen when price has been assigned a numerical score and the selection is based on a mathematical formula instead of a well-reasoned analysis of the relative benefits of the competing proposals.

Some other agencies have recognized the pitfalls of using arithmetic schemes to make source selection decisions. They have opted to not use numerical scores to evaluate technical proposals and they have gone to adjective ratings instead; e.g., “Acceptable,” “Very Good,” and “Excellent.” They have also heavily emphasized the need for substantive narrative explanations of the reasons for the adjective ratings, and the Source Selection Official then focuses on the narrative explanations in determining if it is in the agency’s best interest to pay a higher price for the technical improvements being offered. In this scenario price is evaluated and considered alongside technical merit in a tradeoff fashion using good business judgment to choose the proposal that represents the best value to the MBTA.

### 3.7.7 Proposal Evaluation Criteria

The solicitation will be more easily planned and developed, the criteria will be more accurately listed and ranked, and the evaluation process will be smoother and more objective if the evaluation process is thoroughly planned in advance. The evaluation process begins with the identification of the criteria that will be most meaningful in assessing the relative advantage of the proposals to the MBTA. These will generally include:

1. 3.7.7.1 Past Performance – The solicitation should advise offerors of the approach in evaluating past performance, including evaluating offerors that have no relevant performance history, and should also advise offerors to identify past relevant contracts for efforts similar to your requirement. The solicitation should also allow offerors to provide information on problems encountered on the identified contracts and corrective measures taken. This evaluation should also consider the past performance of key personnel and subcontractors that will perform major or critical aspects of the work. This evaluation of past performance, as one indicator of an offeror’s ability to perform the contract successfully, is separate from the responsibility determination.

2. 3.7.7.2 Technical Criteria – Technical factors regarding the specific methods, designs, and systems proposed to be used by the offeror will be considered and they must be tailored to the specific requirements of your solicitation. These factors must represent the key technical areas of importance that is intended to be considered in the source selection decision. *Technical factors should be chosen to support meaningful comparison and discrimination between competing proposals*. If the MBTA has established minimum standards for determining technical acceptability of proposals, these standards must be clearly set forth in the solicitation.

3. 3.7.7.3 Key Personnel – An evaluation of key personnel is often suggested when the procurement involves services or requirements where management of the work is a critical factor in determining its success. Qualifications and experience of key personnel may be an important evaluation factor. Some other agencies have required oral presentations by key personnel during which the evaluation committee may ask these key personnel relevant questions to determine the depth of their knowledge in critical areas.

4. 3.7.7.4 Cost or Price – Cost or price must be considered in every procurement, even those for professional services (e.g., legal, accounting, etc.), unless the services are those defined by Federal statutes as requiring a qualifications-based selection. Competition normally establishes price reasonableness. Therefore, when contracting on a fixed price basis, comparison of the proposed prices will normally satisfy the requirement to perform a price analysis and no cost analysis will be necessary.

If the contract is to be a cost reimbursement one, then a *cost realism analysis* should be performed to determine what the MBTA should realistically expect to pay for the proposed effort. We should never simply accept at face value the total estimated cost in the proposal and base a selection decision on the proposed amount since many offerors tend to understate the estimated cost in hopes of winning the contract as the “low bidder.” A cost realism analysis would use each offeror’s specific labor and overhead rates as estimating factors (assuming they are not understated) and the MBTA's own estimates for labor hours, travel, materials, etc. The award decision would be made with the cost realism analysis in mind.

5. 3.7.7.5 Relative Importance of Price and Non-Price Factors - The solicitation must advise offerors if the selection is to be made on a “best value” basis. And as already noted, the solicitation must also advise offerors if price is approximately equal to, less than, or greater in importance than the technical evaluation factors as a whole*.*

The MBTA uses language in its solicitations that informs offerors of how we will select that proposal that is the most advantageous to the organization, which may not necessarily be the highest ranked technically nor the lowest proposed price. We also inform offerors of how price may become a more important selection factor than technical merit when the technical proposals are evaluated as essentially equal. The following is as example of the language used:

*The MBTA will make the award to the responsible Proposer whose proposal is most advantageous to the MBTA. Accordingly, the MBTA may not necessarily make an award to the Proposer with the highest technical ranking nor award to the Proposer with the lowest Price Proposal if doing so would not be in the overall best interest of the MBTA. . . .*

*The overall criteria listed below are listed in relative order of importance. As proposals are considered by the MBTA to be more equal in their technical merit, the evaluated cost or price becomes more important so that when technical proposals are evaluated as essentially equal, cost or price may be the deciding factor.*

 *Evaluation Criteria:*

 *A. Technical Qualifications (With Details)*

 *B. Overall Price*

 *C. Other Relevant Matters (With Details)*

### 3.7.8 Competitive Range

At this stage in the competitive proposal procurement, the proposals from interested offerors have been received and the process of evaluation and selection has begun. Negotiation, and the repeated analyses and evaluations required, can be very time consuming, and there is often a wide range of competence or cost‑effectiveness in the initial proposals. It may be necessary to expend this effort on all the proposals for two reasons:

* Certain proposals, upon evaluation, may be so much worse than others for price or other reasons, that the possibility of accepting a subsequent offer is so remote as to make negotiations unnecessary; and
* There may be enough proposals so that it can be assured of negotiating the best buy in dealing only with several of the best; negotiating with more would be wasteful of both our resources and those of the marginal proposers'.

For these reasons, a commonly used technique is to conduct negotiations only with offerors determined to be within the competitive range. In assessing the competitive range, competition remains an important objective, and the effort in determining the competitive range is to preserve those proposals which stand a reasonable chance of being found acceptable, not to unduly limit competition by eliminating viable proposers.

**PROCEDURE**

Competitive range is a difficult concept to define in specific terms which would apply to all potential procurements, because professional judgment must be used in establishing the competitive range. Procedures and factors for determining the competitive range may differ from procurement to procurement.

The competitive range can be determined so that it is:

* Not used to unfairly eliminate offerors;
* Based on factors and criteria known to all offerors;
* Applied uniformly to all proposals; and
* Well documented in the procurement files.

One of the considerations may be that as many offerors as possible be given the opportunity to be considered within the competitive range, so as to attain the goal of full and free competition. Only those offerors whose proposals are determined to be so deficient, or so out of line as to preclude meaningful negotiation, need be eliminated from the competitive range.

The competitive range can consist of those offerors whose proposals have a reasonable chance of being selected for award, i.e., are acceptable as submitted or can be made acceptable through modification. All responsible offerors whose proposals are determined to be within the competitive range would be invited to participate in any oral and/or written discussions.

While it is not possible to identify all of the specific steps and analyses that could be performed in determining which proposals are within the competitive range, the following are provided for consideration in making this determination:

* The determination of which proposals are within the competitive range is made by the evaluation team (or procuring official, if there is no evaluation team).
* Competitive range determinations can be made using cost/price, technical and other factors identified in the solicitation.
* Detailed independent cost estimates (ICE's) prepared by the initiating department or project office can be considered when assessing the cost/price aspects of competitive range.
* The evaluation team's scoring of offerors' technical and management proposals is a logical basis for establishing which proposals are within the competitive range, as is scoring of other evaluation/award criteria specified in the solicitation. However, it may not be sound business policy to commit to competitive range determinations based on predetermined "cutoff scores."
* Borderline proposals need not automatically be excluded from the competitive range, if they are reasonably susceptible of being made acceptable. Remember that as a general rule, if there is doubt as to whether a proposal should be in the competitive range, the goal of competition is served by including it.
* Only those proposals that are judged to be so deficient or so out of line as to preclude further meaningful negotiations need be eliminated from the competitive range.
* Competitive range determinations are significant documents in the procurement file. This documentation is helpful to serve as a basis for debriefing offerors, and for responding to inquiries and protests. Many systems notify, in writing, any offerors whose proposals have been eliminated from consideration for award. Such notification occurs at the earliest practicable time after this determination is made.
* Written and/or oral discussions are usually conducted with all offerors determined to be within the competitive range.
* At the conclusion of discussions with offerors in the competitive range, the procuring official may ask all offerors to submit their best and final offers (BAFO's) in writing. This combines complete fairness for each offeror, with competitive incentive for each to make its best realistic offer.

### 3.7.9 Discussions and Clarifications

**PROCEDURES**

It may be necessary to obtain clarifications from one or more proposers, or hold discussions with all proposers immediately after receipt of proposals. However, it is also possible to proceed with evaluations and determinations of a competitive range as described in the preceding sections, before discussions are held. Most typically, the first discussions are oral presentations made by a short list of proposers within a competitive range. If discussions are held with any proposer at any phase of the procurement, holding discussions with all remaining proposers will increase the likelihood and the appearance of the most accurate and objective evaluation and negotiation.

It is not required to conduct discussions with any offeror provided: (1) the solicitation did not commit in advance to discussions or notified all offerors that award might be made without discussion, and (2) the award is in fact made without any written or oral discussion with any proposer. Normally, however, it may be necessary to conduct discussions. If this is the case, it will be to preserve the competitiveness and fairness of your procurement by conducting discussions with all offerors who submitted proposals in the competitive range. The competitive range is determined on the basis of cost or price and other factors and includes the proposals that have a reasonable chance of being selected for award. The content and extent of the discussions is a matter of your judgment based on the particular facts of the procurement.

Confidentiality has many advantages during the evaluation process. The name and number of proposals received is not normally considered a public record and need not usually be released to the competitors or the public at large. The control of this information may ease the proposers' competitive tension and allow for the conduct of more meaningful negotiations. Competitive information provided relative to both the technical and cost proposals may include trade secrets protected by statute, and can usually be kept confidential during the evaluation process, and, in some instances, after the award of contract.

If it is decided to enter negotiations or discussions (as opposed to simple requests for clarification) with one offeror, an automatic impression of unfairness is avoided by entering them with all remaining offerors. An occasional mistake is to circumvent the process merely by requesting "clarifications" when in fact discussions are being conducted. If the questions, and the concurrent opportunity to respond, are sufficient to lead an offeror into areas of perceived deficiency in its proposal, discussions have been held. If discussions are held, what should the content be or how should they start? Competition and fairness are served by conducting meaningful discussions with offerors.

This includes advising them of deficiencies in their proposals and affording them the opportunity to satisfy the requirements by the submission of revised proposals. There is however, no obligation to afford offerors all encompassing discussions, or to discuss every element of a technically acceptable, competitive range proposal that has received less than a maximum possible score. Also, if a proposal is technically unacceptable as submitted, and would require major revisions to become acceptable, it is not required that the proposal be included in the competitive range for discussion purposes.

Sometimes it could be an uncomfortable position to have discussions concluded only to discover there is a significant mistake or an aspect the evaluators do not understand in one proposal. Since allowing one bidder to correct its proposal would constitute discussions with that firm, discussions must be reopened with all bidders in the competitive range and they must be allowed the opportunity to submit revised proposals.

During discussions with offerors, you may be requested to ask all proposers to submit proposals with an advantageous approach proposed by one of them. Someone on your team may suggest that a technique used by proposer "A" would complement proposer "B's" approach well and could result in an advantageous offer from "B". Also, after price proposals have been evaluated, someone may suggest that a proposer with a high technical score should be asked if it can meet a price which happens to be the price of a competitor. Such techniques are considered technical leveling, technical transfusion, or auctioning. The disadvantage of these techniques is that proposers may react adversely. Because they are concerned about their position relative to their competitors, and want to keep their strengths confidential from their competitors, they may become more secretive in their discussions with you if they sense you may relay their ideas, pricing, or positions to their competitors. This is not to discourage discussion of price or suggesting major revisions in a proposal, but rather to discourage the disclosure, even indirect, of one proposer's information to another. They may hold back their strengths and valuable information, waiting for a BAFO. This can greatly inhibit the negotiation of the most advantageous proposal.

### 3.7.10 Additional Submissions

#### 3.7.10.1 Request for Revised Proposals

The most common tool used by procurement officials in competitive negotiations is a request for a revised proposal. Typically, the deficiencies of a proposal are listed and explained. A complete revised proposal, including price (except under the Brooks Act) is requested from each offeror in the competitive range. Unless explicitly stated otherwise, the revised offer extinguishes the prior offer. The proposer should identify all changes in the revised offer. The submission of the revised offer can trigger another round of evaluations, determination of a new competitive range, and discussions. It may be necessary to repeat this cycle as many times as necessary to obtain the most advantageous offers. If it is clear that the most advantageous offer possible has been obtained, award may be recommended.

**Purpose**

The purpose of the request for revised proposals, like the original request for proposals, is to harness the competitiveness and creativity of the proposers to produce the most advantageous proposal. You and the proposer may understand only gradually each other's capabilities and constraints. Each written proposal may raise new questions and new possibilities. The best improvement can be elicited each time a revised proposal is prepared by listing clearly the deficiencies of the current proposal as it is understood.

Although proposers may be expected to respond primarily to the requests in preparing revised offers, it may also help to learn how the requests affect other aspects of their proposals. Based on the format of the proposals and the nature of the changes being requested, it may be necessary to require that revised proposals be submitted in a form that will both easily allow for the identification of the changes and also form the basis of a coherent contract, if accepted.

