

**FINAL REPORT**  
**OF THE**  
**PROCUREMENT SYSTEM REVIEW**  
**OF**  
**METROPOLITAN COUNCIL (MET COUNCIL)**  
**ST. PAUL, MINNEAPOLIS**



**SEPTEMBER 2014**

**Conducted by a Procurement  
Management Review Team from  
Milligan & Company, LLC  
Philadelphia, PA**

## TABLE OF CONTENTS

<b>EXECUTIVE SUMMARY .....</b>	<b>1</b>
<b>PROCUREMENT SYSTEM REVIEW BACKGROUND .....</b>	<b>2</b>
DESCRIPTION .....	2
REQUIRED ELEMENTS .....	2
CLASSIFICATION OF FINDINGS .....	2
<b>DESCRIPTION OF THE GRANTEE .....</b>	<b>3</b>
RESULTS OF THE REVIEW .....	4
SYSTEM-WIDE PROCUREMENT ELEMENTS .....	4
Not Deficient.....	4
Deficient Elements.....	4
Element (1) Written Standards of Conduct.....	4
Element (6) Procurement Policies and Procedures.....	5
INDIVIDUAL PROCUREMENT ELEMENTS.....	6
Not Deficient.....	6
Not Applicable Elements .....	7
Deficient Elements.....	7
Element (7) Independent Cost Estimate .....	8
Element (10) Unnecessary Experience and Excessive Bonding.....	9
Element (15) Contract Term Limitation .....	10
Element (18) Award to Responsible Contractor.....	11
Element (19) Sound and Complete Agreement .....	11
Element (21) Fair and Reasonable Price Determination (Micro-Purchase) .....	12
Element (39) Cost Analysis Required [Sole Source].....	13
Element (41) Cost or Price Analysis.....	14
Element (42) Written Record of Procurement History .....	15
Element (56) Clauses .....	16
OTHER MATTERS .....	18
APPENDIX A: LIST OF INDIVIDUALS PARTICIPATING IN THE REVIEW .....	21
APPENDIX B: REPORT SUMMARY TABLE .....	23
APPENDIX C: PROCUREMENT ELEMENTS FOR WHICH THE GRANTEE IS NOT DEFICIENT .....	29
APPENDIX D: PROCUREMENT ELEMENTS DETERMINED TO BE NOT APPLICABLE.....	37
APPENDIX E: BEST PRACTICES PROCUREMENT MANUAL (BPPM) REFERENCES .....	40

## EXECUTIVE SUMMARY

Milligan & Company, LLC (MILLIGAN), under contract to the Federal Transit Administration (FTA), performed a Procurement System Review of the Metropolitan Council (Met Council).

The Metropolitan Council (Met Council) is a metropolitan planning organization and regional governmental agency that serves the Twin Cities metropolitan area. The metropolitan area consists of seven counties: Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington. Transit-related procurements conducted by Met Council, Hennepin County, and Washington County were reviewed.

This Procurement System Review (PSR), conducted from July 28 – August 1, 2014, was performed in accordance with FTA procedures, and included a procurement assessment phase and a contract review phase. During the assessment phase, a review was conducted of the organizational structure, staffing, and management direction that define the Met Council procurement system environment.

The contract review phase included interviews with key management and staff personnel and a review of contract files and supporting documents. The Milligan team reviewed FTA-funded capital expenditures.

This report contains several findings aimed at assisting Met Council in conducting their procurements in compliance with Federal requirements. Of the 60 elements designated for review, Met Council was found not deficient in 39 elements and 9 elements were not applicable. Deficiencies were found in the remaining 12 elements. Based on the responses provided by Met Council, one of these deficiencies is now closed.

These deficiencies are summarized in the table below and addressed in the body of this report.

No.	Deficient Elements
1)	Written Standards of Conduct
6)	Procurement Policies and Procedures
7)	Independent Cost Estimate
10)	Unnecessary Experience and Excessive Bonding
15)	Contract Term Limitations
18)	Award to Responsible Contractors
19)	Sound and Complete Agreement
21)	Fair and Reasonable Price Determination
39)	Cost Analysis Required [Sole Source]
41)	Cost or Price Analysis
42)	Written Record of Procurement History
56)	Clauses

## PROCUREMENT SYSTEM REVIEW BACKGROUND

### DESCRIPTION

The objectives of the Procurement System Review (PSR) are to encourage and facilitate improved grantee procurement operations, promote the use of best practices, and assess the grantee's compliance with Federal requirements, specifically the requirements of FTA Circular 4220.1F and the Pre-Award, Post-Delivery Rules applicable to Buy America requirements. The PSR is designed to be a customer-oriented review that encourages working relationships between FTA and the grantees.

This procurement system review was performed in accordance with FTA procedures and includes a risk assessment phase, a contract review phase, and a reporting phase. The risk assessment phase includes a review of regional office documents, grantee document review, system-wide requirements review, and documentation of risk assessment. The contract review phase includes a site visit, interviews, sample selection, contract files review, and follow-up interviews. The specific documents reviewed are referenced in this report and are available at FTA's Regional Office or at recipient administrative offices. The reporting phase consists of reporting the findings of the review. It includes a draft report, a draft final report, and a final report.

Attendees at the entrance and exit conferences and other participants in the review are shown in Appendix A.

### REQUIRED ELEMENTS

The PSR looks at both system-wide and individual procurement elements. System-wide procurement elements are requirements that apply to the procurement system as a whole. Individual procurement elements are evaluated on an individual contract basis and summarized across all contracts reviewed.

### CLASSIFICATION OF FINDINGS

The review team determined the status (not deficient/deficient/not applicable) for each system-wide and individual procurement element. The review team determined the status for: (1) system-wide elements based on the results of the System-wide Elements Review Checklist; and (2) each individual procurement element based upon all the contract files reviewed.

Two levels of findings are used:

**Not Deficient:** A finding of "not deficient" indicates that the grantee complied with the basic requirements of the element. This is defined as: "The review of selected procurement files found that in all instances the grantee complied with the requirement."

**Deficient:** A finding of "deficient" indicates that the grantee did not always comply with the requirements of the element. This is defined as: "The review of selected procurement files found that in one or more of the applicable instances, the grantee did not comply with the requirement."

## DESCRIPTION OF THE GRANTEE

The Metropolitan Council is the regional planning agency serving the Twin Cities seven-county metropolitan area and providing essential services to the region. The Minnesota Legislature established the Metropolitan Council in 1967 to coordinate planning and development within the Twin Cities metropolitan area and to address issues that could not be adequately addressed with existing governmental arrangements. Counties within the jurisdiction include Anoka, Carver, Dakota, Hennepin, Ramsey, Scott and Washington. Additional legislative acts strengthened the Council's planning and policy roles, and merged the functions of three agencies (the Metropolitan Transit Commission, the Regional Transit Board and the Metropolitan Waste Control Commission) into the Metropolitan Council. The 17-member council has 16 members who each represent a geographic district and one chair who serves at large.

Metro Transit is an operating division of Metropolitan Council and is the transportation resource for the Twin Cities, offering an integrated network of buses, light rail and commuter trains as well as resources for those who carpool, vanpool, walk or bike. Metro Transit operates the Hiawatha light-rail line, the Central Corridor light-rail line, Northstar commuter rail line, and 123 bus routes using a fleet of 885 buses.

The Council has several divisions including procurement, real estate, contracts, water area management and the Overhaul Base staff. FTA-funded procurement activities are carried out by the contracts division as well as through subrecipient agreements with Hennepin and Washington Counties. The Director of Procurement is responsible for all procurement activities. The contracts division is headed by a Manager who reports to the Director. There are six Principal Contract Administrators, one Contract Administrator, and a Purchasing Clerk who report to the Manager.

Contracts with a value up to \$50,000 can be executed by Council staff with adequate signature authority. Contracts between \$50,000 and \$125,000 are executed by a Division Director or the General Manager. Contracts between \$125,000 and \$250,000 must be executed by the Regional Administrator. Contracts with a value above \$250,000 must be authorized by Council action and executed by the Regional Administrator.

The PSR focused on contracts connected with the following projects:

- The Central Corridor LRT (CCLRT) project is an 11-mile double track exclusive guideway that will connect the central business districts of Minneapolis and St. Paul with the University of Minnesota and the State Capitol area, and provide a connection to the existing Hiawatha LRT and Northstar Commuter Rail via downtown Minneapolis. The CCLRT project shares five stations and 1.2 miles of track with the existing Hiawatha LRT and will build 18 new stations and 9.8 miles of track.
- The Southwest Corridor is a 16-mile double track guideway that will operate from downtown Minneapolis through St. Louis Park, Hopkins, Minnetonka, and Eden Prairie. This project includes 17 stations and the total project will cost roughly \$1.65 billion.
- The Interchange Project, currently known as Target Field Station, is a \$77 million project that serves as a central multi-modal transportation hub past Target Field in the North

Loop District in downtown Minneapolis. It includes new LRT platforms, parking, public plaza space, retail space, and will be able to accommodate additional incoming light rail services via Central and Southwest LRT corridors.

## **RESULTS OF THE REVIEW**

The results of the review are summarized for each system-wide and individual procurement element. For each procurement requirement, the report describes the required element, cites a reference to FTA Circular 4220.1F and other applicable regulations, discusses the issues and identifies findings, recommends corrective actions and schedules, and presents excerpts from FTA's Best Practices Procurement Manual (BPPM). Excerpts from FTA's BPPM in Appendix E are not presented as requirements; rather they are presented for technical assistance purposes. The procurement review summary table is provided in Appendix B.

### **SYSTEM-WIDE PROCUREMENT ELEMENTS**

System-wide procurement elements are requirements that apply to the procurement system as a whole. The system-wide procurement elements are primarily evaluated during the assessment phase. The findings in this section are a result of these interviews and additional insights gained during the contract review phase. The results are presented below. Those elements for which the grantee is "not deficient" are shown first, and those defined as "deficient" with respect to that element are shown second. Within each category, the numbered element appears as it is listed in FTA's PSR Guide.

#### **Not Deficient**

A full description of the elements for which the grantee is not deficient is in Appendix C. The grantee is not deficient in the following system-wide procurement elements:

- Element 2 – Contract Administration System
- Element 3 – Written Protest Procedure
- Element 4 – Prequalification System
- Element 5 – System for Ensuring Most Efficient and Economic Purchase

#### **Deficient Elements**

The grantee is deficient with respect to the following system-wide procurement elements:

##### **Element (1) Written Standards of Conduct**

*Grantees shall maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts.*

[FTA C4220.1F, Ch. III, 1.](#)

#### **Discussion**

Met Council is deficient with respect to this element.

Met Council's policies do not include applicability to immediate family members of their board and staff.

### **Initial Corrective Action Plan**

By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule for revising procurement policies and procedures. In order to comply with federal regulations, the policies must be updated to include immediate family members of their board and staff.

### **Grantee Response**

The Council's Conflict of Interest Certification statement that is signed by participants on Evaluation Committee and Negotiations Teams does contain the language "financial interests of the member's immediate family." However, the procedure 2-1C Conflicts of Interest Regarding Selections of Consultants and Vendors is being updated to include the words "or members of their immediate family." This will be circulated through the proper committee according to process. See proposed language in the attached Element (1).

### **Reviewer Comments and Final Corrective Action Plan**

Milligan concurs with Met Council's corrective action plan. To close the deficiency, submit the revised policy to the FTA Region V Office by December 31, 2014.

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

*Grantees and subgrantees shall use their own procurement procedures that reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law, including the requirements and standards identified in this circular. If there is no State law on a particular aspect of procurement, then Federal contract law principles will apply.*

[FTA C4220.1F Ch. III, 3.a.](#)

### **Discussion**

Met Council is deficient with respect to this element.

Upon review of Met Council's policies and procedures, it was noted that they should be updated to include the following elements required by FTA's Third Party Contracting Circular 4220.1F:

1. Guidance on the elements that constitute a detailed procurement history and procedures to assure that these elements are contained in each FTA funded procurement file;
2. Guidance for procurement of Design-Bid-Build services; and
3. Appropriate provisions with regard to sole source documentation requirements, which requires the removal of the associated capital maintenance items criteria.

### **Initial Corrective Action Plan**

By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule for revising procurement policies and procedures. The updated Procurement Policies and Procedures should include all procurement requirements as contained in the FTA Master Agreement and FTA's current Third Party Procurement Circular (4220.1F).

## Grantee Response

1. Guidance on elements that constitute a detailed procurement history and procedures to assure that these elements are contained in each FTA funded procurement file.

**Response:** The Department has developed a check off sheet for items that need to be included in the file (attached, Element 6). This list has been being utilized but has not been added to the electronic file. The Council will not only include it in the electronic file but has added it to the Procurement Procedures.

2. Guidance for procurement of Design-Bid-Build services

**Response:** The language is being added to the Procedures and will be changed per the Council's process by December 31, 2014.

3. Appropriate provisions with regard to sole source documentation requirements, which require the removal of the associated capital maintenance items criteria.

**Response:** The sole source form has been changed eliminating the language and the procedure document is being changed per the Council's process.

Final procedural language will be changed per Council procedure and will be sent to FTA by December 31, 2014.

## Reviewer Comments and Final Corrective Action Plan

Milligan concurs with Met Council's corrective action plan. To close the deficiency, submit the revised policy to the FTA Region V Office by December 31, 2014.

## INDIVIDUAL PROCUREMENT ELEMENTS

Individual procurement elements are applicable to the contract files reviewed. These findings were compiled from all contracts reviewed by each individual procurement element. The results are organized by category of findings. Those elements for which the grantee and subgrantees are in compliance are shown first, followed by the elements that are found to be deficient.

## Not Deficient

The grantee was not found to be deficient with the following elements. A full description of the elements for which the grantee is not deficient is in Appendix C.

- Element 8 – A&E Geographic Preferences
- Element 9 – Unreasonable Qualification Requirements
- Element 11 – Organizational Conflict of Interest
- Element 12 - Arbitrary Action
- Element 13 – Brand Name Restrictions
- Element 14 – Geographical Preference
- Element 16 – Written Procurement Selection Procedures
- Element 20 – No Splitting [Micro-purchase]
- Element 23 – Price Quotations [Small Purchase]
- Element 24 – Clear, Accurate, and Complete Specification
- Element 25 – Adequate Competition



- Element 26 – Firm Fixed Price [Sealed Bid]
- Element 27 – Selection on Price [Sealed Bid]
- Element 28 – Discussions Unnecessary [Sealed Bid]
- Element 29 – Advertised/Publicized
- Element 30 – Adequate Number of Sources Solicited
- Element 31 – Sufficient Bid Time [Sealed Bid]
- Element 32 – Bid Opening [Sealed Bid]
- Element 33 – Responsiveness [Sealed Bid]
- Element 34 – Lowest Price (Sealed Bid)
- Element 35 – Rejecting Bids (Sealed Bid)
- Element 36 – Evaluation [RFP]
- Element 37 – Price and Other Factors [RFP]
- Element 38 – Sole Source if Other Award is Infeasible
- Element 44 – Out of Scope Change
- Element 45 – Advance Payment Provisions
- Element 46 – Progress Payment Provisions
- Element 47 – Time and Material Contracts
- Element 48 – Cost Plus Percentage of Cost
- Element 49 – Liquidated Damages Provision
- Element 51 – Qualifications Exclude Price [A&E]
- Element 52 – Serial Price Negotiations [A&E]
- Element 53 – Bid Security [Construction over \$100,000]
- Element 54 – Performance Security [Construction over \$100,000]
- Element 55 – Payment Security [Construction over \$100,000]

### **Not Applicable Elements**

The following elements were rated as “not applicable” because the grantee did not award the types of contracts/purchase orders that included these elements. A full description of these elements is contained in Appendix D.

- Element 17 – Solicitation Prequalification Criteria
- Element 22 – Micro-Purchase Davis Bacon
- Element 40 – Evaluation of Options
- Element 43 – Exercise of Options
- Element 50 – Piggybacking
- Element 57 – Pre-Award Review [Rail]
- Element 58 – Post-Delivery Review [Rail]
- Element 59 – Pre-Award Review – [Bus]
- Element 60 – Post-Delivery Review [Bus]

### **Deficient Elements**

The grantee is deficient with respect to 10 individual procurement elements, as described below.

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

*Grantees must perform a cost or price analysis in connection with every procurement action...as a starting point, grantees must make independent cost estimates before receiving bids and proposals.*

FTA C4220.1F, Ch. VI, 6

### **Discussion**

Met Council is deficient with respect to this element.

The reviewers examined 29 files for this requirement. In five of those files, Met Council did not comply with the requirement to document an independent cost estimate (ICE) prior to receiving bids and proposals.

The procurement files with the following vendors did not contain documentation of an independent cost estimate:

- Arch Language
- Eberwalx - ICE was dated after the cost proposal from the successful contractor was received.
- Ideal Printers
- Joseph Construction
- Unleashed Productions

All of these files were small purchases, except for the Eberwalx contract, which was a sole source / small purchase.

### **Initial Corrective Action Plan**

By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule for developing independent cost estimate procedures to ensure that they are completed and documented, especially in relation to small purchases. Met Council should standardize the process for conducting adequate independent cost estimates. The process should define the point in the procurement process when the ICE should be completed, what constitutes adequate documentation, and a requirement that the estimate be retained in the procurement file. Documentation should include the date the estimate was developed and the name of the person who developed it.

### **Grantee Response**

The Council does have a standardized process for conducting an adequate ICE and Procurement trains staff collectively and on one-on-ones to educate staff. Procurement staff has been instructed to not proceed with a federally funded procurement without first receiving a signed and dated ICE. All documentation is labeled Element (7).

**Eberwalx** – is not a vendor at the Council and there is no record of us doing business with them. I believe further in this audit they are indentified as a subcontractor and their records would not be in the procurement files. Arleen Schilling believes this is in relation to contract **14P042 with Berwald Roofing Company Inc** – which was a sole source for Warranty reasons. I have provided documentation for the Berwald Roofing Contract

#14P042 (Element 7) it is unclear when the ICE was actually performed. On the documents there are several dates: 11/18/2013; 12/9/2013; 2/04/2014; 12/19/2013. It appears that some work on the estimate 11/18/2013 and the rest seem to be dates things were executed, logged, or received it is hard to tell.

**Ideal Printers** — this procurement, on line 7, was entered as an FTA funding code and should not have been. Staff has been instructed not to allow this to happen again. The procurement was solicited using local funds – and therefore cannot be funded in whole or in part with federal funds. We will also communicate this with Accounts Payable.

Solicitation 11P154 with **Joseph Construction** was found in the electronic files (under Independent Cost Estimate) however, it was not titled nor did it indicate who had prepared it. Staff has been advised of this and has been using the check off sheets as appropriate. (Element 7)

### **Reviewer Comments and Final Corrective Action Plan**

Milligan has reviewed the response from Met Council.

- **Eberwalx / Berwald** – Erberwal was identified as the prime vendor, referenced as 14P042, and described as the contract with Berwald Roofing on the list of federal procurements provided by Met Council. According to the documentation reviewed on site and provided as a response to this finding, the ICE was dated December 19, 2013. The vendor's cost proposal was dated December 6, 2013. In order to meet this requirement, the ICE must be conducted before receipt of bids or proposals.
- **Ideal Printers** – This procurement was selected from the list of federally funded procurements provided by Met Council. Submit documentation to substantiate the funding source for this procurement to FTA Region 5 Office for their review.
- **Joseph Construction** – The ICE provided does not include a date. Therefore, it cannot be determined whether or not the ICE was prepared before the receipt of the bids.

Milligan concurs with the corrective action plan. To close this deficiency, submit to the FTA Region V Office evidence of training provided to staff on conducting independent cost estimates by December 31, 2014.

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

*Example of situation restrictive of competition: Unnecessary experience and excessive bonding requirements.*

[FTA C4220.1F, Ch. VI, 2.a. \(4\)\(e\)](#)

### **Discussion**

Met Council is deficient with respect to this element.

The procurement file for ACT Traffic Solutions did not have enough documentation in the file to make a determination. The file did not contain a copy of the solicitation documents.