### 3.7.11 Request for Best and Final Offer (BAFO)

**PROCEDURES**

As the procuring official, the process is now at the stage of the competitive negotiation process where you are ready to receive final offers from the offerors still within the competitive range. It is now at a stage to ask for a "best and final offer" from those offerors. If the other offers have no viable chance of being made competitive by this time, then it may be necessary to request the BAFO from only one proposer; of course there is little competitive pressure under those circumstances. Upon timely receipt of the BAFO(s) and final evaluation by the MBTA, the stage is now set to recommend award to a firm or individual in accordance with the terms and conditions of the solicitation.

**Purpose**

The ability to enter into discussions with offerors in the competitive range is one of the greatest advantages of utilizing the competitive proposal method of procurement. This process allows offerors to resolve questions and concerns they may have about the commodity or service being procured and the MBTA to resolve questions and concerns it may have about the offerors' proposals. At some point during the negotiation process, a decision is made that all outstanding issues have been resolved to the satisfaction of the parties involved. This is the time to formally conclude the discussions by requesting that each offeror remaining in the competitive range submit its best and final offer. The request normally would include the following elements:

* Specific notice that discussions are concluded;
* Notice that this is the opportunity for the offeror to submit a best and final offer;
* A definite, common cutoff date and time that allows a reasonable opportunity for the preparation and submission of the best and final offer; and
* Notice that the final offer must be received at the place designated by the time and date set in the request and is subject to any provisions dealing with late submissions, modifications and withdrawals of proposals set forth in the solicitation.

Following receipt of the best and final offers, they should be evaluated in accordance with terms of the solicitation. Award should be recommended in accordance with those terms.

Request for subsequent best and final offers ‑ It is the preferred practice to only ask for one "best and final offer." Requests for additional best and final offers should be avoided if at all possible.  However, additional technical or price/cost‑related issues may surface as a result of the offeror's final submission or other factors that preclude a reasonable justification for contractor selection and award. If it is clearly in the MBTA's best interests, discussions may be reopened and the issues resolved. Again, at the conclusion of the round of discussions, an additional request for best and final offers would be issued to all offerors still within the competitive range.

### 3.7.12 Award Based on Initial Proposals

It is advisable to make award only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed agreement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

Awards will be made to the responsible firm whose proposal is most advantageous to the MBTA program with price and other factors considered.

It may be possible to accept one of the initial proposals if it can be clearly demonstrated that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price. Therefore, as a general matter, it is advantageous for solicitations to contain a notice that award may be made without discussion of proposals received, and that proposals should be submitted initially on the most favorable terms possible, from a price and technical standpoint*.*

It is not required to conduct discussions with any offeror provided: (1) the solicitation did not commit in advance to discussions or notify offerors that award might be made without discussion, and (2) the award is in fact made without any written or oral discussion with any proposer. This is often the case where the proposal is for services where rates are regulated and the competition is on the basis of service, e.g., certain types of insurance. If an initial offer is accepted, the determination of fair and reasonable price will be an important document in the file. Normally, however, there will be need to conduct discussions.

### 3.7.13 Withdrawal of Proposal

**PROCEDURES**

Solicitations state a date and time by which offers must be submitted, and a period following that date during which the offers remain firm. Competition is best served and unnecessary alternate proposals are avoided by allowing proposers to withdraw or modify their proposals up to the time due. However, after the due date, the proposals are usually firm and cannot be withdrawn during the validity period.

**Purpose**

As in the case of sealed bids, it is important to the integrity of the procurement that all offers are serious and not submitted for exploratory reasons, or to cast a certain light on other offers. Although the negotiation process, in contrast to sealed bidding, reduces the incentive to this sort of gamesmanship, the concern is still valid, particularly where it may be a good decision to accept an initial offer.

The terms of the solicitation and requests for revised offers, or BAFOs, can state a period during which the offers remain firm. A good practice is to note this period on the offer form used by proposers to summarize their proposals.

Solicitations also often state that modifications, or withdrawals, will be permitted until the time due. In the case of a revised offer or BAFO, the solicitation can provide that the withdrawal of the offer would result in the continued validity of the most recent offer.

## 3.8 NON‑COMPETITIVE PROPOSALS (SOLE SOURCE)

## (FTA Circular 4220.1F Ch. VI, 3. i.)

**Justification for Use**

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| **REQUIREMENT**In addressing the various methods of procurement that may be used, FTA Circular 4220.1F provides:Procurement By Noncompetitive Proposals (Sole Source). 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 inadequate. A contract amendment or change order that is not within the scope of the original contract is considered a sole source procurement that must comply with this subparagraph.1. 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:1. The item 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;(d) After solicitation of a number of sources, competition is determined inadequate; or 2. A cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit, is required.**Sole source** items are common in the transportation industry, as there may be only one of two companies providing needed services/items, or suppliers may not make subcomponents that fit competitor products, or sales may be too low to entice aftermarket companies. However, FTA Circular 4220.1F is very strict as to what is considered a sole source procurement. If the property or services are available from only one source, the end-user must provide the mandatory justification to demonstrate how the procurement meets at least one, or more, of the criteria in FTA Circular 4220.1F: * 1. 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.
	2. Patents or Restricted Data Rights. Patent or data rights restrictions preclude competition.
	3. 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.
	4. 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.
 |

**PROCEDURES**

Sole source solicitations may not be issued, nor may noncompetitive proposals be accepted, except under the unusual conditions listed above. Often, there are practical means of obtaining competition which are not at first apparent. If a non‑competitive proposal is accepted, a careful cost analysis must be done. Because of the strict scrutiny applied to sole source procurements, painstaking documentation of the justification for the noncompetitive proposal and of the cost analysis is valuable in the long run. FTA approval for noncompetitive negotiation is not required, unless there is reliance on justification (c) in the Circular. This places a heavy burden on the MBTA to ensure the use of noncompetitive negotiation only in the public interest and according to the Federal requirements

**Purpose**

Public procurement essentially operates in an environment where full and open competition is the primary goal or aspiration and, in many cases, is a mandate. However, there may be very legitimate reasons or situations when, as opposed to "full and open" competition, limited or no competition exists. The FTA, through the requirements set forth above, has established guidelines when sole source procurements may be used if FTA funds are involved.

Because procurement by sole source is a noncompetitive procurement, it is treated as an "exception‑to‑the‑norm" in public procurements and, as a result, the ability to use it requires justification and, frequently, preapproval before the award of a sole source contract. In this context, "justification" equates to paperwork and documentation.

As quoted above, FTA Circular 4220.1F establishes a matrix that should be followed in justifying the use of noncompetitive or sole source procurements as discussed below:

3.8.1 Sole Source: Step One ‑ It must first be determined that the requirement cannot be obtained under small purchase procedures, sealed bids, or competitive proposals. Does more than one source exist? Does adequate time exist to obtain the requirement through a competitive process? Is Item B (for which competition exists) an acceptable substitute for Item C (for which there is only one source)?

* Procurement Staff should take reasonable steps to avoid using sole source procurement except in circumstances where it is both necessary and in the best interest of the MBTA.
* If one of the three methods can be used (or is feasible), even if you would rather not, sole source is not an option.

3.8.2 Sole Source: Step Two ‑ Feasibility: If one of the competitive processes is not feasible in the situation, it may be appropriate to use sole source procurement if at least one of the following circumstances is present:

* The item is available only from a single source ‑ In justifying the use of this circumstance, it is pertinent to frequently address factors such as:

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| --- | --- |
| Single Source Factors:How was this conclusion reached that this item represents the minimum need or requirement? Is this a "nice to have" with all the "bells and whistles" or does it really represent the requirement or minimum need? How was availability determined? Was there a review of prior procurements for the same or similar items? Are there other sources? Are they responsible? Are identical or compatible parts or equipment available from any other source?  | **Examples**: *Utility services* (how many sources are available for electricity in the community?)*Limited rights in data, patent rights, copyrights, or secret processes* (If one entity owns the patent on a process or product needed, can anyone else meet the need?) *Relocation of a major natural gas distribution line from the rail right of way* (the natural gas utility company is the only source available to work on the gas line) |
| Who prepared the specification or statement of work? Did a vendor or contractor assist? If so, will they benefit somehow by the decision to proceed with a sole source contract? |  |

* The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation ‑ Two factors: public exigency or emergency, and no time to competitively procure!
* When the MBTA's need for the supplies or services is of such an unusual or compelling urgency that the MBTA would be seriously injured unless sole source procurements were utilized, it can be justified.
* In an emergency situation, it is not unusual for health and safety issues to be a factor in the decision to proceed with a sole source.
* If the MBTA itself is responsible for being short of time ‑‑ i.e., lack of advance planning, delays in procurement administration due to shortage of procurement personnel, or incompetence of procurement personnel, money in the budget balance expires the end of next month, particular caution should be exercised in making a determination regarding whether the emergent consequences of delay warrant noncompetitive negotiation, and to what extent the MBTA contributed; an independent opinion may be warranted.
* If the emergency is to repair a hole in the roof of your maintenance facility where a tree limb fell through, because of the storm last night, is the sole source procurement a patch job or a replacement of the roof because it was getting old anyway? One school of thought is the approach should be to only perform the minimal work necessary to alleviate the exigency or the emergency. Don't use it as an excuse to do remedial work or buy a year's supply of something that is intended to be done competitively next month anyway.
* After solicitation of a number of sources, competition is determined inadequate ‑ An IFB has been issued and only one bid received from a responsible contractor, but it cannot be determined if its price is reasonable. If the bidding environment and the reasons why one bid is received is deemed satisfactory, a sole source contract can be negotiated to arrive at a reasonably priced contract.

3.8.3 Sole Source: Step Three‑ Documentation of Justification. It is recommended that the rationale and all steps undertaken to justify the sole source procurement be documented very thoroughly and carefully.

It is recommended that a proposal be requested from the source. There is no need to advertise ‑ there will be no competition! The request for a proposal can be as formal as it is deemed ‑‑ from letter requests up to a full blown solicitation document. Regardless of the form used, the following should be noted:

* Refer to, or attach, all terms and conditions of the solicitation. There is still need to comply with federal representation and certification requirements. It is still necessary to have special and general provisions. There may be additional MBTA requirements that must be met. What is the DBE goal for this procurement ‑‑ how will it be met?
* Refer to, or attach, the specifications or statement of work for the supply or service being procured.
* Refer to, or attach the applicable cost or pricing data. A cost analysis is required, including verifying the proposed cost data, the projections of the data, and the evaluation of specific elements of costs and profit.

### 3.8.4 Sole Source: Step Four - Negotiation of Contract

Negotiate the final terms and conditions of the contract using the negotiation procedures used in the competitive proposal method of procurement. These negotiations can be more pointed and open because there is no competitive environment involved ‑‑ the integrity of a procurement process is not involved so issues like "technical leveling" and "transfusion" do not have to be considered. Review the proposal with impacted internal MBTA staff ‑‑ really prepare for negotiations for the sole source.

3.8.4.1 Single Offer, after Competitive Solicitation – It may be possible to conclude after receiving only a single bid that competition is inadequate, and that it may be reasonable to negotiate with the single bidder, to establish a fair and reasonable price. This situation has arisen because only one bid or proposal was received from one source, or it has been determined that the competition received was otherwise "inadequate." To proceed in this case, the requirements for noncompetitive negotiation must be met. However, it is not necessary to issue a new solicitation because the requirement is adequately stated. It may be possible after meeting the requirements of the previous section, to proceed with the negotiation of a reasonably priced contract.

**3.8.4.2 Cost Analysis Required**

A cost analysis is required for all sole source procurements that exceed the micro-purchase limit of $3,500. It is required whenever adequate price competition is lacking, unless price reasonableness can be established on the basis of catalog or market prices of commercially available items. A cost analysis entails the review and evaluation of the separate cost elements and the proposed profit in a vendor’s cost proposal. A cost analysis is conducted to form an opinion on the degree to which the cost, including profit, represents what the performance of the contract “should cost”, assuming reasonable economy and efficiency. This analysis must be documented and included in the permanent procurement file.

## 3.9 SPECIAL PROCUREMENT METHODS

### 3.9.1 Multi‑Step Procurements

**PROCEDURES**

FTA Circular 4220.1F permits a number of procurement methods. For example, a variation that has long been recognized in public procurement is referred to as the two‑step, sealed bidding method of procurement. While it has some characteristics of both sealed bidding and competitive proposals, it complies with all FTA Circular 4220.1F requirements for the competitive proposal process. This process allows, in the first phase, for the submission of un-priced technical proposals in response to the request. In the second phase, only those firms that have been found to be technically qualified in the first phase are invited to submit sealed bids, as though it were regular sealed bid procurement. Award is then made to the lowest, responsive and responsible bidder.