### **Initial Corrective Action Plan**

By September 15, 2014, submit a corrective action plan to the FTA Region V Office. The corrective action plan should state how Met Council will ensure that solicitations will be retained as part of a complete procurement file.

### **Grantee Response**

This file is not in the Application Extender files (AX) but is attached to the corresponding PO #190256. It was a sole source – and the documentation is attached (Element (10)).

### **Reviewer Comments and Final Corrective Action Plan**

Met Council's response does not address the deficiency. The documentation referenced above is related to another project than the one that was reviewed. The deficiency was found for Purchase Order Number 176828 that was awarded on November 30, 2012. Met Council should submit a revised corrective action plan to the FTA Region V Office by November 29, 2014.

### **Element (15) Contract Term Limitation**

*Grantee shall not enter into any contract for rolling stock or replacement parts with a period of performance exceeding five (5) years inclusive of options. All other types of contracts (supply, service, leases of property, revenue and construction, etc.) should be based on sound business judgment.*

[FTA C4220.1F Ch. IV, 2.e \(10\)](#)

### **Discussion**

Met Council is deficient with respect to this element.

The reviewers examined 27 files. The Eberwalx contract document did not indicate a contract period of performance.

### **Initial Corrective Action Plan**

By September 15, 2014, submit a corrective action plan and schedule to the FTA Region V Office. The corrective action plan should include provisions to ensure the inclusion of contract terms in all FTA funded contracts.

### **Grantee Response**

The Council does not know what contract they are speaking of here. Eberwalx is not a vendor for the Council nor have we ever contracted with them. The audit report later describes that this vendor is a subcontractor – the Procurement department does not keep files on subcontractors. One thing that Procurement has implemented in early 2014 was “Contract Handoff” in which when a Notice to Proceed is issued for any contract (regardless of funding) the Contract Administrator (person responsible for the solicitation process) sits with the project manager and explains the key elements of the contract and what is expected of them. If this is the Berwald Contract – see Element 7.

### **Reviewer Comments and Final Corrective Action Plan**

Erberwal was identified as the prime vendor, referenced as 14P042, and described as the contract with Berwald Roofing on the list of federal procurements provided by Met Council.

Met Council's response does not address the deficiency. Submit a revised corrective action plan to the FTA Region V Office by November 29, 2014.

### **Element (18) Award to Responsible Contractor**

*The grantee shall make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement, considering such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.*

[FTA C4220.1F, CH. VI, 8.b.](#)

### **Discussion**

Met Council is deficient with respect to this element.

The review team did not find evidence that a determination of contractor responsibility was made for the ACT Traffic Solutions procurement.

### **Initial Corrective Action Plan**

By September 15, 2014, submit a corrective action plan and schedule for implementation to the FTA Region V Office. The corrective action plan should include provisions to ensure that a determination of contractor responsibility is prepared prior to award of a contract.

### **Grantee Response**

The determination of contractor responsibility was made for the ACT Traffic Solutions procurement see Element (10) attachment.

### **Reviewer Comments and Final Corrective Action Plan**

Met Council's response does not address the deficiency. The documentation referenced above is related to another project than the one that was reviewed. The deficiency was found for Purchase Order Number 176828 that was awarded on November 30, 2012.

FTA Circular 4220.1F states, "Before selecting a contractor for award, the recipient must consider such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources." There was no documentation in the file that demonstrated that these factors were considered. Met Council should submit a revised corrective action plan to the FTA Region V Office by November 29, 2014.

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

*All contracts shall include provisions to define a sound and complete agreement. In addition, contracts and subcontracts should include remedies for breach of contract and provisions covering termination for cause and convenience.*

FTA C4220.1F Ch. III, 3.b

## Discussion

Met Council is deficient with respect to this element.

The contract documents for Yaw Construction and ACT Traffic Solutions did not include termination and breach of contract provisions.

## Initial Corrective Action Plan

By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule. The corrective action plan should include procedures to ensure the inclusion of breach and termination provisions into applicable contracts.

## Grantee Response

For the finding with YAW; The bid documents are part of the conformed documents and the termination provisions are in Article 15, specifically 15.2 Council May Terminate for Cause, 15.4 Council May Terminate for Convenience. Breach of Contract is in several areas of the conformed documents – Breach is found in FTA -6.7 Contract Termination: Debarment; FTA-9.2.4 Changes in the Work; 13.1 Federal Changes; FTA-14.1 Nondiscrimination; and 14.5.5 Non-compliance by the CONTRACTOR (DBE). (Element 19) The ACT Traffic Solutions is in Element (10).

## Reviewer Comments and Final Corrective Action Plan

Milligan has reviewed the response from Met Council.

- **Yaw Construction** - The termination and breach of contract language referenced in the response is with regards to Davis-Bacon Act compliance. The termination language does not reference the ability to terminate the contract on the basis of cause and convenience. The Common Grant Rule requires administrative, contractual, or legal contract remedies in instances in which a contractor violates or breaches terms of a contract. The dispute language in the response references disputes concerning labor standards. It does not discuss provisions for disputes, breaches, and other litigation in general.
- **ACT Traffic Solutions** - The documentation provided was for another project than the one that was reviewed. The deficiency was found for Purchase Order Number 176828 that was awarded on November 30, 2012.

The response provided by Met Council does not address the deficiency. Met Council should submit a revised corrective action plan to the FTA Region V Office by November 29, 2014.

## Element (21) Fair and Reasonable Price Determination (Micro-Purchase)

*Procurements by micro-purchase are those purchases under \$3,000. Purchases below that threshold may be made without obtaining competitive quotations if the grantee determines that the price is fair and reasonable... and how this determination was derived.*

(FTA C4220.1F CH. VI, 3.a.)

### **Discussion**

Met Council is deficient with respect to this element.

Of the five micro procurements that were reviewed, deficiencies were found with Protection Products. The file did not contain a determination of fair and reasonable price.

### **Initial Corrective Action Plan**

By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule. The corrective action plan should ensure that a fair and reasonable price determination is conducted for all micro-purchases made with FTA funds.

### **Grantee Response**

The TXBase procurement system will not let a transaction using federal funds be completed without a Fair and Reasonable statement being completed. Statement was in the file and is attached (Element 21).

### **Reviewer Comments and Final Corrective Action Plan**

Milligan has reviewed the fair and reasonable price determination provided by Met Council and found it to be acceptable. This deficiency is now closed.

## **Element (39) Cost Analysis Required [Sole Source]**

*Procurement By Noncompetitive Proposals (Sole Source) A cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of cost and profit, is required.*

(FTA C 4220.1F CH. VI, 3.i.(3)(c))

### **Discussion**

Met Council is deficient with respect to this element.

There was no cost analysis or determination that the price was fair and reasonable in the Giro sole source procurement file.

### **Initial Corrective Action Plan**

By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule for conducting and documenting cost analyses for sole source procurements. Met Council needs to develop a process that will ensure a cost analysis documenting that the price is fair and reasonable is completed for all sole source procurements prior to contract award.

### **Grantee Response**

Giro is the developer of HASTAS, and under contract 13P054 the attached ICE was listed in the AX documents (Element 39).

### **Reviewer Comments and Final Corrective Action Plan**

Milligan has reviewed the response from Met Council. The lack of an ICE is not part of this deficiency. The deficiency cited relates to the lack of a cost analysis that determined the amount

of the Giro contract was fair and reasonable. The ICE can be used as one element of this analysis.

The response provided by Met Council does not address the deficiency. Met Council should submit a revised corrective action plan to the FTA Region V Office by November 29, 2014.

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

*Either a cost analysis, with associated profit negotiation, or a price analysis should be performed and documented in the procurement file with respect to the initial contract award. Also cost analysis should be performed when negotiating contract modifications unless price reasonableness is 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.*

[FTA C4220.1F Ch. VI, 6](#)

### **Discussion**

Met Council is deficient with respect to this element.

There was no documentation that a cost or price analysis was conducted prior to the awarding of the following contracts:

- Acentech
- Eberwalx
- Ideal Printers
- Meisinger (Washington County)
- RLS Valuation
- Unleashed Productions

### **Initial Corrective Action Plan**

By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule. The corrective action plan should establish policies and procedures that will ensure that a cost or price analysis is conducted prior to contract award and that a copy is included in the files. The corrective action plan must also discuss how Met Council will ensure that their subrecipients conduct a cost or price analysis when federal funds are utilized.

### **Grantee Response**

Acentech was a formal RFP – it was evaluated by a committee – the individual who ran this solicitation is no longer an employee of the Council – in part as a result of this error.

Eberwalx – the Council has no record of this vendor ever being at the Council. If this is Berwald Roofing (contract 14P042) there is a document labeled Cost or Price Analysis in the file but it is the same as the ICE (see Element 7).

Ideal Printers – this was quoted – with PO 167945 – – this procurement, on line 7, was entered as an FTA funding code and should not have been. Staff has been instructed not to allow this sort of change to occur. The procurement was solicited using local funds – and therefore cannot be funded in whole or in part with federal funds. We have also informed Accounts Payable.



Meisinger (Washington County) – this was a formal bid – see Price Analysis attached (Element 41)

RLS Valuation – This was part of a formal RFP and no price analysis was needed. There is an ICE and an Evaluation Panel Report -- (Element 41). Contracts were awarded to the 10 proposers that ranked higher than a rating of “good.”

Unleashed Productions – see proposal evaluation memo Element (7).

### **Reviewer Comments and Final Corrective Action Plan**

Milligan has reviewed the response from Met Council.

- **Eberwalx / Berwald** - Erberwal was identified as the prime vendor, referenced as 14P042, and described as the contract with Berwald Roofing on the list of federal procurements provided by Met Council. A cost or price analysis is not the same as an ICE. A cost or price analysis is conducted before the contract is awarded in order to make a determination that the price is fair and reasonable. An ICE is one element that can be used in making the cost or price analysis determination.
- **Ideal Printers** - This procurement was on the list of federally funded procurements provided by Met Council. If federal funds were used for this procurement, this deficiency is valid.
- **Meisinger (Washington County)** –The price analysis provided was for another project than the one that was reviewed. The deficiency was found for the construction of the Newport Transit Station, a procurement that was conducted by Washington County.
- **RLS Valuation** - Master contracts were awarded to ten of the 15 proposers whose prices ranged from \$50,000 to \$300,000. The documentation reviewed on-site and submitted with the response does not demonstrate a determination was made that the contract price of \$300,000 for RLS was fair and reasonable.

Met Council’s response does not address the deficiency found. Met Council should submit a revised corrective action plan to the FTA Region V Office by November 29, 2014.

### **Element (42) Written Record of Procurement History**

*Grantees shall maintain records detailing the history of each procurement. At a minimum, these records shall include: (1) the rationale for the method of procurement, (2) selection of contract type, (3) reasons for contractor selection or rejection, and (4) the basis for the contract price.*

[FTA C4220.1F Ch. III, 3.d\(1\)](#)

### **Discussion**

Met Council is deficient with respect to this element.

There was no written record of the procurement history in the procurement files with the following vendors:

- ACT Traffic Solutions
- Ideal Printers
- Unleashed Productions

### **Initial Corrective Action Plan**

By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule. Met Council should ensure that the minimum required records are included in the procurement file. These records should constitute documentation that requirements of FTA Third Party Contracting Circular 4220.1F have been met throughout a project's procurement, award, and contract administration cycles.

### **Grantee Response**

The following documents were in the file: ACT Traffic Solutions – was attached to the Purchase Order #190256 as no contract was signed with this procurement (Element (10)).

Ideal Printers – this procurement, on line 7, was entered as an FTA funding code and should not have been. Staff has been instructed not to allow this to happen again. The procurement was solicited using local funds – and therefore cannot be funded in whole or in part with federal funds. All quotes are in the file (this is a PO and would be in the TXBase system). (Element (42))

Unleashed Productions – was an informal request for proposals, evaluation memo is attached as Element (7) these were attached to the Purchase Order which is the permanent file for smaller dollar procurements.

### **Reviewer Comments and Final Corrective Action Plan**

Milligan has reviewed the response from Met Council.

- ACT Traffic Solutions – The documentation provided was for another project than the one that was reviewed. The deficiency was found for Purchase Order Number 176828 that was awarded on November 30, 2012.
- Ideal Printers – This procurement was on the list of federally funded procurements provided by Met Council. Submit documentation to substantiate the funding source for this procurement to FTA Region 5 Office for their review.
- Unleashed Productions – The evaluation memo provided is acceptable.

Met Council's response does not address the deficiency. Met Council should submit a revised corrective action plan to the FTA Region V Office by November 29, 2014.

### **Element (56) Clauses**

*Contracts should contain the appropriate FTA required clauses. The contract clauses located in the Master Agreement should be used to determine the applicability of the clauses to the procurement type.*

[FTA C 4220.1F Appendix D](#)

### **Discussion**

Met Council is deficient with respect to this element.

FTA clauses were not found in the procurements with the following vendors:

- ACT Traffic

- Eberwalx - The clauses and terms and conditions were incorporated by reference to another contract (10P092) that was entered into by PCL, a prime contractor, to which Eberwalx, the successful bidder, was a subcontractor.
- Yaw Construction

The following procurements did not include a SAM verification in the file:

- Acentech
- BD Construction
- Giro
- Ideal Printers
- Knudson Construction (Hennepin County)
- Meisinger (Washington County)
- RLS Valuation

Specific FTA clauses were incorrect or missing in the procurement files with the following vendors:

- A&M Business - Incorporation of FTA Terms language references 4220.1D
- Acentech - Debarment / Suspension
- Acme Tuckpointing (IFB) - ADA Access
- Arch Language - Incorporation of FTA Terms language references 4220.1D
- BD Construction - Incorporation of FTA Terms language references 4220.1D
- Brown Traffic - Access to Records, Civil Rights, DBE, Energy Conservation, Federal Changes, Incorporation of FTA Terms, No Federal Obligations, Program Fraud, Termination Provisions, Prompt Payment, and Return of Retainage
- Electro Watchman - Incorporation of FTA Terms language references 4220.1D
- Ideal Printers - Debarment / Suspension, Incorporation of FTA Terms language references 4220.1D
- Joseph Construction - ADA Access, Incorporation of FTA Terms language references 4220.1D
- Kimley Horn - ADA Access
- Knudson Construction (Hennepin County) - ADA Access, Seismic Safety, Incorporation of FTA Terms language references 4220.1E
- Meisinger - Incorporation of FTA Terms language references 4220.1D
- Meisinger (Washington County) - ADA Access
- PCIRoads - Incorporation of FTA Terms language references 4220.1D
- PCL Construction - Incorporation of FTA Terms language references 4220.1D
- Peoples - Incorporation of FTA Terms language references 4220.1D
- RSI Associates - Incorporation of FTA Terms language references 4220.1D
- Tech- Pro - DBE, Prompt Payment, Return of Retainage, and Termination
- Unleashed Productions - Incorporation of FTA Terms language references 4220.1D
- Visu-Sewer - Incorporation of FTA Terms language references 4220.1D

### **Initial Corrective Action Plan**

By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule for appropriate inclusion of required clauses and SAM verifications. Met Council needs to ensure that appropriate FTA contract clauses are included in all FTA funded contracts including those conducted by their subrecipients. All contract files should contain an FTA clause checklist that indicates the clauses were included in the contracts. It is recommended that the checklist be signed by the person filling it out, and signed by a person reviewing the procurement package. Adequate documentation that a SAM search was conducted prior to the award of the contract should also be included in all Met Council and subrecipient files.

### **Grantee Response**

The first – FTA Clauses were not in procurements:

ACT Traffic Solutions – this solicitation is a Purchase Order and attached is the federally funded PO terms and conditions – Element (10) attached.

Eberwalx – it appears from the notes is a subcontractor – Procurement would not house these documents in our files. This would be held with the Prime or with the contract manager. Procurement does do a contract hand off with every Notice To Proceed is issued so that contract manager's know what they are responsible for. If this is Berwald Construction #14P042 – this is a finding. A full contract should have been prepared and was not. Staff has been advised.

Yaw Construction – The bid solicitation is incorporated as part of the conformed documents for the contract. They do contain the federal clauses – see Element (19). I did not print the entire document as the bid itself is 295 pages long. However, NOTE the footer on the pages in Element (19).

The Second – Procurements did not include a SAM verification in the file:

Acentech, BD Construction, Giro, Ideal Printer (not federally funded see Element (41)Meisinger (Washington County); These were all done by employees that are no longer working at the Council, in part because of these critical errors.

Knudsen Construction (Hennepin County). One thing that Procurement has implemented in early 2014 was “Contract Handoff” in which when a Notice to Proceed is issued for any contract (regardless of funding) the Contract Administrator (person responsible for the solicitation process) sits with the project manager and explains the key elements of the contract and what is expected of them. In addition, training is provided for subrecipients . Procurement will reinforce with both Contract Administrators and subrecipients the importance adhering to all Federal procurement requirements.

RLS Valuation – The SAM report was in the file under Evaluation of Responsibility – see last page Element (56) RLS Valuation.

The third part – FTA Clauses were incorrect or missing in the procurement files with several vendors: One thing that Procurement Management has done is to template all the contract and solicitation documents so that staff will always have the “latest” version. There is also a check

list that staff needs to complete with each solicitation – regardless of funding – and it is double checked that all documents are present. Staff is instructed to ONLY use these templates and to not copy from a previous solicitation for many reasons. To deviate from this process is considered a critical error. Procurement management staff self audits the criteria and the process of all staff and in these cases discovered the errors and the deviation from the standard process. As a result, the individuals responsible for running these solicitations were found to have performed several critical areas in different areas of the process and are no longer with the Council.

### **Reviewer Comments and Final Corrective Action Plan**

Milligan has reviewed the response from Met Council.

- **ACT Traffic Solutions** - The documentation provided was for another project than the one that was reviewed. The deficiency was found for Purchase Order Number 176828 that was awarded on November 30, 2012.
- **Yaw Construction** – Based upon the response provided, the following clauses were not included in the contract: Access to Records, Program Fraud, Buy America, Cargo Preference, Fly America, Contract Work Hours, and ADA Access. The Incorporation of FTA Terms language references 4220.1D. The termination and dispute language is incorrect. Please see the reviewer comments in Element 19: Sound and Complete Agreement.
- **RLS Valuation** – The SAM verification provided was completed after the date of award.

Milligan partially concurs with Met Council’s corrective action to provide training to staff on the importance of adhering to Federal requirements, procedures for utilizing the checklist, and new contract templates with the most up-to-date and complete contract clause language.

However, Milligan does not agree that training alone is sufficient to address this finding for their subrecipients. Met Council is responsible for providing guidance, oversight, and monitoring of their subrecipients to ensure that FTA requirements are being met. The proposed training addresses guidance, but oversight and monitoring were not discussed. Met Council should provide a revised corrective action plan to the FTA Region V Office by November 29, 2014.

## Other Matters

### ***Subrecipient Oversight***

During the PSR site visit, two FTA funded procurements were reviewed that were being carried out by subrecipients to Met Council. One procurement was the design-build procurement for the light rail Interchange Project being carried out by Hennepin County. The other procurement, being carried out by Washington County, was for the development of a park and ride lot. Through discussions with Met Council purchasing staff and subrecipient project managers, there does not appear to be adequate direct and on-going subrecipient oversight by Met Council. Subrecipients were given initial descriptions of FTA procurement requirements. There did not appear to be any oversight during the procurement process. Lack of oversight has contributed to several deficiencies being found with both subrecipient procurements. When FTA grantees elect to have procurements carried out by subrecipients, they are expected to maintain adequate oversight that will ensure FTA requirements are met.

### ***Use of Procurement Checklists***

Met Council procurement files contain a quality control checklist that is completed once the procurement has been concluded. This checklist includes various documents that are part of the procurement history, which should be contained in the procurement file. During the file reviews, there were several deficiencies that occurred during various stages of the procurement process. It is recommended that Met Council develop a procurement file checklist that is contained in the procurement file and includes documentation and FTA clause requirements during various stages of the procurement process.