#### 3.9.1.1 Overview

Two‑step bidding is a two-phase process generally consisting of a technical first phase composed of one or more steps in which bidders submit unpriced technical proposals (and discussions are held with offerors of those proposals, if necessary) to be evaluated by the MBTA, and a second phase in which those bidders whose technical offers are determined to be acceptable during the first phase have their priced bids considered.

The process is designed to:

* Obtain the benefit of sealed bidding by award of a contract to the lowest responsive, responsible bidder, and, at the same time,
* Obtain the benefit of the competitive proposal method of procurement through the solicitation of technical offers and conducting discussions to determine the acceptability of the technical offers.

#### 3.9.1.2 Conditions for Use

The two-step procurement process can be used when all of the following conditions are present:

* Available specifications are not definite or complete or may be too restrictive without technical evaluation (and any necessary discussion), of the technical aspects of the requirement to ensure mutual understanding between each source and the MBTA;
* Definite criteria exist for evaluating technical proposals;
* More than one technically qualified source is expected to be available;
* Sufficient time will be available for use of the two‑step method; and
* A firm fixed‑price contract or a fixed‑price contract with economic price adjustment will be used.

#### 3.9.1.3 Phase One of Process

This process normally includes the following steps:

*Solicitation phase* ‑ In addition to the normal requirements for an IFB, the first phase solicitation also generally provides:

* That unpriced technical offers are requested;
* That the procurement is a two‑step sealed bid procurement and that priced bids will be considered in the second phase, and only from those bidders whose unpriced technical offers are found to be acceptable in the first phase;
* The criteria to be used in evaluating the unpriced technical offers;
* That the MBTA, to the extent determined to be necessary, may conduct oral or written discussions regarding the technical offers;
* A statement that bidders should submit proposals that are acceptable, without additional explanation or information and that the MBTA may make a final determination regarding the acceptability of the proposals, based solely on the basis of the proposals as submitted, and may proceed with the second step without requesting further information from any bidder;
* That bidders may designate those portions of the technical offers which contain trade secrets or other proprietary data which are to remain confidential; and
* That the item being procured shall be furnished generally in accordance with the bidder's technical offer as found to be technically acceptable, and shall meet the requirements of the solicitation.

*Clarifications in two-step process:*

* The MBTA may request clarifications from bidders for evaluation of Phase One submittals.

*Amendments to solicitation in two‑step process*:

* Amendments issued prior to the receipt of technical offers are important to all prospective bidders as in a "normal" IFB.
* Amendments issued after receipt of the technical offers need be submitted only to those bidders who submitted unpriced technical offers, and they should be allowed to submit new technical offers or amend those previously submitted.

*Receipt of unpriced technical offers*. Unpriced technical offers need not be publicly opened.

* Offers are typically opened in front of two or more MBTA employees as witnesses. Phase One is not a public opening.
* Offers are usually not disclosed to unauthorized persons.

*Evaluation of unpriced technical offers should be in accordance with the criteria set forth in the solicitation.* The unpriced technical offers should be categorized as --

* Pass. This constitutes 100% compliance with all elements of Phase One.
* Fail, in which case the buyer records in writing the basis for this finding and makes it part of the procurement file.
* Any proposal which fails to conform to the essential requirements or specifications of the solicitation can be considered nonresponsive and categorized as unacceptable.
* When an unpriced technical offer has been determined to be unacceptable, the bidder is not notified of that fact that their bid is unresponsive, and is not afforded additional opportunities to submit supplemental information amending its technical offer.

*Discussions involving unpriced technical offers may be conducted with any offeror who submitted an acceptable or potentially acceptable technical offer.*

* Discussions can be conducted in accordance with the principles discussed in the competitive proposal method of procurement.
* Once discussions have commenced, any offeror who has not been notified that its offer has been found unacceptable may submit supplemental information amending its technical offer at any time until the closing date established.
* Such submission may be made at the request of the buyer, or upon the offeror's own initiative.

*Phase Two of the process may be initiated without discussions* if there are a sufficient number of acceptable proposals to ensure adequate price competition under Phase Two. Based upon the results of Phase One, it may be necessary to revise the technical specifications (minimum technical requirements) in Phase Two IFB, in a manner that does not conflict with the final unpriced proposals.

Phase One Evaluation Phase - The team responsible for evaluating Phase One proposals is determined before going out to bid. The recommendation for members on the evaluation team is made by the Department Head, or designee. The General Managers Office and/or the Materials Department has final approval of members in the evaluation team. The evaluation team must consist, at a minimum of:

Voting members:

* End-User Department staff
* Other Department staff, as considered necessary, based on needed expertise, e.g., ITD, Budget, Safety, Environment

Non-voting Advisory members:

* Buyer (non-voting)
* General Counsel, or designee - Advisory (non-voting)
* Materials Management Staff. This can include but is not limited to: Materials Manager, Deputy Director, Director of Materials, Contract Compliance Manager, and/or Chief Procurement Officer (non-voting)
* ODCR (non-voting)
* Note: Consultants may be used on an advisory basis, but must have no voting authority.

ODCR should review Phase One proposals for acceptable DBE participation, and provide the list of responsive bidders to the evaluation team for further review.

#### 3.9.1.4 Phase Two of the Process

Each bidder who submitted an unpriced offer that was determined to be acceptable in Phase One is invited to submit a priced offer. The IFB states that the bidder shall comply with the specifications and the offeror's acceptable technical proposal. No additional public notice or advertisement of the IFB need be given, because such notice was given during the Phase One Process.

Phase Two is a public opening. Award is made to the lowest, responsive, responsible offeror, without further evaluation.

Unresponsive and/or unsuccessful bidders may be debriefed after the process is completed, and notice of award made.

### 3.9.2 Piggybacking (Using contracts procured by another organization-- e.g. State Contracts) (FTA Circular 4220.1F Ch. V,7,a.(2))

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| **REQUIREMENT****Piggybacking and Tag-ons-** FTA Circular 4220.1F sets forth FTA policy and guidance related to procurements commonly referred to as “piggybacking” and “tag-ons.” These terms are defined in the Circular as follows:*“Piggybacking” is an assignment of existing contract rights to purchase supplies, equipment or services.**“Tag-on” is defined as the addition of work (supplies, equipment or services) that is beyond the scope of the original contract that amounts to a cardinal change as generally interpreted in Federal practice by the various Boards of Contract Appeals. “In scope” changes are not tag-ons.*  |

3.9.2.1 Circumstances When Piggybacking Is Permissible **–** There are a number of issues that should be addressed by the MBTA before deciding to piggyback another agency’s contract. The MBTA must be able to affirmatively determine that the contract to be piggybacked meets Federal requirements. For example, an Independent Cost Estimate (ICE) is required before piggybacking can be established (please see Chapter 3 section on ICE for additional information). These Federal requirements include compliance with FTA Circular 4220.1F and the *Dear Colleague* Letter C-98-25.

(Tag-ons are defined as the addition of work that is beyond the original scope advertised in the procurement; i.e., cardinal changes. Tag-on’s are prohibited by FTA.)

MBTA procurement staff are advised to pay particular attention to the specific issues identified in the paragraph below.

1. Has a copy of the contract been obtained and the solicitation document, including the specifications and any Buy America Pre-Award or Post-Delivery audits?
2. Does the contract contain an express *assignability clause* that provides for the assignment of all or part of the specified deliverables? FTA’s policy is that the original solicitation must contain an *express notification* to all bidders that an assignment would be possible under the terms of the contract. Such a notification would put the bidders on notice that they would likely be called upon to deliver all of the deliverable items, both the base as well as the option quantities. The assignment clause would thus be an important factor in the original competitive bidding. **If the contract does not contain an express assignability clause, piggybacking is not permitted.**
3. Did the Contractor submit the “certifications” required by Federal regulations in accordance with the requirements of this solicitation? Piggybacking is not permitted when the Contractor has failed to submit the required Federal certifications with its bid.
4. Does the contract contain the clauses required by Federal regulations? If a required Federal clause is not included in the contract, piggybacking is not permitted.
5. Were the piggybacking quantities included in the original solicitation; i.e., were they in the original bid and were they evaluated as part of the contract award decision? If not, a *Tag-on is not permitted.*
6. If the contract is an *indefinite quantity contract*, did the original solicitation and resultant contract contain both a minimum and a maximum quantity, which represent the reasonably foreseeable needs of the parties to the solicitation? If the piggybacking action represents the exercise of an option provision in the contract, is the option still valid? Options that have expired may not be exercised.
7. Does Massachusetts State law allow for the procedures used by the original contracting agency; e.g., negotiations vs. sealed bids?
8. Was a cost or price analysis performed by the original procuring agency documenting the reasonableness of the contract price? Include a copy in the files.
9. Does the contract term comply with the five or seven year term limit established by FTA 4220.1F?
10. Was there a proper evaluation of the bids or proposals? Include a copy of the analysis in the files.
11. Was the piggyback checklist used by the MBTA for this procurement? Include a copy in the files. Please see Appendix.

3.9.2.2 Indefinite Quantity Contracts, Unlimited Options, and Piggybacking – Serious problems arise when agencies issue solicitations with unlimited quantities, which result in open-ended contracts which other agencies then piggyback. This practice creates a number of serious problems; therefore, *unlimited quantities are not permitted*.

* Since the rolling stock manufacturers do not know what the potential orders may be under the contract, they cannot plan their operations nor can they quote prices which reflect the quantities that may be produced.
* Unspecified quantities result in higher unit prices for the procuring agency because manufacturers must use the minimum quantity specified to calculate prices for material, engineering, etc.
* For these reasons, *open-ended, indefinite quantity/indefinite delivery contracts, or contracts with unlimited options are not permitted.* They are not only disruptive to bus manufacturers and their suppliers, who cannot plan their production schedules given the degree of uncertainty that these contracts entail, but they are also counter-productive to the grantee community, which will invariably pay higher prices for items which were not really competed in a “full and open competition.”

**3.10 Blanket Purchase Agreements**

A blanket purchase agreement (BPA) is a simplified method of filling anticipated

repetitive needs for supplies or services by establishing “change accounts” with

qualified sources of supply. A BPA is designed to reduce administrative costs in

accomplishing small purchases by eliminating the need for issuing individual Purchase Orders. The BPA is satisfactory, it may be renewed. The period of time that a BPA is established may vary. The agreements are reviewed annually to assure contractor conformance to the terms and conditions of the agreement and satisfactory performance, as well as to update repetitive buys that can be extended indefinitely. When the BPA is combined with electronic transmission, greater efficiency is realized.

 A Buyer may establish a BPA if:

* There is a wide variety of items in a broad class of goods that are generally purchased, but the exact items, quantities, and delivery requirements are not known in advance and may vary considerably;
* There is a need to provide commercial sources of supply for one or more MBTA offices that do not otherwise have or need direct authority to purchase; or
* The Administrative cost of writing numerous Purchase Orders can be avoided through the use of this procedure.

A BPA shall not be used for any commodity, service, or other item for which a requirements type contract has been issued by the Authority. To the extent practical, BPA’s for items of the same type shall be placed concurrently with more than one vendor. All competitive sources shall be given an equal opportunity to furnish supplies, services, or other items under a BPA.

The Buyer shall not use a BPA to authorize purchases that are not otherwise authorized by law or regulations. The existence of a BPA shall not justify procurement on a sole source basis. When there is an insufficient number of vendors with BPA’s to ensure maximum practicable competition for a particular purchase, the Buyer shall:

* Solicit quotations from other sources and make the purchase as appropriate; and
* Establish additional BPA’s to facilitate future purchases when recurring requirements for the same or similar terms or services seen likely, when qualified sources are willing to accept a BPA, or when it is otherwise practical to do so.

## 3.11 Common Elements of Solicitation Process

### 3.11.1 Independent Cost Estimates (ICEs)

### (FTA Circular 4220.1F, Ch.VI, 6)

**REQUIREMENT**

The FTA Procurement Circular [4220.1F](http://www.fta.dot.gov/13057_10916.html), on page VI-19 states:

Grantees must 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, but as a starting point, grantees must make independent estimates before receiving bids or proposals.

The FTA Best Practices Procurement Manual ([BPPM](http://www.fta.dot.gov/grants/12831_6037.html)), Section 5.2 - Cost and Price Analysis, suggests that the independent estimate can range from a simple budgetary estimate to a complex estimate based on inspection of the product itself and review of items like drawings, specifications and prior procurement data.

By "change order", the FTA means any contract action that calls for the negotiation of a cost or price proposal arising out of a change in the contract requirements.

The independent cost estimate is a tool to assist in determining the reasonableness or unreasonableness of the bid or proposal being evaluated and is required for all procurements regardless of dollar amount. Estimates may be obtained from market research sources, such as:

* Published competitive prices, such as those found in catalogs;
* Results of previous procurements of the same items, with inflation factored (if purchased more than 6 months from present date)
* Estimates by in-house or external estimators; and
* General Services Administration (GSA) prices.

**A template to help end users develop their Independent Cost Estimates is available as Exhibit 3.2 in Chapter 3 of this manual.**

The ICE is the MBTA's best estimate of what the work "should cost." It is an estimate that is completed before proposals are received to assist in the cost analysis of the contractor's proposal once it is received, and is based on the MBTA's assumptions that may or may not be accurate. The ICE does not impose any limits on what the MBTA may finally negotiate. The requirement is that the MBTA determine the negotiated price to be fair and reasonable, considering all the information presented at negotiations, including such things as complexity of the work, risks associated with performance, the amount of competition or the lack thereof, etc.

#### 3.11.1.1 Purpose

Purposes of establishing a cost estimate using a method independent from the prospective offerors in advance of the offer include:

* Ensures a clear basis for the MBTA'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.

The cost estimate is essential information for procurement planning. It gives the buyer some indication of the complexity of the project, thus allowing planning of procurement time and personnel. It is also the basis for determining which procurement procedures apply to the project.

A final purpose of the independent cost estimate is for price analysis. Either a cost or price analysis is required for every contract, and every change order, so that the essential objective of a reasonable price is assured.

Although the responsibility for developing or obtaining an independent cost estimate is with the end-user, the adequacy of the price or cost analysis is a critical responsibility of the buyer. The word "independent" does not imply that it is performed by someone other than the MBTA. This could be the case, however, if the MBTA does not have the expertise for a large complex procurement. The independent estimate is especially critical whenever there is no price competition (e.g., for architect-engineer procurements or where only one price proposal is received), or where offerors are submitting price proposals for goods or services that are not exactly comparable (e.g., for procurements of high-technology items or professional services). It is also useful in competitive procurements to alert the agency when all competitors are submitting unreasonably high cost proposals.

If there is a direction to the contractor that does not result in a price adjustment to the contract, then an independent cost estimate is not required. For example, if a written direction or authorization is given to the contractor to do certain work, but the work does not represent a "change" giving rise to a price adjustment (either increasing or decreasing the contract value), then no proposal will be forthcoming and no price negotiations will be required; therefore, no independent cost estimate will be required.

Another example would be as follows: if the contract arrangement is a Time & Materials one, the end-user will not be evaluating billing rates in the contractor's price proposal (since they are already established by contract terms), but will be evaluating the proposed labor hours by labor category in order to determine the reasonableness of the proposed skill mix. End users will also be looking at materials cost. For these negotiable items (type and quantity of labor, materials, etc.), end users must have an independent cost estimate before the contractor submits its proposal in response to the change order. If the change order is an emergency one, the contract terms can give the contractor thirty days to respond with a price proposal, and the cost estimate could be developed by the end user within that thirty day period prior to the proposal.

**The** FTA does not expect end users to perform a "cost estimate" in the sense of estimating the cost of manufacturing the commercial item. What the FTA requires is simply a market survey of current prices or an examination of previous prices paid recently under competitive conditions. The documentation would be minimal, indicating that the requisitioner checked the market prices being offered to the public for similar items and found the range of prices to be $X to $Y.

### 3.11.2 Inventory

Inventory purchases are the recurrent purchases of stock items that the MBTA makes to support operations. Since these purchases are recurring, FTA has agreed[[2]](#footnote-2) to allow the MBTA to use internal historical purchasing data (i.e. the last price paid) as the basis for an Independent Cost Estimate (ICE). Buyers are required to print out the screen in FMIS which shows the last price paid and the date of purchase. If this data is more than six months old, a print-out of the inflation calculation is also required.

### 3.11.3 Non-Inventory

Non inventory purchases are initiated by the using department. The department develops an independent cost estimate (ICE) for the work or service that is needed based upon the market place and historic data within the MBTA and then enters a requisition into the FMIS system. The requisition then goes through a series of budget approvals which ensure that there are sufficient funds available to support the purchase. Buyers must attach the ICE to the fully approved requisition. A stand-alone requisition without any back up documentation does not satisfy the requirement for an ICE.

In the event that the non-inventory purchase involves an item or service that has been previously procured by the MBTA, the buyer may use the previous price paid for the supply or service as an Independent Cost Estimate, provided that an inflation calculation has been included with the pricing data.

### 3.11.4 Advertising and Publicizing Solicitation (FTA Circular 4220.1F, CH.VI,3.c(2))

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| **REQUIREMENT**FTA Circular 4220.1F requires that all procurement transactions be conducted in a manner providing full and open competition, and requires that invitations for bids (IFB’s) and requests for proposals (RFP’s) are to be "publicly" advertised. |

**PROCEDURES**

IFBs and RFPs must be publicly advertised, at a minimum, on the MBTA’s website. In addition to increasing competition, advertising procurement actions also broadens industry participation in meeting industry requirements, as well as provides assistance to small businesses and firms interested in obtaining contracts and subcontracts. Depending on the procurement, other places to advertise can include major newspapers, trade journals, specialized industry websites, etc.

The MBTA advertises all procurements with a value of $50,000 or greater on its website. State‑level home pages or bulletin boards can also be used. It is a good practice to advertise procurements in a manner that will encourage maximum competition, and allow adequate time for the contractor to prepare its proposal prior to submission back to the MBTA.

### 3.11.5 FULL AND OPEN COMPETITION

The MBTA shall obtain 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 4220.1F.VI, 2, a (4) (b);
* Noncompetitive pricing practices between firms or between affiliated companies; and
* Noncompetitive awards to any person or firm on retainer contracts.

### 3.11.6 Brand Name or Equals (FTA Circular 4220.1F Ch.VI,2.a(4)(f))

A clear and accurate description of the technical requirements must be incorporated for the material, product or services to be procured. Such description must not contain any feature than can be deemed unduly restricting competition. The description may, however, include statements regarding the qualitative nature of the material, product or service to be procured, and, when necessary, shall set forth those MINIMUM essential characteristics and standard to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equal description” may be used.

Departments shall use a “brand name or equal description” only when it cannot provide an adequate specification or more detailed description without performing an inspection and analysis, in time for the acquisition under consideration. In addition, any department that desires to use this procurement method must carefully identify its minimum needs, and clearly set forth those salient physical and functional characteristics of the brand name product in the solicitation.

### 3.11.7 Requisition and Purchase Order Splitting

More than one (1) requisition shall not be issued for an identical item or items when one requisition could satisfactorily address the particular material or service needs of the end user Department. Requisition and Purchase Order splitting so as to purposely circumvent the procurement process or level of authorization is strictly prohibited.

Requisition and Purchase Order splitting includes, but is not limited to:

* Identical items (no matter what the quantity) requested from the same area within 30 days of each other; and/or

* Multiple items (no matter what the quantity) requested from the same area split to, for example, avoid required authorizations, and/or competitive procurement processes.

Requisitions should include like items or like categories of items, all of which are obtainable from the same type of vendor.

Controls in the FMIS procurement system have warning signals for drawing attention to suspicious multiple procurement that are limited to procurement thresholds. These signals are regularly reviewed by the Materials Department.

### 3.11.8 AWARD TO RESPONSIBLE CONTRACTORS (FTA Circular 4220.1F Ch.VI,8.(b))

The MBTA shall make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed agreement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance including financial and technical resources.

Evaluation of the responsibility of prospective contractors may be made based upon the following sources:

1. A review of the list of debarred, suspended, or ineligible firms or individuals.
2. From the prospective contractors’ bids and proposals, replies to questionnaires, financial data, current and past performance records and sub-contracting arrangements.
3. Publications, including credit ratings, trade and financial journals, business directories and registers.
4. References such as supplies, customers, banks and financial institutions, commercial credit agencies and other government agencies, trade agencies and chamber of commerce.
5. Documented past performance with the MBTA or its member agencies in the Massachusetts Department of Transportation.

Documentation

At a minimum, buyers must check the federal System for Award Management (SAM) www.sam.gov/portal/public/SAM/ to ensure that vendors are not on it. Buyers will search the vendor by name or DUNS number and print out the results. This document must be retained in the permanent procurement file for all purchases that exceed the $3,500 micro-purchase limit. Vendors who appear on this list are barred from receiving contract awards that contain federal funding and should not be awarded contracts.

**These search results are time and date stamped by the computer system. Buyers should conduct these searches *before* a contract is awarded to a vendor.**

### 3.11.9 Solicitation Mailing List (Vendor/Bidder’s Lists) (FTA Circular 4220.1F Ch.VI,3.c(2))

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| **REQUIREMENT**In addition to the general requirement for full and open competition which we have discussed above, an additional requirement dealing (indirectly) with a mailing list is the requirement in FTA Circular 4220.1F that, if the IFB method is used, "bids shall be solicited from an adequate number of known sources." |

The development and use of a solicitation mailing list is a critical part of the procurement process. This list includes vendors that have expressed an interest in receiving the solicitation, or that the MBTA considers capable of filling the requirements of a particular procurement.

Over a period of time and after repetitive procurements for the same items or services, the mailing list for some items will stabilize, and there may be no need for adding too many new names to the list, even after an aggressive and comprehensive advertisement campaign. However, it is important to continue to "manage" that list and ensure it is kept current, and that firms expressing an interest or desire to participate in up‑coming procurements are added. During the actual solicitation process (after the solicitation is released), the list takes on added significance because it is the record detailing which firms received the solicitation and to whom amendments should be issued.

3.11.9.1 Procurement Role of Solicitation Mailing Lists ‑ Very simply put, the solicitation mailing list contains the names, addresses, and frequently the point of contact for vendors that will receive your solicitation.

3.11.9.2 Development of Solicitation Mailing Lists – These lists can be developed from a variety of sources:

* Prior procurements are reviewed and the names of entities that submitted bids or proposals in response to those procurements are included in the list for this new procurement.
* If what is being procured is currently under contract, the incumbent contractor is normally included on the list.
* Firms that responded to the advertisement expressing an interest in obtaining the solicitation being issued should be added to the mailing list.
* It may be necessary to encourage the MBTA's internal customers to provide names of firms considered capable of filling the requirements of the procurement for inclusion on your list. If the specifications for the requirement were prepared by third party consultants or contractors, they may be a source for firms that are considered capable of filling the requirements.
* The ODCR program office within the MBTA can identify any DBE vendors that may be interested in receiving the solicitation (Please see Chapter 3 section on DBE's).

Once the solicitation has been issued, the mailing list should be used to ensure that any solicitation amendments are furnished to all entities that received the original solicitation.

After the solicitation process is completed, the final administrative task associated with the mailing list is its update. Indicate which firms on the list responded to the solicitation, which firms did not but asked to receive future solicitations (if this was asked for), and which firms did not respond, nor indicate they wanted future solicitations. An updated list will make preparation of the next solicitation that much easier to accomplish.

### 3.11.10 Solicitation (FTA Circular 4220.1F Ch.VI,3.c(2))

**REQUIREMENT**

FTA Circular 4220.1F requires that invitations for bids be issued with sufficient time to prepare bids prior to the date set for opening the bids. Further, the invitation for bids will include any specifications and pertinent attachments and shall properly define the items or services sought in order for the bidder to properly respond.

FTA Circular 4220.1F requires that requests for proposals identify all evaluation factors along with their relative importance.

**PROCEDURES**

The solicitation, either an invitation for bids or a request for proposals, identifies both the procurement and the contact person(s). It contains simple, clear instructions for preparing an offer, often including a checklist of the items in the offer. It clearly states the time and manner for submitting the offer, and the length of time for which the offer must remain firm (not subject to withdrawal).

It is important avoid unnecessary requirements and keep the solicitation as simple as possible. Large or complex solicitation packages may discourage some good potential offerors.

#### 3.11.10.1 Common Solicitation Contents (IFB and RFP)

1. **A Bid form which acts as the solicitation document ‑** When signed by the bidder or proposer, this acts as the offer which, if accepted by the MBTA, may result in a binding contract. Although it is typically a single page, it is not unusual for the acceptance document (the contract) to be a separate form. The form typically identifies:

* A solicitation number for reference;
* Who to contact for questions;
* If there will be a pre‑bid or pre‑proposal conference and where and when it will be held;
* The date, time, and place bids or proposals are to be received;
* What additional documents are included in the solicitation and what documents will be included in the contract;
* Space for the price (offer) to be included;
* Space where amendments to the solicitation can be acknowledged;
* Space where the firm can be identified; and
* Space for the firm official to sign and date the bid or proposal.

If the instructions are lengthy, and because of the many certification forms typically required, it is becoming more common to provide a separate checklist of all the documents or other submissions required in a responsive offer. For a list of these, please see Appendix.

2.  **A document that describes the various representations and certifications that are required to be made by the bidder or offeror in conjunction with the procurement at the time of bid or proposal submission.** Many of these relate to responsibility‑type issues and typically include:

* A representation as to the type of business the offeror is (individual, partnership, sole proprietorship, etc.);
* A representation as to the DBE status (Please see Chapter 3 section related to DBE's);
* A certification regarding compliance with the DBE provisions of the contract (Please see Chapter 3 section related to DBE's);
* A certification of restrictions on lobbying;
* A certification regarding compliance or non‑compliance with the Buy America provisions of the Federal Transit Act and 49 CFR Part 661; and
* Any submissions required by state law.