### ***Non-Federally Funded Procurements***

Prior to the site visit, a list of federally funded procurements was prepared by Met Council. The list serves as a basis for selecting procurement files to be reviewed during the site visit. The list provided by Met Council included four procurements carried out by Hennepin County in connection with the light rail Interchange project. The scopes of these procurements were for various stages of engineering oversight and construction inspection services. Two were procured on a sole source basis. During the file review, several deficiencies were found with these procurements. After the file reviews, Hennepin County stated these procurements were not using FTA funding. Review of current federal drawdown information confirmed that federal funds had not been used. It is strongly recommended that any remaining FTA grants for the Interchange Project not be used to finance the following Hennepin County contracts:

- Contract No. A120204 - LTK Engineering Services
- Contract No. A131930 - Transit Systems Development
- Contract No. A120907 - Kimley-Horn and Associates
- Contract No. A120426 - American Engineering Testing, Inc.

## Appendix A:

### List of Individuals Participating in the Review

<b>FEDERAL TRANSIT ADMINISTRATION</b>			
<i>Name</i>	<i>Title</i>	<i>Phone #</i>	<i>Email</i>
Marisol R. Simón	Regional Administrator	312-353-2789	marisol.simon@dot.gov
Jason Ciavarella	Director, Office of Program Management and Oversight	312-353-1653	jason.ciavarella@dot.gov
Cyrell McLemore	Engineer	312-886-1625	cyrell.mclemore@dot.gov
Lisa Joiner	Transportation Program Specialist	312-353-2791	lisa.joiner@dot.gov

<b>METROPOLITAN COUNCIL (MET COUNCIL)</b>			
<i>Name</i>	<i>Title</i>	<i>Phone #</i>	<i>Email</i>
Arleen Schilling	Director, Program Evaluation and Audit	651-602-1042	arleen.schilling@metc.state.mn.us
Arleen McCarthy	Director	651-602-1754	arleen.mccarthy@metc.state.mn.us
Micky Gutzmann	Director, Contracts and Procurement	651-602-1741	micky.gutzmann@metc.state.mn.us
Heather Aagesen-Huebner	Manager, Administration	651-602-1728	heather.aagesen-huebner@metc.state.mn.us
Jody Jacoby	Manager	651-602-1144	jody.jacoby@metc.state.mn.us
Donald Mueting	General Counsel	651-602-1463	donald.mueting@metc.state.mn.us
Cedrick Baker	Auditor	612-373-3924	cedrick.baker@metc.state.mn.us

<b>METRO TRANSIT</b>			
<i>Name</i>	<i>Title</i>	<i>Phone #</i>	<i>Email</i>
Craig Lamothe	Deputy Director, Transit Systems Development	612-373-3830	craig.lamothe@metrotransit.org
Mary Sue Abel	Senior Project Manager	612-349-5427	marysue.abel@metrotransit.org
Ed Petrie	Director, Finance (Metro Transit)	612-349-7624	edwin.petrie@metrotransit.org
Georgette McDonald	Director, Facilities and Engineering	612-349-7652	georgette.mcdonald@metrotransit.org
Melanie Steinborn	Assistant Director Project Controls Southwest Project	612-373-3811	melanie.steinborn@metrotransit.org

Mary Gustafson	Grants Manager	612-349-7603	mary.gustafson@metrotransit.org
Nancy Schantzen	Manager, Accounting	612-349-7712	nancy.schantzen@metrotransit.org
Steve True	Senior Manager Finance	612-349-7701	steven.true@metrotransit.org
Marilyn Porter	Director, Engineering and Facilities	612-349-7689	marilyn.porter@metrotransit.org
Kathy Downs	Lead Financial Analyst	612-349-7471	katherine.downs@metrotransit.org

**HENNEPIN COUNTY**

<i>Name</i>	<i>Title</i>	<i>Phone #</i>	<i>Email</i>
Ed Hunter	Manager, Interchange Project	612-543-7273	ed.hunter@hennepin.us

**JACOBS ENGINEERING**

<i>Name</i>	<i>Title</i>	<i>Phone #</i>	<i>Email</i>
John Hogan	Project Manager		john.hogan@jacobs.com
Tracey Lober	Regional Quality Manager		tracey.lober@jacobs.com

**MILLIGAN & COMPANY, LLC.**

<i>Name</i>	<i>Title</i>	<i>Phone #</i>	<i>Email</i>
John Clare	Lead Reviewer	315-729-9073	Jclare1948@gmail.com
Sandra Swiacki	Reviewer	215-496-9100	sswiacki@milligancpa.com
Habibatu Atta	Reviewer	215-496-9100	hatta@milligancpa.com
Benjamin Sumpter	Reviewer	215-496-9100	bsumpter@milligancpa.com



## Appendix B: Report Summary Table

REPORT SUMMARY TABLE													
No.	Element	Basic Requirement	MET COUNCIL			HENNEPIN COUNTY			WASHINGTON COUNTY			Tot	Corrective Action Plan and Schedule
			ND	D	NA	ND	D	NA	ND	D	NA		
1)	Written Standards of Conduct	(FTA C 4220.1F CH III, 1.)	0	1	0	0	0	1	0	0	1	1	By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule for revising procurement policies and procedures.  <b>Provide additional information by December 31, 2014.</b>
2)	Contract Administration System	(FTA C 4220.1F CH. III, 3)	1	0	0	0	0	1	0	0	1	1	
3)	Written Protest Procedures	(FTA C 4220.1F CH VII, 1.)	1	0	0	0	0	1	0	0	1	1	
4)	Prequalification System	(FTA C 4220.1F CH. VI, 1.c.)	1	0	0	0	0	1	0	0	1	1	
5)	System for Ensuring Most Efficient and Economic Purchase	(FTA C 4220.1F CH IV,1.b)	1	0	0	0	0	1	0	0	1	1	
6)	Procurement Policies and Procedures	(FTAC 4220.1F CH III, 3.a.)	0	1	0	0	0	1	0	0	1	1	By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule for revising procurement policies and procedures.  <b>Provide additional information by December 31, 2014.</b>

7)	Independent Cost Estimate	(FTA C 4220.1F CH. VI, 6.)	22	5	5	1	0	0	1	0	0	34	By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule for developing independent cost estimate procedures to ensure that they are completed.  <b>Provide additional information by December 31, 2014.</b>
8)	A&E Geographic Preference	(FTA C 4220.1F CH. VI, 2.(g)(1))	3	0	29	0	0	1	0	0	1	34	
9)	Unreasonable Qualification Requirements	(FTA C 4220.1F CH. VI, 2.a.(4)(a))	25	0	7	1	0	0	1	0	0	34	
10)	Unnecessary Experience and Excessive Bonding	(FTA C 4220.1F CH. VI, 2.a.(4)(e))	15	1	16	1	0	0	1	0	0	34	By September 15, 2014, submit a corrective action plan to the FTA Region V Office that states how Met Council will ensure that solicitations will be retained as part of a complete procurement file.  <b>Provide additional information by November 29, 2014.</b>
11)	Organizational Conflict of Interest	(FTA C 4220.1F CH. VI, 2.a.(4)(h))	2	0	30	0	0	1	0	0	1	34	
12)	Arbitrary Action	(FTA C 4220.1F CH. VI, 2.a.(4)(j))	27	0	5	1	0	0	1	0	0	34	
13)	Brand Name Restrictions	(FTA C 4220.1F CH. VI, 2.a.(4)(f))	8	0	24	0	0	1	0	0	1	34	
14)	Geographic Preferences	(FTA C 4220.1F CH. VI, 2.a.(4)(g))	27	0	5	1	0	0	1	0	0	34	
15)	Contract Period of Performance Limitation	(FTA C 4220.1F CH. IV, 2.e(10))	26	1	5	1	0	0	1	0	0	34	By September 15, 2014, submit a corrective action plan and schedule to the FTA Region V Office which include provisions to ensure the inclusion of contract terms in all FTA funded contracts.  <b>Provide additional information by November 29, 2014.</b>

16)	Written Procurement Selection Procedures	(FTA C 4220.1F CH. III,3.d.(1)(c))	14	0	18	1	0	0	1	0	0	34	
17)	Solicitation Prequalification Criteria	(FTA C 4220.1F CH. VI, 1.c.)	0	0	32	0	0	1	0	0	1	34	
18)	Award to Responsible Contractors	(FTA C 4220.1F CH. VI, 8.b.)	15	1	16	1	0	0	1	0	0	34	By September 15, 2014, submit a corrective action plan and schedule for implementation to the FTA Region V Office, which include provisions to ensure that a determination of contractor responsibility is prepared prior to contract award.  <b>Provide additional information by November 29, 2014.</b>
19)	Sound and Complete Agreement	(FTA C4220.1F CH. III, 3.b)	14	2	16	1	0	0	1	0	0	34	By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule which includes procedures to ensure the inclusion of breach and termination provisions into applicable contracts.  <b>Provide additional information by November 29, 2014.</b>
20)	No Splitting [Micro-purchase]	(FTA C4220.1F CH. VI, 3.a. (2)b)	5	0	27	0	0	1	0	0	1	34	
21)	Fair and Reasonable Price Determination [Micro-purchase]	(FTA C4220.1F CH. VI, 3.a.)	4	1	27	0	0	1	0	0	1	34	By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule which ensures that a fair and reasonable price determination is conducted for all micro-purchases made with FTA funds.  <b>Closed based on the responses to the draft report.</b>
22)	Micro-purchase Davis-Bacon	(FTA C 4220.1F CH. IV,2.h(5))	0	0	32	0	0	1	0	0	1	34	

23)	Price Quotations [Small Purchase]	(FTA C 4220.1F CH. VI, 3.b)	11	0	21	0	0	1	0	0	1	34	
24)	Clear, Accurate, and Complete specification	(FTA C 4220.1F CH. III, 3.a.(1)(a))	27	0	5	1	0	0	1	0	0	34	
25)	Adequate Competition – Two or More Competitors	(FTA C 4220.1F CH. VI, 3.c.(2)(b))	14	0	18	1	0	0	1	0	0	34	
26)	Firm Fixed Price [Sealed Bid]	(FTA C 4220.1F CH. VI, 3.c)	9	0	23	0	0	1	1	0	0	34	
27)	Selection on Price [Sealed Bid]	(FTA C 4220.1F CH. VI, 3.c)	9	0	23	0	0	1	1	0	0	34	
28)	Discussions Unnecessary [Sealed Bid]	(FTA C 4220.1F CH. VI, 3.c(1)(e))	9	0	23	0	0	1	1	0	0	34	
29)	Advertised / Publicized	(FTA C 4220.1F CH. VI, 3.c.(2)(a))	14	0	18	1	0	0	1	0	0	34	
30)	Adequate Solicitation	(FTA C 4220.1F CH. VI, 3.d.(2)(c))	14	0	18	1	0	0	1	0	0	34	
31)	Sufficient Bid time [Sealed Bid]	(FTA C 4220.1F CH. VI, 3.c.(2))	9	0	23	0	0	1	1	0	0	34	
32)	Bid Opening [Sealed Bid]	(FTA C 4220.1F CH. VI, 3.c(2)(e))	9	0	23	0	0	1	1	0	0	34	
33)	Responsiveness [Sealed Bid]	(FTA C 4220.1F CH. VI, 3.c(2)(f))	9	0	23	0	0	1	1	0	0	34	
34)	Lowest Price [Sealed Bid]	(FTA C 4220.1F CH. VI, 3.c(2)(f))	1	0	31	0	0	1	1	0	0	34	
35)	Rejecting Bids [Sealed Bid]	(FTA C 4220.1F CH. VI, 3.c(2)(g))	3	0	29	0	0	1	1	0	0	34	
36)	Evaluation [RFP]	(FTA C 4220.1F CH. VI, 3.d(2)(b))	5	0	27	1	0	0	0	0	1	34	
37)	Price and Other Factors [RFP]	(FTA C 4220.1F CH. VI, 3.d.(2)(e))	5	0	27	1	0	0	0	0	1	34	
38)	Sole Source if Other Award is Infeasible	(FTA C 4220.1F CH. VI, 3.i(1)(a))	4	0	28	0	0	1	0	0	1	34	

39)	Cost Analysis Required [Sole Source]	(FTA C 4220.1F CH. VI, 3.i.(3)(c))	1	1	30	0	0	1	0	0	1	34	By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule for conducting and documenting cost analyses for sole source procurements.  <b>Provide additional information by November 29, 2014.</b>
40)	Evaluation of Options	(FTA C 4220.1F CH. VI, 7.b)	0	0	32	0	0	1	0	0	1	34	
41)	Cost or Price Analysis	(FTA C 4220.1F CH. VI, 6)	20	5	7	1	0	0	0	1	0	34	By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule which establishes policies and procedures that will ensure that a cost or price analysis is conducted prior to contract award and that a copy is included in the files.  <b>Provide additional information by November 29, 2014.</b>
42)	Written Record of Procurement History	(FTA C 4220.1F CH. III, 3.d(1))	24	3	5	1	0	0	1	0	0	34	By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule to ensure that the minimum required records are included in the procurement file.  <b>Provide additional information by November 29, 2014.</b>
43)	Exercise of Options	(FTA C 4220.1F CH. V, 7.a(1))	0	0	32	0	0	1	0	0	1	34	
44)	Out of Scope Changes	(FTA C 4220.1F CH. V, 7.b(1))	2	0	30	0	0	1	1	0	0	34	
45)	Advance Payments	(FTA C 4220.1F CH. IV, 2.b(5)(b))	16	0	16	1	0	0	1	0	0	34	
46)	Progress Payments	(FTA C 4220.1F CH. IV, 2.b(5)(c))	10	0	22	1	0	0	1	0	0	34	

47)	Time and Materials Contracts	(FTA C 4220.1F CH. VI, 2.c(2)(b))	1	0	31	0	0	1	0	0	1	34	
48)	Cost Plus Percentage of Cost	(FTA C 4220.1F CH. VI, 2.c(2)(a))	16	0	16	1	0	0	1	0	0	34	
49)	Liquidated Damages Provisions	(FTA C 4220.1F CH. IV, 2.b(6)(b1))	7	0	25	0	0	1	0	0	1	34	
50)	Piggybacking	(FTA C 4220.1F CH. V, 7.a(2))	0	0	32	0	0	1	0	0	1	34	
51)	Qualifications Exclude Price [A&E]	(FTA C 4220.1F CH. VI, 3.f(3)(b))	3	0	29	0	0	1	0	0	1	34	
52)	Serial Price Negotiations [A&E]	(FTA C 4220.1F CH. VI, 3.f(3)(d))	3	0	29	0	0	1	0	0	1	34	
53)	Bid Security [Construction over \$100,000]	(FTA C 4220.1F CH. IV, 2.h(1)(a))	9	0	23	0	0	1	1	0	0	34	
54)	Performance Security [Construction over \$100,000]	(FTA C 4220.1F CH. IV, 2.h(1)(b))	9	0	23	0	0	1	1	0	0	34	
55)	Payment Security [Construction over \$100,000]	(FTA C 4220.1F CH. IV, 2.h(1)(c))	9	0	23	0	0	1	1	0	0	34	
56)	Clauses	(FTA C 4220.1F Appendix D)	4	23	5	0	1	0	0	1	0	34	By September 15, 2014, submit to the FTA Region V Office a corrective action plan and schedule for appropriate inclusion of required clauses.  <b>Provide additional information by November 29, 2014.</b>
57)	Pre-Award Review – Rail	49 C.F.R. 663	0	0	32	0	0	1	0	0	1	34	
58)	Post-Delivery Review - Rail	49 C.F.R. 663	0	0	32	0	0	1	0	0	1	34	
59)	Pre-Award Review – Bus	49 C.F.R. 663	0	0	32	0	0	1	0	0	1	34	
60)	Post-Delivery Review - Bus	49 C.F.R. 663	0	0	32	0	0	1	0	0	1	34	

## Appendix C:

### Procurement Elements for which the Grantee is Not Deficient

#### SYSTEM-WIDE ELEMENTS

##### **02) Contract Administration System**

*The grantee has a contract administration system that ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.*

[FTA C4220.1F, Ch. III, 2.](#)

##### **03) Written Protest Procedure**

*Grantees shall have written protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding protests to FTA. All protest decisions must be in writing. A protester must exhaust all administrative remedies with the grantee before pursuing a protest with FTA.*

*Review of protest by FTA will be limited to:*

- (1) A grantee's failure to have or follow its protest procedures, or its failure to review a complaint or protest; or*
- (2) Violations of Federal law or regulation.*

*An appeal to FTA must be received by the cognizant FTA regional or Headquarters Office within five (5) working days of the date the protester learned or should have learned of an adverse decision by the grantee or other basis of appeal to FTA.*

[FTA C 4220.1F Ch. VII, 1](#)

##### **04) Prequalification System**

*Grantees shall ensure that all lists of prequalified persons, firms, or products that are used in acquiring goods and services are current and include enough qualified sources to ensure maximum full and open competition. Also, grantees shall not preclude potential bidders from qualifying during the solicitation period, which is from the issuance of the solicitation to its closing date.*

[FTA C4220.1F, Ch. VI, 1.c.](#)

[Note: grantees are not required, or encouraged, to have a prequalification system.

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

##### **05) System for Ensuring Most Efficient and Economic Purchase**

*Grantee procedures shall provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives and any other appropriate analysis to determine the most economical approach.*

FTA C4220.1F, Ch. IV, 1.b

## **INDIVIDUAL PROCUREMENT ELEMENTS**

### **08) A&E Geographic Preferences**

*...geographic location may be a selection criterion in procurements for architectural and engineering (A&E) services provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.*

FTA C4220.1F CH. VI, 2. (g)(1)

### **09) Unreasonable Qualification Requirements**

*Example of situation restrictive of competition: Unreasonable requirements placed on firms in order for them to qualify to do business.*

FTA C4220.1F Ch. VI, 2.a. (4)(a)

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

*Example of situation restrictive of competition: Organizational conflicts of interest* FTA C 4220.1F Ch. VI, 2.a.(4)(h)

- (i) *An organizational conflict of interest means that because of other activities, relationships, or contracts, a contractor is unable, or potentially unable, to render impartial assistance or advice to the grantee; FTA C4220.1F Ch. VI, 2.a.(4)(h)(1)(a);*
- (ii) *An organizational conflict of interest means that because of other activities, relationships, or contracts, ...a contractor's objectivity in performing the contract work is or might be otherwise impaired; FTA C4220.1F Ch. VI, 2.a.(4)(h)(1)(a);*
- (iii) *An organizational conflict of interest means that because of other activities, relationships, or contracts, ... a contractor has an unfair competitive advantage. FTA C4220.1F Ch. VI, 2.a.(4)(h)(1)(b)*

### **12) Arbitrary Action**

*All procurement transactions will be conducted in a manner providing full and open competition. Some situations considered to be restrictive of competition include, but are not limited to any arbitrary action in the procurement process.*

FTA C4220.1F Ch. VI, 2.a.(4)(j)

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

*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 as a means to define the performance or other salient characteristics of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated.*

FTA C4220.1F Ch. VI, 2.a.(4)(f)



#### **14) Geographic Preference**

*Grantees shall conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference.*

FTA C4220.1F Ch. VI, 2.a. (4)(g)

#### **16) Written Procurement Selection Procedures**

*Grantees shall have written selection procedures for procurement transactions. All solicitations shall:*

- (1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured...*
- (2) Identify all requirements that offerors must fulfill and all other factors to be used in evaluating bids or proposals.*

FTA C4220.1F Ch. III,3. d.(1)(c)

#### **20) No Splitting**

*There should be ...no splitting of procurements to avoid competition.*

FTA C4220.1F Ch. VI, 3.a.(2)b

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

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

FTA C4220.1F Ch. VI, 3.b

#### **24) Clear, Accurate, and Complete Specifications**

*Grantees shall have written selection procedures for procurement transactions. All solicitations shall: (1) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features that unduly restrict competition. The description may include a statement of the qualitative nature of the material, product, or service to be procured and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equal” description may be used as a means to define the performance or other salient characteristics of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated.*