3.  **A document that includes solicitation instructions and conditions ‑** These typically include instructions relating to: offer preparation; instructions relating to acknowledging amendments to the solicitation; rules relating to late submissions, modifications and withdrawals of offers; instructions relating to the DBE participation goals and program; instructions as to how the contract will be awarded; advice as to protest procedures; advice as to cancelling the solicitation; and establishment of an order of precedence covering how inconsistencies between provisions of the solicitation are to be resolved.

4.  **A document that includes special contract requirements or provisions (as opposed to general provisions) relating to this particular solicitation and contract that are not addressed elsewhere in the solicitation** **‑**  These provisions typically address such things as bonding requirements; insurance requirements; any special permits or licenses required; what property the MBTA will furnish the contractor and rules relating to that property; liquidated damages; warranties; indemnity provisions; options; contract administration; and rules relating to royalties and patents. If a cost‑type contract will be awarded, special provisions relating to those contracts are typically included in the special provisions.

5.  **Special provisions required by the FTA through FTA Circular 4220.1F,** **or the Master Agreement, which must be included in the solicitation and the contract ‑** Model clauses for compliance with these requirements include such provisions as EEO clauses; affirmative action clauses; DBE program clauses; Contract Work Hours and Safety Standards Act provisions; Davis‑Bacon Act provisions; Title VI of the Civil Rights Act of 1964 compliance provisions; Clean Air and Water Acts provisions; Energy Policy and Conservation Act provisions; Cargo Preference Act clause; Buy America Provisions; Officials Not to
Benefit clause, and Restrictions on Lobbying provisions.

6.  **The contractual requirements of the DBE programs ‑** (Sometimes included in special provisions.) DBE programs for FTA funded projects must comply with 49 CFR Part 23 (Please see Chapter 3 section related to DBE's).

7.  **Each solicitation will have some sort of specification, statement of work, or scope of work describing what it is that is being sought for procurement**. As presented in the Specification sectionof the Manual, the detail furnished will vary from contract to contract, but it is against this document that satisfactory performance of the contractor will be measured ‑‑ did the contractor furnish satisfactorily what is requested?

### 3.11.11 Pre‑Bid and Pre‑Proposal Conferences

**PROCEDURES**

Pre‑bid and pre‑proposal conferences are generally used in complex acquisitions as a means of briefing prospective offerors, and explaining complicated specifications and requirements to them as early as possible after the solicitation has been issued and before offers are received. This is also an open forum for potential respondents to address ambiguities in the solicitation documents that may require clarification. Notice of the conference is included in the solicitation at the time of issuance.

When utilized properly, a pre‑bid or pre‑proposal conference is a valuable tool for both the MBTA and the prospective offerors. There are certain common practices and policies relating to this conference that will aid in achieving a successful procurement.

The decision has to be made in the solicitation preparation process whether a pre‑proposal or pre‑bid conference will be conducted. It is recommended that one be considered if the acquisition is deemed complex or contains peculiar requirements that can only be addressed by holding a conference for the benefit of the prospective offerors. Determine if a conference is necessary and put the time and location details in the solicitation.

An agenda must be developed for the conference and the buyer must arrange to have the appropriate staff members at the conference who can respond knowledgeably to questions. In addition to the procurement official, a technical representative and a representative from the DBE department (ODCR), if appropriate, is beneficial at the conference (Please see Chapter 3 section related to DBE's).

Someone needs to be present at the conference who can develop a record of what transpired, including a sign‑in list of attendees. Normally, this list is made available to attendees as a matter of information. One of the uses of this list by potential offerors is determining who else is interested in the project, and who might be interested in teaming.

At the conference, advise conferees that remarks and explanations at the conference shall not qualify the terms of the solicitation, unless a written amendment is furnished to everyone.

The pre-bid conference or general provisions in the solicitation document may also limit the effect of unwritten statements at the conference or of any other oral or unauthorized changes or qualifications of the solicitation terms. The specifications and solicitation document must stand alone representing the contractual commitment.

During the conference, in addition to responding to any questions raised by the conferees, and anything unusual about the special provisions or bidding conditions should be explained. A DBE staff member will explain the DBE program and the goals set for the procurement (Please see Chapter 3 section related to DBE's). A technical staff member will give an overview of the specifications or scope of work.

At the conclusion of the conference, the buyer must determine which questions have been raised that will necessitate the issuance of a solicitation amendment. Other questions may have been received during this period of time that highlighted the need for an amendment, or an issue might have been raised by internal reviews that necessitated an amendment.

After the conference, finalize the record of attendees and promptly furnish it to all prospective offerors, upon their request (those on the final solicitation mailing list); whether they were in attendance at the meeting or not. It is important that all prospective offerors be furnished the same information concerning the proposed acquisition. This can be furnished with the amendment if one is to be issued.

It is preferable for prospective offerors whom have been offered an opportunity to actually visit the site (as related to the procurement), to so do in conjunction with this pre-bid, pre-proposal conference. It is necessary to be sensitive to the cost offerors incur in preparing a bid or proposal and the MBTA should try to allow them to accomplish multiple tasks on the same trip, particularly for those entities traveling to your location from another city, state or country.

### 3.11.12 Amendment of Solicitations

**PROCEDURES**

Frequently, in the course of the solicitation process and prior to receipt of offers, something may be found within the solicitation package that needs to be corrected. This is something that can be done easily and may enhance competition if the changes are significant (i.e., impact quantity, specifications, or delivery). Each recipient of the solicitation should receive the amendments and should acknowledge that receipt by the time of submitting its offer. Extension of the time for receipt of offers should be considered, if necessary, to permit offerors to compete effectively under the modified terms.

In many solicitations, someone will bring to attention a problem with the solicitation that necessitates a change. The problem may have something to do with the "boilerplate", changes in quantity, the specifications, delivery schedules, opening dates, or drawings. It may have to do with correcting an ambiguous provision or resolving conflicting provisions. Regardless of what (or who) requires the amendment, there are a few simple steps/considerations that are normally followed.

As presented in the pre‑bid/pre‑proposal conference section, even if a change was mentioned during that conference, an amendment to the solicitation must be issued. When the written terms of the solicitation are changed, they must be done formally in writing. This serves two purposes: (1) It documents the change in writing so there are no misunderstandings, and (2) It provides the changes to offerors who were not at the conference.

Amendments include the following elements:

* Identify the solicitation number of the original solicitation;
* Identify the amendment number;
* Identify the contact person and phone number within the department for further information;
* Indicate whether or not the time and date specified in the original solicitation is changed as a result of the amendment;
* Advise offerors of the need to and how they should acknowledge receipt of the amendment;
* Advise offerors what the changes are; and
* Have the amendment signed by the appropriate procurement official, most frequently the contracting officer.

Amendments must be sent to every firm that has been furnished the original solicitation (the IFB or RFP). Once the solicitation has been issued, using the mailing list to ensure that any solicitation amendments are furnished to all entities that received the original solicitation is important.

One of the critical issues when issuing an amendment is whether or not to extend the time and date for receipt of offers. The impact of the changes being made in light of the time it will take a prudent offeror to incorporate those changes should be considered. This includes the time impact on the work already done in preparing the bid or proposal. The impact could be minimal or very significant and there is no "cookie cutter" answer to how much additional time, if any, should be allowed ‑‑ Sufficient time should be allowed for the changes to be considered in a meaningful manner.

One "warning:" this may be the first time in the solicitation process the schedule the Agency’s internal customer has established may become an issue. Basic instincts may say that the time and date set for receipt should be extended but the internal customer may say the change is negligible and no time is warranted. Early planning and communication with the customer may build in some time for changes like this. If not, the consequences may be fewer competitors, a protest, pricing that includes unnecessary contingencies, or post‑award discovery of specification conflicts that require compensation for changes.

If a decision is made to amend the solicitation with bids due in two days, consider notifying prospective offerors by telephone, Fax, or telegram of the new date and time and follow that notification up with an amendment to the solicitation. If offers have already been received in your bid room, it is recommended that the offerors be notified of the amendment and inquire if they want their offers returned.

There are special rules regarding solicitation amendments that incorporate revisions or modifications of Davis‑Bacon Act wage determinations.

If, because of schedule distress, it is agreed to proceed with the procurement without a necessary amendment, adverse consequences are likely when the change is brought forward with the ultimate contractor and the contract must be modified. It is even possible that the change would constitute a cardinal change if attempted after award, and would require a new competition; in this case you have little choice but to amend and postpone.

**3.11.13 Receipt of Offers**

**PROCEDURES**

The culmination of a solicitation process is the receipt of bids or proposals. Regardless of the method used, great importance is attached to the time of receipt. Preparations are made to ensure that offers are not delayed and are properly recorded. The solicitation may contain a checklist of items to be submitted with the offers, and the individual submittals are discussed in the following sections.

Bids submitted to the Materials Department are time stamped upon receipt and recorded in the bid log and promptly filed in a folder created specifically for each solicitation.

### Late bids (FTA Circular 4220.1F Ch.VI,3.c(2)(g))

Any offer received at the Materials Management Department after the exact time specified for receipt as designated will not be considered, unless it is received before the award is made, and:

* Package was sent by certified or registered US Mail, no later than the 5th calendar date before the due date; or
* Package was sent by mail, or other method authorized by the MBTA (e.g., facsimile), and the late receipt was due solely to the mishandling of the package by the MBTA after receipt; or
* It is the only offer received by the MBTA.

**3.11.14 Federally Required Submissions with Offers**

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| **REQUIREMENT**FTA Circular 4220.1F, entitled "Statutory and Regulatory Requirements" states that:"A current but not all inclusive and comprehensive lists of statutory and regulatory requirements applicable to grantee procurements (such as Davis‑Bacon Act, Disadvantaged Business Enterprise, Clean Air, and Buy America) is contained in the FTA Master Agreement. Grantees are responsible for evaluating these requirements for relevance and applicability to each procurement. For example, procurements involving the purchase of iron, steel and manufactured goods will be subject to the 'Buy America' requirements in 49 CFR Part 661. Further guidance concerning these requirements and suggested wording for contract clauses may be found in FTA's specific requirement section of this manual. |

**PROCEDURES**

The FTA has included a comprehensive listing of contract clause requirements in the Master Agreement. This section highlights the federal requirements that must be submitted to the MBTA as part of the solicitation process involving either IFBs or RFPs.

**3.11.15 Debarment, Suspension, and other Responsibility Matters** (FTA Circular 4220.1F Ch.VI, 8. (b))

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| **REQUIREMENT** Executive departments and agencies shall participate in a government-wide system for (nonprocurement) debarment and suspension.  |

Much like the "common grant rule" (49 CFR Part 18), the federal government has adopted a "common rule" on the government‑wide effect of debarments and suspensions. DOT's implementation of that common rule is found at 49 CFR Part 29. The policy behind this rule is that a person or entity that is debarred or suspended shall be excluded from Federal financial and non‑financial assistance and benefits under Federal programs and activities. As stated in the regulations, debarment and suspension are serious actions which should be used only in the public interest and for the protection of the federal government and not for the purposes of punishment.

In order to protect the public interest, it is the policy of the federal government to conduct business only with responsible persons. Persons who have been debarred or suspended are not "responsible" and, unless approved by the FTA, contracts will not be awarded to those persons. A certification by the contractor is not longer required, but the Authority is required to check the System for Award Management (SAM) and the Commonwealth’s debarment lists to ensure that contractors are indeed responsible. Additionally, a clause which addresses debarment status must be included in all contracts with a value over $50,000.

The MBTA performs a responsibility check for all procurements that exceed the micro-purchase limit of $3,500, using the federal System for Award Management (SAM).

**3.11.16 Lobbying Certification**

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| **REQUIREMENT** §3.d of the Master Agreement states that:d. Lobbying Restrictions. The Recipient agrees as follows:(1) Refrain from using Federal assistance funds to support lobbying, and(2) Comply, and assure the compliance by each third party contractor at any tier and each sub recipient at any tier, with applicable requirements of U.S. DOT regulations, "New Restrictions on Lobbying," 49 CFR Part 20, modified as necessary by 31 U.S.C. § 1352. |

**PROCEDURES**

The requirements set forth above have been included in all grants between the FTA and its grantees with a requirement that the certification flow down to all contractors and subcontractors for whom a contract involving federal funds in excess of $100,000 is contemplated. The requirement has two aspects to it: First, the certification itself must be executed and returned with the bid or proposal. Second, in the event funds of any sort have been used for lobbying activities by the contractor or any subcontractor; a Standard Form‑LLL, "Disclosure Form to Report Lobbying" must also be completed. It is your ultimate responsibility to ensure that these certifications and disclosure forms are submitted to the FTA.

Certifications Required ‑ In all solicitations that are expected to result in contract amounts in excess of $100,000, the certification set forth in Appendix A to 49 CFR Part 20 must be included

Timeliness ‑ The certification (and Standard Form LLL if applicable) should be executed and returned with the bid or proposal. Because the language of the regulations refers to needing the Certification and applicable disclosures at time of award, failure to submit the executed certification with the offer would not be considered a responsiveness issue in a competitive bidding procurement.