FTA C4220.1F Ch. III, 3.a.(1)(a)

#### **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 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 is available;  
FTA C4220.1F Ch. III, 3.a.(1)(a)

*Procurement By Sealed Bids/Invitation For Bid (IFB).*

- (2) If this procurement method is used, the following requirements apply:
  - (b) The 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;

FTA C4220.1F Ch. III, 3.a.(1)(a)

### **25) Adequate Competition (2 or More Competitors)**

*Two or more responsible bidders were willing and able to compete effectively for the business.*

FTA C4220.1F Ch. VI, 3.c.(2)(b)

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

*...the procurement lends itself to a firm fixed price contract.*

FTA C4220.1F Ch. VI, 3.c

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

*The selection of the successful bidder should be made principally on the basis of price.*

FTA C4220.1F Ch. VI, 3.c

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

*No discussion with bidders is needed.*

FTA C4220.1F Ch. VI, 3.c.(1)(e)

### **29) Advertised/Publicized**

*Procurement By Sealed Bids/Invitation For Bid (IFB)*

*2) If this procurement method is used, the following requirements apply:*

- (a) *The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time to prepare bids prior to the date set for opening the bids;*

FTA C4220.1F, Ch. VI, 3.c. (2)(a)

### **30) Adequate Number of Sources Solicited**

*Bids and proposals are solicited from an adequate number of known suppliers...*

FTA C4220.1F Ch. VI, 3.c. (2)(c) and 3.d.(2)(c)

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

*If this procurement method is used, ...sufficient time to prepare bids prior to the date set for opening the bids will be provided.*

FTA C4220.1F Ch. VI, 3.c.(2)

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

*If this procurement methods is used, ...[a]ll bids will be publicly opened at the time and place described in the invitation for bids.*

FTA C4220.1F Ch. VI, 3.c(2)(e)

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

*If this procurement method is used, ...[a] firm fixed-price contract award will be made in writing to the lowest responsive ...bidder. [FTA C4220.1F Ch. VI, 3.c(2)(f)]*

- (i) *When specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest;*
- (ii) *Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of.*

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

*If this procurement method is used, ...[a] firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder.*

FTA C4220.1F Ch. VI, 3.c.(2)(f)

### **35) Rejecting Bids**

*Any or all bids may be rejected if there is a sound documented business reason.*

FTA C4220.1F Ch. VI, 3.c.(2)(g)

### **36) Evaluation**

*Grantees will have a method in place for conducting technical evaluations of the proposals received and for selecting the awardees.*

FTA C4220.1F Ch. VI, 3.d.(2)(b)

### **37) Price and Other Factors (RFP)**

*If this procurement method is used the following requirements apply: ...awards will be made to the responsible firm whose proposal is most advantageous to the grantee's program with price and other factors considered.*

FTA C4220.1F Ch. VI, 3.d.(2)(e)

### **38) Sole Source**

(a) *Sole Source procurements are accomplished ... after solicitation of a number of sources, competition is determined inadequate. FTA C 4220.1F CH. VI, 3.i(1)(a)*

(b) *Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and at least one of the following circumstances applies FTA C 4220.1F CH. VI, 3.i(1)(a)*

(i) *The item is available only from a single source FTA C 4220.1F CH. VI, 3.i(1)(a)*  
*or*

(ii) *The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation FTA C 4220.1F CH. VI, 3.i(1)(a) or*

(iii) *FTA authorizes noncompetitive negotiations FTA C 4220.1F CH. VI, 3.i(1)(a); or*

(iv) *After solicitation of a number of sources, competition is determined inadequate FTA C 4220.1F CH. VI, 3.i(1)(a); or*

(v) *The item is an associated capital maintenance item as defined in 49 U.S.C. § 5307(a)(1) that is procured directly from the original manufacturer or supplier of the item to be replaced. The grantee must first certify in writing to FTA: (i) that such manufacturer or supplier is the only source for such item; and (ii) that the price of such item is no higher than the price paid for such item by like customers.* [FTA C 4220.1F CH. VI, 3.i\(1\)\(a\)](#)

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

*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. A contract change that is not within the scope of the original contract is considered a sole source procurement that must comply with FTA requirements for sole source procurements.*

[FTA C4220.1F, Ch. V, 7.b \(1\)](#)

#### **45) Advance Payment Provisions**

*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*

[FTA C4220.1F Ch. IV, 2.b\(5\)\(b\)](#)

#### **46) Progress Payment Provisions**

*Grantees may use progress payments provided the following requirements are followed [FTA C4220.1F Ch. IV, 2.b(5)(c)]:*

- (1) *Progress payments are only made to the contractor for costs incurred in the performance of the contract. [FTA C4220.1F Ch. IV, 2.b(5)(c)2]:*
- (2) *When progress payments are used, 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. [FTA C4220.1F Ch. IV, 2.b(5)(c)1]*

#### **47) Time and Materials Contracts**

*Grantees will use time and materials type contracts only after the grantee has determined that no other type of contract is suitable and if the contract specifies a ceiling price that the contractor shall not exceed except at its own risk.*

[FTA C4220.1F CH. VI, 2.c\(2\)\(b\)](#)

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

*The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.*

[FTA C4220.1F Ch. VI, 2.c\(2\)\(a\)](#)

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

*A grantee may use liquidated damages if it may reasonably expect to suffer damages and the extent or amount of such damages would be difficult or impossible to determine.*

*The assessment for damages shall be at a specific rate per day for each day of overrun in contract time; and the rate must be specified in the third party contract. Any liquidated damages recovered shall be credited to the project account involved unless the FTA permits otherwise.*

FTA C4220.1F Ch. IV, 2.b(6)(b)1

**51) Qualifications Exclude Price**

- (a) *Grantees shall use qualifications-based competitive proposal procedures (i.e., Brooks Act procedures) when contracting for A&E services as defined in 40 U.S.C. §541 and 49 U.S.C. §5325(d). Services subject to this requirement are program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services.*  
(FTA C 4220.1F CH. VI, 3.f(3)(b))
- (b) *Qualifications-based competitive proposal procedures require that: ...An offeror's qualifications be evaluated FTA C4220.1F Ch. VI, 3.f(3)(b));*
- (c) *Qualifications-based competitive proposal procedures require that: ...Price be excluded as an evaluation factor FTA C4220.1F Ch. VI, 3.f(3)(b));*
- (d) *Procurement of Design-Build. Grantee must procure design-build services through means of qualifications-based competitive proposal procedures based on the Brooks Act...when the preponderance of the work to be performed is considered to be for architectural and engineering (A&E) services...Qualification-based competitive proposal procedures should not be used to procure design-build services when the preponderance of the work to be performed is not of an A&E nature.*

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

- (a) *Qualifications-based competitive proposal procedures require that ...Negotiations be conducted with only the most qualified offeror. FTA C4220.1F Ch. VI, 3.f(3)(d)*
- (b) *Qualifications-based competitive proposal procedures require that ...Failing agreement on price, negotiations with the next most qualified offeror be conducted until a contract award can be made to the most qualified offeror whose price is fair and reasonable to the grantee.*

FTA C4220.1F Ch. VI, 3.f(3)(d)

**53) Bid Security [Construction Over \$100,000]**

FTA has determined that grantee policies and requirements that meet the following minimum criteria adequately protect the Federal interest:

- (a) *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 his bid, execute such contractual documents as may be required within the time specified. [FTA C4220.1F Ch. IV, 2.h(1)(a)]*

**54) Performance Security [Construction Over \$100,000]**

FTA has determined that grantee policies and requirements that meet the following minimum criteria adequately protect the Federal interest:

- (a) *A performance bond on the part of the contractor for 100 percent of the contract price. A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract. [FTA C4220.1F Ch. IV, 2.h(1)(a)]*

### **55) Payment Security [Construction Over \$100,000]**

FTA has determined that grantee policies and requirements that meet the following minimum criteria adequately protect the Federal interest:

- (b) *A payment bond on the part of the contractor. A payment bond is one executed in connection with a contract to assure payment, as required by law, of all persons supplying labor and material in the execution of the work provided for in the contract.*  
[FTA C4220.1F Ch. IV, 2.h(1)(c)]
  - (1) *Payment bond amounts ... fifty percent of the contract price if the contract price is not more than \$1 million [FTA C4220.1F Ch. IV, 2.h(1)(c)1];*
  - (2) *Payment bond amounts ... forty percent of the contract price if the contract price is more than \$1 million but not more than \$5 million [FTA C4220.1F Ch. IV, 2.h(1)(c)2]; or*
  - (3) *Payment bond amounts ... two and a half million dollars if the contract price is more than \$5 million. [FTA C4220.1F Ch. IV, 2.h(1)(c)3]*
  - (4) *A grantee may seek FTA approval of its bonding policy and requirements if they do not comply with these criteria. [FTA C4220.1F Ch. IV, 2.h(1)(e)]*

**APPENDIX D:  
PROCUREMENT ELEMENTS  
DETERMINED TO BE NOT APPLICABLE**

**17) Solicitation Prequalification Criteria**

- (a) *Grantees shall ensure that all lists of prequalified persons, firms, or products that are used in acquiring goods and services are current... FTA C4220.1F, Ch. VI, 1.c.(1);*
- (b) *Grantees shall ensure that all lists of prequalified persons, firms, or products that are used in acquiring goods and services ...include enough qualified sources to ensure maximum full and open competition FTA C4220.1F, Ch. VI, 1.c.(2);*
- (c) *Grantees shall not preclude potential bidders from qualifying during the solicitation period, which is from the issuance of the solicitation to its closing date. C4220.1F, Ch. VI, 1.c.(3)*

**22) Micro-purchase Davis-Bacon**

*Micro-purchases are those purchases under \$3,000... The Davis-Bacon Act applies to construction contracts between \$2,000 and \$3,000.*

FTA C 4220.1F CH. IV,2.h(5)

**40) Evaluation of Options**

*The option quantities or periods contained in the contractor's bid or offer must be evaluated in order to determine contract award. When options have not been evaluated as part of the award, the exercise of such options will be considered a sole source procurement.*