Subcontracts – It may not always be possible to know who the prime contractor subcontracts with, particularly in fixed price contracts. It is recommended that during any pre‑performance conference, the prime should be reminded of the requirement to forward the certification and disclosure statements made by subcontractors at any tier who have subcontracts in excess of $100,000 through the tiers to the contracting officer.

**3.11.17 Acknowledgment of Solicitation Addenda**

**PROCEDURES**

Although the topic has been discussed in different contexts, one of the most critical submissions that should be received with offers is an acknowledgment of any amendments to the solicitation. These are the changes to the terms of the solicitation (including to the "boilerplate," the drawings, specifications, scope of work, etc.) that in all likelihood have an impact on price or schedule. If an amendment is not acknowledged, it is impossible to know if the offeror is really offering the same product or service that is wanted.

There are two ways which allow offerors to acknowledge receipt of amendments.

* The MBTA includes a form in thesolicitation packagefor solicitation amendments to be acknowledged.
* A second way is for the offeror to actually sign and date the amendment cover sheet and return it either at the time of receipt or include it with the offer.

If a bid or proposal is received and one or more of the issued amendments are not acknowledged, what should be done?

If the amendment is material, accumulate the documents and seek the advice of the legal counsel. Particularly in an IFB procurement, there may be a low bid that is non‑responsive and cannot be considered for award. The failure to acknowledge an amendment is not usually "fatal" and an acknowledgment could be sought during negotiations or discussions.

**3.11.18 Bid Guarantee** (FTA Circular 4220.1F Ch.VI, 2.h(1)(a-c))

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| REQUIREMENT |
| In discussing bonding requirements, FTA Circular 4220.1F provides:For those construction or facility improvement contracts or subcontracts exceeding $100,000, FTA may accept the bonding policy and requirements of the grantee, provided FTA determined that the policy and requirements adequately protect the Federal interest. FTA has determined that grantee policies and requirements that meet the following minimum criteria adequately protect the Federal interest: 1. A bid guarantee from each bidder equivalent to five (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, upon acceptance of its bid, execute such contractual documents as may be required within the time specified;

§15.m of the Master Agreement states that:(m) Bonding - The Recipient agrees to comply with the following bonding requirements.(1) Construction Activities – The recipient agrees to provide bid guarantee, contract performance, and payment bonding to the extent deemed adequate by FTA and applicable Federal regulations, and comply with any other bonding requirements FTA may issue.(2) Other Activities – The Recipient agrees to comply with any other bonding requirements or restrictions FTA may impose.State laws are sometimes specific in requiring or prohibiting security and guarantees in public procurements. Performance bonds are often required, and the requirement may also affect bid guaranties. |

**PROCEDURES**

The primary function of obtaining a bid guarantee is to financially protect the owner from loss should the successful offeror fail to execute further contractual instruments and furnish performance bonds or insurance certificates as required. As required by the FTA, this financial protection on construction contracts is 5% of the amount of the offer. Bid guaranties are usually used only where there is a requirement for performance and/or payment bonds are required prior to the commencement of performance.

In this section, we will discuss the submission requirements for the various types of bid guarantee, such as bid bonds, certified checks, and other allowable negotiable instruments.

Solicitation ‑ If a bid guarantee is to be required, a solicitation clause is included that details:

* the requirement;
* the amount of the guarantee (typically 5 percent of offer price) and how it should be calculated;
* acceptable forms of guarantee (usually, cashier's check, letter of credit, or bond from a licensed agency); and
* that the guarantee must be submitted with the offer.

Non-responsiveness ‑ The actions to be taken if one is not furnished in accordance with the solicitation requirement may be included in the policy regarding bid guaranties.

* If the proper guarantee is not furnished with the bid, the bid is non‑responsive. If the bidder is allowed to submit the missing guarantee or correct a defective guarantee after the bids were "exposed", there is the risk of allowing "two bites from the apple." Once the bids are known, the bidder could decide to submit (or not) the bid guarantee based on how much money is left on the table!
* In a *competitive proposal* process, if a guarantee was required and was not submitted, the solicitation document would determine whether it could be asked for during negotiations. But what should be done if a contract could be awarded without negotiations, (a right frequently reserved to be exercised)? If one offeror is asked for its bid guarantee, is that considered discussions or negotiations? If so, that would necessitate opening discussions with all offerors in the competitive range. For these reasons, and because proposers have other means of effectively withdrawing from competitive proposal processes, proposal guarantee is less frequently used than bid guarantee (even if a performance bond is ultimately required).

Custody of Guarantee ‑ It is recommended that if the guarantee is a bond or letter of credit, it be retained with the procurement file. If it is other than a bid bond, it is recommended that it be placed in a secure area (safe or locked file cabinet) with a notation in the procurement file its location.

Unused Guarantee ‑ Guaranties have a financial impact on proposers as long as they are in effect. Therefore, they should be returned to the unsuccessful offerors as soon as it is prudent to do so (e.g., the contract has been awarded or the offeror is too far down the bid list to reasonably expect an award).

Return unused guarantees to contractors after the contingencies have been met ‑‑ all contractual requirements have been met and the required performance and payment bonds and insurance certificates are in place as protection for the owner in the event of default or non‑performance of the contractor.

Collection of Bond ‑ Although collecting funds from a bonding agency are seldom used under a bid bond, collection is like the capture of the king in chess. It dictates many of the moves that could be made to use a bid bond effectively without imposing unnecessary burden on your offerors. The conditions which discharge the bond should be specified in your solicitation. Generally, the principal condition that discharges the bond or guarantee is the furnishing of a performance bond. Often the terms of the bid guarantee also guarantee that the offeror will provide executed contract documents, insurance certificates, payment bonds, or evidence of DBE compliance (Please see Chapter 3 section related to DBE's).

Once the performance bond is in place, it guarantees performance of all other contractor obligations. The most likely reasons a performance bond would not be furnished (which are the conditions to be looked for in deciding whether to require bid guarantee) are: a financial condition so weak that bonding companies will not participate, such a large amount of bonds already issued that the bond cannot be obtained, second thoughts about the contract based on the information revealed up to the point in time of bonding, or a frivolous bid.

If the performance bond is not provided, it can be specified under the right under the bid guarantee provision to immediately accept the next ranked offer and to collect *from the defaulting offeror* the price and value difference between the offers. (Estimating this difference is one way to set the amount of the bid guarantee.) If the guarantee is a bond or equivalent letter of credit, it may be necessary to obtain a judgment against the offeror before there can be actual collection from the bonding company or bank. As indicated above, it is critical to most suppliers who provide bid guarantee that they retain the confidence of bonding companies. The bonding company's concern may assist in collection from a defaulting offeror.

**3.11.19 Responsive Bidder** (FTA Circular 4220.1F Ch.VI,3.c(2)(f))

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| REQUIREMENT |
| The concept of "responsiveness" is discussed in FTA Circular 4220.1F as an integral element of the sealed bidding method of procurement:c. Procurement by Sealed Bids/Invitation for Bid (IFB). Bids are publicly solicited and a firm‑fixed‑price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. FTA Circular 4220.1F, in discussing the requirements to be used if the sealed bid method of procurement, lists the following:(d) A firm fixed‑price contract award will be made in writing to the lowest responsive and responsible bidder. When specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest; |

**PROCEDURES**

The concept of awarding a contract to the lowest responsive and responsible bidder is a common precept in public contracting at the Federal, state, and local levels throughout the country. It is helpful to maintain the distinction among these concepts in reviewing bids, and to consider them in the stated sequence. First identify the lowest bid, then find the lowest responsive bid, then find the lowest responsive and responsible bidder.

Evaluation Sequence

The following is a sequence of evaluation that is useful for explanation and may also be useful in practice; however, the concepts and correct determinations are far more important to successful procurement than is the sequence. Examination of bids logically begins with the lowest bidder. Once the lowest bidder is determined, look to see if the bidder is responsive. "Responsiveness" is a concept critical to the sealed bidding process. In public contracting, in order for a bid to be acceptable, it must conform in all material respects to the requirements stated in the invitation. Responsiveness is determined from the bid documents themselves and, with very few exceptions, is determined with no discussions or further input from the bidder.

If the initial low bidder is not responsive (the bid does not conform to the material requirements of the invitation), you need go no further with that bidder. Instead you may go back and look at the second lowest bid and determine if it is responsive.

Once you have determined that you have a low priced bidder who is responsive, you then begin the more subjective process of determining the bidder's responsibility.

"Responsibility" is a term with specific connotations in procurement. FTA defines "responsibility" to be a contractor who possesses the ability to perform successfully under the terms and conditions of the proposed procurement. In determining whether a contractor possesses this ability, you may consider such matters as contractor integrity, compliance with public policy (e.g., EEO record, attainment of DBE goal, not debarred or suspended, etc.), record of past performance, and financial and technical resources (Please see Chapter 3 section related to DBE's for additional information). Unlike responsiveness, which normally can be finally determined based on the bids, a determination of responsibility may be affected by new information up to the time of contract award. Thus, in ascertaining whether or not a bidder is responsible, discussions may be held with the bidder to discuss these factors so that, by the time of award, a positive determination can be made. If you cannot determine that the bidder is responsible, look through the list of bidders again to determine a low, responsive, responsible bidder to whom a contract can be awarded.

Strict Responsiveness ‑ To understand the concept of "responsiveness" and its practical rigidity in the public contracting environment, recall that the IFB issued by the MBTA is designed so that all bidders who respond can make comparable offers under the same terms and conditions. When a bidder submits its bid to the MBTA in response to the IFB, the MBTA must be able to accept that bid as submitted, thereby creating a binding contract. The following discussion of responsiveness will cover general principles and parameters of Federal procurement precedents. The best practice is to establish a clear, unambiguous MBTA policy on which bidders can rely, so that, in preparing their bids, they can be confident that no material deviations will be allowed to any bidder in complying with the solicitation and its specifications.

**Purpose**

Requiring strict responsiveness, i.e. compliance in all material respects with the IFB "enables bidders to stand on an equal footing and maintains the integrity of the sealed bidding system." Examples of bids typically considered nonresponsive include:

* The bid fails to conform to material requirements;
* The bid does not conform to applicable specifications (unless the invitation allowed alternates);
* The bid fails to conform to delivery schedule or permissible alternates;
* The bid imposes conditions that would modify the requirements of the invitation or limit the bidder's liability to the MBTA;
* There is a condition of the bid which affects the substance of the bid (i.e., affects price, quantity, quality, or delivery of the items offered) or works an injustice on other bidders;
* The bid contains prices for line items that are materially unbalanced, i.e., figures in the bid conflict with the total bid price; date;
* The bidder fails to furnish a bid guarantee in accordance with the requirements of the invitation; or
* Failure to submit Buy America Certification.

Responsiveness is a fairly objective concept and is ascertainable at the time of bid opening. Further, the bidder's intent to be bound by the IFBs requirements can normally be determined from the bid itself. A "second bite at the apple" is a phrase commonly heard in discussions pertaining to the precept that responsiveness be determined at the bid opening solely from the bid documents and without explanation. It is necessary not to allow an apparently low bidder to re‑evaluate its bid after the public opening and effectively withdraw the bid by refusing to respond or responding in a subversive way; the bidder should not have a second bite at the apple. This means that the bid package must be examined thoroughly. Some of the questions to ask are:

* Does the cover letter take exception to any material terms and conditions?
* Is the bid ambiguous? Is it susceptible to two or more reasonable interpretations?
* Were all material amendments to the solicitation acknowledged?
* Was the bid signed?
* Were all material representations and certifications completed?
* Is the Buy America certificate required by 49 CFR § 661.6 or § 661.12 signed?
* Were required descriptive literature and bid samples included with the bid?
* If required, was a bid bond or bid guarantee submitted?
* Was the bid defective?
* Was the price offered firm and definite?
* Were the material items or information required by the invitation submitted with the bid?
* Was the bid received at the place designated in the invitation at the exact time specified or was it late?

If something is questionable, is the issue one of responsibility or responsiveness? The internal customers may want to gain greater confidence in the bids by specifying, purportedly as a condition of responsiveness, that bidders have specific capacities. A defect may also be noted (e.g. in certifications or requested information) that relates primarily to the ability of the bidder to perform. Precedent for direct Federal procurement is that merely by the language in an IFB, a contracting agency cannot change a matter of responsibility (ability to perform) into one of responsiveness (unequivocal offer to perform). The best practice is to maintain this distinction.

Materiality ‑ Whole courses are taught on sealed bidding and the issue of responsiveness. The list of questions and issues raised in this discussion should not be considered as all encompassing. Instead, they are intended to raise sensitivity to some of the issues that impact responsiveness. It should be apparent from this discussion that the single most important concept impacting responsiveness is "materiality" ‑‑ does the inclusion or omission of the fact, item, or requirement affect price, quantity, quality, or delivery of the items offered? If so, the bid is probably nonresponsive. If not, the bid is probably responsive. There are, however, many facts and situations that do not clearly fall within these parameters and become issues that may require analysis and input from your legal advisor. If in doubt, ask!

DBE ‑ Although DBE program compliance is more often a responsibility requirement, some processes make DBE compliance a condition of responsiveness (Please see Chapter 3 section related to DBE's for additional information).

**3.11.20 Bid Withdrawal**

When to allow withdrawal of bids

If a written request is received from a bidder prior to the time and date set for receipt of bids that it wishes to withdraw a bid it has previously submitted, that request is honored under most procurement policies. If the request to withdraw is received after the time and date set for receipt of bids, the same rules apply to that request as would apply to the late receipt of a bid.

Bids may be withdrawn by written notice or telegram (including mailgram) received at any time before the exact time set for receipt of bids. If the solicitation authorizes facsimile bids, bids may be withdrawn via facsimile received at any time before the exact time set for receipt of bids, subject to the conditions specified in the provision entitled 'Facsimile Bids.' A bid may be withdrawn in person by a bidder or its authorized
representative if, before the exact time set for receipt of bids, the identity of the person requesting withdrawal is established and the person signs a receipt for the bid.

If a bidder has established the existence of a mistake in its bid prior to award of the contract, it should be allowed to withdraw its bid if:

* The mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or
* The bidder submits proof which clearly and convincingly demonstrates that a mistake was made.

What if the request to withdraw does not fit into those categories?

For the reasons that follow, it may probably be advisable not allow the bidder to withdraw its bid without legal counsel. This is an issue that may be impacted by an interpretation of the state law on public contracting, particularly in the absence of a clause as will be discussed next.

Of critical importance to being able to take this position is the inclusion in the solicitation document of two clauses which we have referred to in previous sections of the Manual. The first clause (which we have included a suggested provision earlier in this discussion) is the Late Submissions, Modifications, and Withdrawals of Bids clause. The second is a clause addressing the bid notification period as discussed in the Section, "Solicitation."

**3.12 Bid Mistakes**

**PROCEDURES**

It may not be as certain as death and taxes, but inevitably and unfortunately, a mistake may be discovered in a low bid. A mistake doesn't necessarily mean a contract cannot be awarded to the low bidder, but that could be the result. How the mistake is typically dealt with will depend upon what the mistake is and when it is discovered.

Mistakes in bids are usually discovered after bids are opened and before the contract is awarded. The mistake, or suspicion of a mistake, may be discovered by the review of the bids.

The four generally accepted categories of bid mistakes are:

1. Minor informalities or irregularities in bids prior to award of the contract;

2. Obvious or apparent clerical mistakes discovered prior to award;

3. Mistakes other than minor informalities or irregularities in bids, or obvious or apparent clerical mistakes that are discovered prior to award; or

4. Mistakes discovered after award.

If a mistake fits within one of these categories, three things can happen: the mistake can be corrected, the mistake will be recognized and the bid allowed to be withdrawn, or the mistake will not be recognized and the bid not allowed to be withdrawn.

The following tables analyze the types of mistake and one set of actions; many variations on the illustrative rules presented here are successfully in use.

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| **Minor informalities or irregularities in bids priorto award of the contract.** Merely a matter of form and not of substance. May be an immaterial defect in a bid that can be corrected or waived without being prejudicial to other bidders. The defect is "immaterial" when the effect on price, quantity, quality, or delivery is negligible when contrasted  | **Remedy:** the contracting officer shall give the bidder an opportunity to cure the deficiency or waive it, whichever is in the best interests of the owner. **Examples** of minor informalities or irregularities include failure of the bidder to: Return the incorrect number of signed bids required by the IFB (1 submitted, 3 required). Sign the bid, but only if the unsigned bid is accompanied by other material indicating the bidder's intent to be bound, such as a bid guarantee or letter signed by the bidder referring to and clearly identifying the bid itself.Acknowledge receipt of an amendment to the IFB, but only if it is clear from the bid itself that the bidder received the |
| with the total cost or scope of the requirement being procured. | amendment and intended to be bound by its terms or the amendment involved had no (or a negligible) effect on price, quantity, quality, or delivery.Furnish required information that goes to the issue of responsibility (e.g., number of employees bidder has, information concerning parent company and any affiliates, certifications concerning EEO and Affirmative Action programs, certification concerning Lobbying.) |
| **Obvious or apparent clerical mistakes discovered prior to award.** Mistake must be obvious or apparent on the face of the bid. This is the category of mistake most frequently discovered by the contracting officer during its examination of the bid after bid opening. If it is known, or there is reason to know or suspect, that a mistake in a bid has been made, there is a real issue of whether you can, in good faith, accept that bid. The bidder may also discover this category of mistake and bring it to your attention and request that it be allowed to correct the mistake. | **Examples** include: Obvious misplacement of decimal point. Obvious reversal of the price f.o.b. destination and price f.o.b. origin –higher price for you picking the product up at the origin than for the bidder to deliver the product to the place designated by you.  - Obvious mistake in designation of unit.  - Typographical errors.  - Error in extending unit prices.  - Transposition errors.  - Arithmetic errors. **Procedure:** What do to do if there is this category of mistake? Recommend the legal counsel be made aware of situation so proper legal advice can be obtained the mistake evaluation process is undertaken. This is an area that is prime for a later protest by either the firm requesting relief from a "mistake" or from another bidder that feels it could be impacted by the decision regarding the mistake.Request verification of the bid. This is necessary to assure the contracting officer that the bid as confirmed is without error, or to elicit the allegation of a mistake by the bidder.This process normally includes the following steps: Prepare a written request to the bidder that it verify its bid price.The request puts the bidder on notice of a mistake suspected by the contracting officer as appropriate. For instance, the bid is so much lower than the other bids or the agency independent estimate as to indicate a possibility of error. Or, highlight important or unusual characteristics of the specification. Point out the fact that there were changes in the specifications or requirements from previous purchases of a similar item. Your notice can include any information, which is proper for disclosure, that lead you (as the contracting officer) to believe that there is a mistake in the bid.Evaluate the verification response from the bidder. If the bidder verifies its original bid, you may consider the bid as originally submitted. If, however, the bidder alleges a mistake was made, it is recommended you take the following actions.Advise the bidder to make a written request to withdraw or modify its bid.Advise the bidder that it must support its request with any and all evidence to support the position it is taking.Advise the bidder of definite time deadlines in which to provide the information requested. |
|  | Be suspicious – don't forget that everyone's bid has been exposed to the world!**Remedy**: After verification, the contracting officer may correct an apparent or obvious clerical mistake. The following is recommended:Attach the verification to the original bid. Reflect the correction in the award document. Document the procurement file to indicate reason for the action taken. Allow a bid to be corrected if the bid, as submitted, was responsive ‑‑ The correction of a bid that would make a non‑responsive bid a responsive bid should not be allowed. If correction of the bid would displace one or more lower bids, it is recommended not to allow correction unless the evidence of the mistake and bid actually intended are ascertainable substantially from the invitation and bid itself as opposed to evidence brought in by the bidder in response to the request for verification.Do not allow the bid to be withdrawn.  |
| **Mistakes other than minor informalities or irregularities in bids, or obvious or apparent clerical mistakes that are discovered prior to** **award.** These mistakes are generally raised by the bidder along with a request to withdraw its bid.  | **Procedures:** It is recommended that the procedures outlined in the previous discussion be followed when a bidder alleges a mistake has been made. Particular attention should be paid to the evidence the bidder furnishes that establishes the existence of the mistake – remember, it is not obvious from the bid itself. Be particularly sensitive to the bidder that wants out of its bid simply because it made a judgmental error in preparing its bid and, after bid opening, discovered it "left too much money on the table."  |
| Examples include: A pricing element from a vendor was received but not included in the bid – the electrical subcontractor's quote was not included.The material cost for an element of work was included but the labor to install it was not included. | **Remedy:** The bidder should be allowed to withdraw its bid if: The mistake is clearly evident on the face of the bid document but the intended correct bid is not similarly evident; or The bidder submits proof which clearly and convincingly demonstrates that a mistake was made.A determination may be made to correct the bid and not allow its withdrawal if:The bidder requests permission to withdraw a bid rather than correct it; The evidence is clear and convincing both as to the existence of a mistake and as to the bid actually intended; and The bid, both as originally submitted and as corrected, is the lowest bid received. |
| **Mistakes discovered after award**.Although it is much rarer than other allegations of mistake, a contractor may raise the issue of mistake in bid after award of the contract is made. Obviously, the burden of proving a mistake was made at this time is great and must be carried by the contractor.  | **Remedy**: What to do with mistakes discovered and proven after award are really policy questions that should be considered when adopting the regulations. There really is no "best" practice in this area but it appears that transit properties have taken one of the two approaches outlined below: The "hard line" approach: do not allow correction except where the contracting officer makes a written determination that it would be unconscionable not to allow the mistake to be corrected.  |
|  | The FAR approach offers more alternatives other than the "unconscionable" approach:The mistake may be by contract amendment if correcting the mistake would be favorable to the transit property without changing the essential requirements of the specification.Additionally, a determination could be made to (a) rescind the contract; (b) reform 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 (c) allow no change to be made. It is recommended that you proceed very carefully through this process and with advice of legal counsel. |

**3.13 Revenue Contracts**

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| 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 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.  |

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, and FTA uses broad latitude in approving them.

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 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*.*

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.

The MBTA has experience in many of the areas of revenue generation:

* advertising ‑ buses, trains, stations and other property (billboards),
* lease/rental of MBTA‑ owned property ‑ concessions, newsstands, retail space, subleasing of office space

**3.14** **Time and Materials Contracts**

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| 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; and2. If the contract specifies a ceiling price that the contractor shall not exceed except at its own risk. |

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 his 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 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 Contract Administration -** This type of contract requires a high degree of Authority oversight during performance in order to provide reasonable assurance that efficient methods and cost controls are used by the contractor.

**3.15 Cost Plus Percentage of Cost Contracts (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 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.

**3.16 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:

1. Rent
2. Tuition
3. Insurance premiums
4. Subscriptions to publications
5. Software licenses
6. Construction mobilization costs
7. Public utility connections

**3.17 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. (See footnote above re *adequate security*.)

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

**3.18 Contract Termination**

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|  **FTA Circular 4220.1F requires grantees to include provisions in their contracts and subcontracts that allow for:**1. Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of $10,000.)
 |

**DISCUSSION**

It is sometimes necessary to end a contractual relationship prior to the completion of the work called for in the contract. In the public sector, when that relationship is ended because of a problem with the contractor's compliance with one or more terms of the contract, that termination is most commonly referred to as a *termination for default or a termination for cause*.

When the public agency decides to end the contract for a reason other than the default of the contractor, that termination is most frequently referred to as a *termination for the convenience of the public entity*.

If there is no plan for the possibility of one or the other of these events occurring in the contractual relationships, through the careful drafting of clauses which define the rights and obligations of the parties under a default and convenience situation, the consequences can be substantial from a monetary and contract performance standpoint.

Because of the nature of the different types of contracts, it may be prudent to consider having different termination clauses for fixed price as opposed to cost reimbursement contracts.

Because of the different nature of the product or services being bought, it may be necessaryt to have different termination clauses for construction, supply, and services contracts, including professional services.

It is possible to have an abbreviated termination clause for contracts below a dollar threshold (say $100,000). Likewise for purchase orders, there is need to decide how sophisticated these should to be.

P*artial* as well as *complete* terminations need to be addressed.

**3.18.1 Termination For Convenience**

DISCUSSION/JUSTIFICATION

The development of clauses allowing the government to terminate contracts for its convenience was a necessity growing out of the major wars and the need to end the large number of procurement contracts once the wars were ended. Without such clauses the government could terminate its contracts but such action constituted a breach. This meant having to pay profits to contractors on unperformed work (anticipatory profits). Thus the need for and the development of these convenience termination clauses, which give the government the right to terminate without cause and which limit the contractor's recovery of profit based upon the work actually performed up to the point of termination.

Please note that the FTA Circular requires a clause which defines "the manner by which the termination will be effected and the basis for settlement". Appendix II, Model Contract Clauses, number 21, contains model clauses with suggested language for both convenience and default terminations. These model clauses are very broad in their definition of the basis for settlement. For example, while the clauses clearly limit thecontractor's profit to work actually performed, and they commit to pay the contractor its costs, they do not define how those costs will be determined, i. e., the *cost principles* which will be used to determine allowable costs. It is highly recommended that these clauses be supplemented to stipulate the *cost principles* which will be operative in the event of a termination, and which will determine which costs are allowable and which are not. By using an objective and clearly defined method for determining allowable costs problems will be avoided which may otherwise arise in the negotiation of final costs.

**3.18.2 Partial Terminations**

The Termination for Convenience clause must include a provision allowing for a partial termination of the work, in which case the contractor must continue with the unterminated portion. The Federal government clause at FAR 52.249-2(k) allows the contractor to file a proposal for an equitable adjustment of the price(s) for the continued portion of the contract. This price adjustment would allow the contractor to recover those costs of a fixed nature which he would have recovered in the prices of the terminated work, had there been no termination. This is not anticipatory profit but recovery of fixed overhead. An example might be the rental of a facility whose costs would have been recovered over all the deliverable units of the original contract but which can only be recovered over a smaller number of units on the partially terminated contract, assuming you allow a price adjustment for the unterminated portion of the contract.

**3.18.3 Termination for Default**

DISCUSSION

Fixed Price Supply Contracts - If it is determined to use a default termination clause similar to the federal clauses, the termination is likely to have the following effects:

* The Authority is not liable for the costs of unaccepted work. The contractor will only be paid for work which is accepted.
* The Agency is entitled to a return of all progress, partial, or advance payments.
* The Agency has the right to take custody of the contractor's material, inventory, construction plant and equipment at the site, and of the drawings and plans, with the price to be negotiated.
* The contractor will be liable for the excess costs of reprocurement or completion.
* The contractor will be liable for either actual damages or liquidated damages if your contract provides for them.

Services and Construction Contracts - Some of the above consequences for supply contracts are also applicable to services and construction contracts but a contractor furnishing services or construction will be entitled to payment for work that was properly performed prior to the default termination. Under supply contracts the contractor will not be paid costs for producing supplies not accepted, whereas services and construction contractors can recover costs because the Authority will be seen as having benefited from the contractor's partial performance in the services rendered or the improvements made to your property.

Defining "Default" - The clause must define what "default" means ‑‑ i.e., failure to deliver the supplies or perform the services within the time specified in the contract, failure to make progress so as to endanger performance of the contract, refusal or failure in a construction contract to prosecute the work or any separable part within the time specified in the contract.

Excess Reprocurement Costs - There may be need to decide if it is prudent to hold the contractor responsible for excess reprocurement costs and include an appropriate provision in the clause.

Excusable Reasons for Non-performance - The clause typically defines acts or events that will excuse the contractor's default ‑ i.e., causes beyond the control and without the fault or negligence of the contractor, such as acts of God, unusually severe weather, etc.

Conversion to Convenience Termination - If a contract is terminated for default, and it is later determined that the contractor was not in default or that the default was excusable, it would be very helpful if your default termination clause specifically stated that the termination will be treated as if it had been issued for the convenience of the agency. This will act to limit your liability for a wrongful termination by invoking the procedures of the convenience termination clause, thus precluding the contractor from recovering anticipatory profits.

Notice Provisions - The clause typically defines what kind of written notices, if any, must be furnished to the contractor prior to the termination taking place ‑ i.e., *cure* and *show* *cause* letters. Within a specified time after you notify the contractor in writing to *cure* the deficiency in performance, the contractor has the opportunity (without jeopardy of immediate termination) to *show cause* why it should not be terminated; it may accelerate performance, present new information, or offer additional promises. If the contractor does not successfully show that it should not be terminated, the Authority may then proceed with a termination for default. If the clause grants the contractor a cure period, it may be necessary to specify exceptions such as where default is necessary to take over the work in the interest of public safety.

**3.19 PURCHASE ORDER APPROVALS**

The level of signatory approval within Materials Management is as follows:

|  |  |
| --- | --- |
| **Amount** | **Role** |
| Up to $5,000 | Buyers |
| Up to $50,000 | Supervisor of Inventory Planning |
| Up to $500,000 |  Chief Procurement Officer |
| Up to $1 Million |  Chief Financial officer |
|  Up to $15 Million | General Manager |
| Over $15 Million | Board of Directors |
|  |  |
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MBTA's Chief Procurement Officer (CPO) is authorized up to a limit of $500,000, without the approval of the General Manager, and without authorization from the Board of Directors, to:

* Execute agreements; place purchase orders; contracts for supplies, materials or services; and
* Enter into any expenditure for capital, operating, other purposes, or contracts.

The Chief Procurement Officer has the authority to approve purchase requisitions up to $500,000. The Chief Procurement Officer may delegate these powers as considered necessary.

Purchase orders not awarded to the lowest responsive and responsible bidder must also have appropriate senior management review and approval, in accordance with MBTA procedures. Any decision to award a contract to a vendor who is not the lowest bidder must be fully documented in order to avoid the appearance of an Arbitrary Action as defined by FTA in Circular 4220.1F, Ch.4, Section 2.a (4)(j).

**3.20 Record of Procurement History**

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| **REQUIREMENT** |
| 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.
 |

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

**3.21 Contract Options**

An option is a unilateral right in a contract by which the Authority may elect to purchase additional equipment, supplies, or services. They can also be structured to extend the term of the contract.

Options are most often used where there is uncertainty as to the quantity of goods and services you will require under a contract. Rather than planning a separate, later procurement when the requirement becomes certain and incurring potential delays in delivery of the items because of the procurement lead-time to buy additional items, you may want to specify the option to buy more in your present contract. Options may also be appropriate when there is a need for standardization of parts or interchangeability and it is best to get proposers to bid competitively on the entire potential need at the time of the initial procurement, rather than processing a sole source add-on at a later date when the supplier will be under no competitive pressures.

If you include terms in a contract that permit you to choose, at the time of award or later, quantities and items in addition to the base amount (options), you must include the price of those quantities or items in the price evaluation of the offer before selecting an apparent low bidder.

Options must be evaluated both at the initial contract award stage, and again before they are executed to make sure that the pricing is still favorable to the Authority. These evaluations must be documented and included in the procurement file.

FTA Circular 4220.1F requires that options must be evaluated as part of the price evaluation of offers or must be treated as sole source awards if executed without being considered during the initial procurement. The procurement files should indicate how priced options were evaluated, and the final results of such evaluations should be specified.

Circular 4220.1F requires that grantees ensure that the exercise of an option is in accordance with the terms and conditions of the option stated in the initial contract award. An option may not be exercised unless the grantee 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.

When grantees exercise previously evaluated contract options, they should confirm that the evaluation done in the past is still valid by performing an analysis of market pricing. When exercising options not previously evaluated, the reasonableness of pricing must be validated by a cost analysis as a sole source procurement to ensure that at the time the options are exercised, the options offer a better value than a new procurement action.

**3.22** **GSA Contracts**

General Services Administration (GSA) contracts are procured by the Federal Government for their use. Federal laws limit State and Local Government use of Federal Supply Schedules to two categories of contracts; Schedule 70 Information Technology (IT) and Schedule 84 Disaster Preparation/Recovery. GSA defines the term “state and local government broadly to include may FTA governmental recipients, including public authorities like the MBTA.

Vendors on these schedules must be designated as a participant in the Cooperative Purchasing Program in order to be used by the Authority.

Schedule 70 - Information Technology Products and Services:

* IT Equipment, software, and maintenance
* IT professional services
* Wireless and electronic commerce services
* Cloud computing services
* IT training
* Virtualization services
* IPv6 services
* Cyber security services
* Access Certificates for Electronic Services (ACES) Program
* Public Key Infrastructure (PKI) Shared Service Provider (SSP) Program
* HSPD-12 Product and service components

Schedule 84 - Disaster Preparation/Recovery:

* Alarm and signal systems
* Facility management systems
* Firefighting and rescue equipment
* Law enforcement and security equipment
* Marine craft and related equipment
* Special purpose clothing

**All FTA and Federal requirements apply when using GSA schedules to acquire property or services.** The required documentation for these GSA purchases is the same as any other purchase. Buyers must ensure all Federal requirements, required clauses and certifications (i.e. Buy America) are properly followed and included, whether in the master intergovernmental contract or in the Authority’s purchasing documents.

When using GSA contracts to acquire property or services, buyers must fulfill the Common Grant Rules’ competition requirement by seeking 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 schedule. GSA vendors will frequently reduce their listed price if asked, so buyers should ask vendors for the best price they can offer during the procurement process and should not assume that the listed price is firm.

GSA Schedules are presented in Chapter V, Section 6 of FTA Circular 4220.1f.

**3.23 DEFINITIONS**

Acceptance ‑ An agreement to the terms of an offer. In most jurisdictions, "award" by a public agency can constitute acceptance, and may create an enforceable contract.

Best and Final Offer (BAFO) - A best and final offer (BAFO) can be requested of each offeror in the competitive range at the conclusion of discussions (negotiations) with those offerors. If an offeror does not respond to your request, your procedures may allow you to consider the most recent offer to be the best and final offer.

Best Value - *A selection process in which proposals contain both price and qualitative components, and award is based upon a combination of price and qualitative considerations. Qualitative considerations may include technical design, technical approach, quality of proposed personnel, and/or management plan. The award selection is based upon consideration of a combination of technical and price factors to determine (or derive) the offer deemed most advantageous and of the greatest value to the MBTA.*

Bid Splitting – FTA Circular 4220 1.F VI, I.3.a dictates that grantees may not divide or reduce the size of a procurement merely to stay within the micro-purchase threshold of $3,500. In addition, grantees may also not divide or reduce the size of a procurement to stay within authorization levels.

Buyer – A contracting officer operating within their procurement MBTA to complete the simplified acquisition procurement process.

Change Order - Any contract action that calls for the negotiation of a cost or price proposal arising out of a change in the contract requirements.

Clarification ‑ A communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in a proposal.

Consolidation of Micro-Purchases - If there is a large volume of repetitive buys, it should be considered whether it is feasible to consolidate these purchases into larger quoting packages in order to get better pricing, reduce inventory levels, and make the procurement operation more efficient in terms of effort expended.

Contracting Officer – person or position designated in writing to act on behalf of the MBTA's General Manager to acquire goods and services.

Discussion ‑ Any oral or written communication between a procurement official and a potential offeror (other than communication conducted for the purpose of minor clarification) whether or not initiated by the procurement official, that (1) involves information essential for determining the acceptability of a proposal, or (2) provides the offeror an opportunity to revise or modify its proposal.

Equitable Distribution – FTA Circular 4220 1.F, 3.a dictates that micro-purchases should be distributed equitably among qualified suppliers.

Fair and Reasonable Determination – FTA Circular 4220 1.F, 3.a. establishes that the only documentation required for micro-purchases is a determination that the price is fair and reasonable. An explanation/documentation of how the buyer made the determination is required.

Firm offer ‑ A promise to undertake specified obligations in exchange for consideration which promise may be accepted for a specified or implied period of time; a firm offer cannot be withdrawn during the period for which it remains firm.

Micro-Purchasing ‑ The method of procuring goods and services under $3,500. A micro-purchase does not require obtaining competitive quotations if it is determined that the price to be paid is fair and reasonable.

Negotiation - A procedure that includes the receipt of proposals from offerors, permits bargaining and usually affords offerors an opportunity to revise their offers before award of a contract.

No Responsive Bids ‑ All bids received at the time and date set for bid opening are nonresponsive.

Offer ‑ The promise to provide goods or services according to specified terms and conditions in exchange for material compensation.

Piggybacking - An assignment of existing contract rights to purchase supplies, equipment or services.

Quote - A [formal](http://www.businessdictionary.com/definition/formal.html) [statement](http://www.businessdictionary.com/definition/statement.html) of [promise](http://www.businessdictionary.com/definition/promise.html) (submitted usually in [response](http://www.businessdictionary.com/definition/response.html) to a request for quotation) by potential [supplier](http://www.businessdictionary.com/definition/supplier.html) to [supply](http://www.businessdictionary.com/definition/supply.html) the [goods](http://www.businessdictionary.com/definition/goods.html) or [services](http://www.businessdictionary.com/definition/services.html) [required](http://www.businessdictionary.com/definition/required.html) by the MBTA, at specified [prices](http://www.businessdictionary.com/definition/price.html), and within a specified [period](http://www.businessdictionary.com/definition/period.html). A quotation may also contain [terms of sale](http://www.businessdictionary.com/definition/terms-of-sale.html) and [payment](http://www.businessdictionary.com/definition/payment.html), and [warranties](http://www.businessdictionary.com/definition/warranty.html).

Responsive ‑ If an offer conforms in all material aspects to the requirements of the solicitation at the scheduled time of submission and does not require further discussions with the offeror, the offer is responsive.

Single Bid ‑ Only one bid has been received at the time and date set for bid opening.

Single Responsive Bid ‑ Only one responsive bid received at the time and date set for bid opening. This may result from having only one bidder or from all other bidder(s) being nonresponsive.

Small Purchase ‑ Acquisition of services, supplies or other property that cost less than $50,000[[3]](#footnote-3).

Sole Source Procurements - Are accomplished through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

Solicitation ‑ A purchasing entity's request for offers, including a telephone request for price quotations, an invitation for bids, or a request for proposals.

Tag-on - The addition of work (supplies, equipment or services) that is beyond the scope of the original contract that amounts to a cardinal change as generally interpreted in Federal practice by the various Boards of Contract Appeals. “In scope” changes are not tag-ons.

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.

1. The federal threshold in FTA Circular 4220.1F for small purchases is $150,000, but the MBTA adheres to the Commonwealth’s threshold of $50,000. [↑](#footnote-ref-1)
2. At a meeting held in Cambridge on January 26, 2010 [↑](#footnote-ref-2)
3. Ibid [↑](#footnote-ref-3)