FTA C4220.1F Ch. VI, 7.b

**43) Exercise of Options**

*Grantees may include options in contracts. An option is a unilateral right in a contract by which, for a specified time, a grantee may elect to purchase additional equipment, supplies, or services called for by the contract, or may elect to extend the term of the contract.*

*A grantee must ensure that the exercise of an option is in accordance with the terms and conditions of the option stated in the initial contract awarded. 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.*

(FTA C 4220.1F CH. V, 7.a(1))

**50) Piggybacking**

*Grantees are encouraged to utilize available state and local intergovernmental agreements for procurement or use of common goods and services. When obtaining goods or services in this manner, grantees must ensure all federal requirements, required clauses, and certifications (including Buy America) are properly followed and included, whether in the master intergovernmental contract or in the grantee's purchase document.*

FTA C4220.1F, Ch. V, 7.a (2) (a)

*Piggybacking is permissible when the solicitation document and resultant contract contain an assignability clause that provides for the assignment of all or a portion of the specified deliverables as originally advertised, competed, evaluated, and awarded. If the supplies were solicited, competed and awarded through the use of an indefinite-delivery-indefinite-quantity (IDIQ) contract, then both the solicitation and contract award must contain both a minimum and maximum quantity that represent the reasonably foreseeable needs of the party(s) to the solicitation and contract. If two or more parties jointly solicit and award an IDIQ contract, then there must be a total minimum and maximum.*

(FTA C 4220.1F CH. V, 7.a(2))

### **57) Pre-Award Review - Rail**

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

(a) *A pre-award audit under this part includes:*

- (1) *A Buy America certification as described in Sec. 663.25 of this part;*
- (2) *A purchaser's requirements certification as described in Sec. 663.27 of this part;*  
*and*
- (3) *Where appropriate, a manufacturer's Federal Motor Vehicle Safety certification information as described in Sec. 663.41 or Sec. 663.43 of this part.*

(49 C.F.R. 663)

### **58) Post -Delivery Review - Rail**

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

(a) *A post-delivery audit under this part includes:*

- (1) *A post-delivery Buy America certification as described in Sec. 663.35 of this part;*
- (2) *A post-delivery purchaser's requirements certification as described in Sec. 663.37 of this part; and*
- (3) *When appropriate, a manufacturer's Federal Motor Vehicle Safety Standard self-certification information as described in Sec. 663.41 or Sec. 663.43 of this part.*

(49 C.F.R. 663)

### **59) Pre-Award Review - Bus**

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

(a) *A pre-award audit under this part includes:*

- (1) *A Buy America certification as described in Sec. 663.25 of this part;*
- (2) *A purchaser's requirements certification as described in Sec. 663.27 of this part;*  
*and*
- (3) *Where appropriate, a manufacturer's Federal Motor Vehicle Safety certification information as described in Sec. 663.41 or Sec. 663.43 of this part.*



49 C.F.R. 663

**60) Post-Delivery Review - Bus**

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

(a) *A post-delivery audit under this part includes:*

- (1) *A post-delivery Buy America certification as described in Sec. 663.35 of this part;*
- (2) *A post-delivery purchaser's requirements certification as described in Sec. 663.37 of this part; and*
- (3) *When appropriate, a manufacturer's Federal Motor Vehicle Safety Standard self-certification information as described in Sec. 663.41 or Sec. 663.43 of this part.*

(49 C.F.R. 663)

## **APPENDIX E: BEST PRACTICES PROCUREMENT MANUAL (BPPM) REFERENCES FOR SELECTED DEFICIENT ELEMENTS**

Excerpts from FTA's BPPM are not presented as requirements; rather they are presented for technical assistance purposes.

### **Element (1) Written Standards of Conduct**

#### ***Excerpts from FTA's Best Practices Procurement Manual BPPM § 2.1.3***

Every Agency employee involved in the award or administration of contracts must be given a copy of the Agency's (or State's) written standards of conduct, and they should be required to sign a statement that they are familiar with and will abide by these standards. These statements should be signed as a condition of employment. It would be well to review and sign them again annually as part of the employee's annual performance evaluation as a means of reinforcing the importance of ethical conduct by the Agency's employees.

Some Agencies have issued a memorandum to all employees by the General Manager, summarizing the most sensitive issues dealing with ethical conduct and emphasizing the importance of avoiding even the appearance of conflicts of interest. One public agency has inserted such a memorandum into its Procurement Manual, together with the standards of conduct.

One area of particular sensitivity concerns "outside employment." Employees must understand what kinds of outside employment are inconsistent with their Agency responsibilities; e.g., furnishing advice or services to a firm bidding on or planning to bid on a contract with the Agency, or which is doing business presently with the Agency. One strategy employed by firms bidding on contracts is to offer employment (if the firm is selected for award) to critical procurement or technical personnel working on the procurement. This kind of situation creates a strong conflict of interest (bias) situation in the minds of those employees to whom offers have been made. Employees need to be forewarned of these and similar tactics which they may encounter in the course of their Agency work. The Agency may want to conduct employee-training sessions for all employees doing sensitive work in the acquisition of Agency equipment or services.

Many public agencies have adopted disclosure statement requirements for certain positions. These disclosure statements require that employees occupying designated positions within the Agency disclose their investments in businesses that engage in certain activities related to the business of the Agency. Reportable interests might include companies engaged in manufacturing rail transit rolling stock and related components, transit equipment suppliers, construction companies engaged in transit systems, etc.

The FTA Circular requires penalties, sanctions, or other disciplinary action for violation of the standards of conduct by the grantee's employees or by contractors. The lack of explicit penalties in grantees' procurement policies and procedures is a recurring observation made in the FTA Procurement System Reviews. Grantees need to adopt explicit written penalties for their employees and contractors who violate these standards of conduct.

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

#### **Excerpts from FTA's BPPM §2.3.2.**

A logical element of your annual procurement plan is a cost estimate for each major procurement. It is normally cost-effective to have an independent cost estimate that also satisfies the Federal requirement and to have such an estimate at some time before receiving bids or proposals. You

may obtain such estimates from published competitive prices, results of competitive procurements, or estimates by in-house or outside estimators.

### **Purpose**

The following are purposes of establishing a cost estimate using a method independent from the prospective offerors in advance of the offer:

- it ensures a clear basis for the grantee's determination that the benefits of the procurement warrant its cost;
- it provides essential procurement and financial planning information (see "Advance Procurement Plan," above); and
- it provides a basis for price analysis, which may assist in obviating the need for a more burdensome cost analysis.

Although it may seem self-evident that the agency has at least implicitly prepared a cost estimate in deciding to proceed with a procurement, many projects can change in scope without clear communication among the people responsible. For example, a management information system for parts inventory control may seem cost-effective, but may grow during discussions to include unanticipated electronic imaging, scanning of repair manual diagrams, unanticipated distributed processing devices, and multi-user programming. An independent cost estimate prepared when the agency first undertook the project could alert all involved that the project had grown beyond the scope originally intended. A deliberate decision to reduce the scope or revise the cost estimate can be made at each step of the project's development.

The cost estimate is essential information for procurement planning. It gives the contracting official some indication of the complexity of the project and the degree of investment that offerors will want to make in the procurement process, thus allowing planning of procurement time and personnel. It is also the basis for determining which procurement procedures apply to the project. If the cost estimate exceeds \$100,000, for example, a competitive solicitation is normally required. (State or local requirements may be stricter.) Similarly, certification and bonding requirements imposed by Federal regulations are triggered based on the value of the contract. However, the application of these and most other requirements depends not on the cost estimate, but on the contract amount.

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. The adequacy of the price or cost analysis is a critical responsibility of the contracting official. In many contract awards the bids alone may be adequate to assure a reasonable price. However, in all negotiated procurements, most contract changes, sealed bids where price competition was not sufficient, and non-competitive awards, further analysis is required. An independent cost estimate prepared before receipt of offers is invaluable in these circumstances. The estimate alone may, if prepared with sufficient detail and reliability in the contracting official's judgment, be sufficient to determine whether the price is reasonable. It will at least supplement other pricing data in making the determination. Because cost analysis can be time consuming, expensive, and raise disputes, the availability of an independent pre-bid estimate, which allows for price analysis and obviates cost analysis, is worth material pre-bid effort.

In these circumstances, it is essential that the grantee's cost estimate be developed independently from the offerors' pricing submissions. If a bus purchase is being prepared, for example, the prospective offerors should not be relied upon for the independent cost estimate, except in the form of prior bids submitted with adequate competition.

Any price analysis or data collection performed after receipt of the offers, in addition to consuming valuable time during the limited validity of the offers, will not be as probative as data collected before the receipt of the offers. An independent cost estimate prepared before the receipt

of the offers does not raise the question of whether the particular data and analysis was consciously or unconsciously intended to justify the award.

## Element (15) Contract Term Limitation

Excerpts from FTA's Best Practices Procurement Manual BPPM § 2.2.1

### DISCUSSION

On May 29, 2002, the FTA Administrator issued *Dear Colleague Letter C-08-02* rescinding FTA's long-standing five-year contract term limitation for all contracts except those for rolling stock and replacement parts. The limitation on rolling stock and replacement parts remains in effect since the limitation is a statutory requirement and not an FTA policy. The new FTA policy is now expressed in FTA Circular 4220.1E, paragraph 7.m - *Contract Term Limitation*.

Prior to this letter, FTA Circular 4220.1D, paragraph 7.m - *Contract Period of Performance Limitation*, had limited the period of performance of DOT-assisted supply and service contracts to five years, inclusive of options, without prior FTA approval. As a result of this rescission of the contract term limitation, grantees will no longer be required to obtain prior FTA approval for contract terms longer than five years. The rescission of the five-year term limit applies not only to new contract awards, but to existing contracts as well. Grantee procurements will continue to be reviewed by FTA for compliance with the "full and open competition" principle stated in FTA Circular 4220.1E paragraph 8a, and grantees will continue to be responsible for conducting their procurements in accordance with sound business practices. Grantees are expected to be judicious in establishing and extending their contract terms.

### Best Practices

Although FTA no longer requires prior approval for contract terms longer than five years, grantees remain responsible for conducting their procurement transactions in accordance with the "full and open competition" principle expressed in FTA Circular 4220.1E, paragraph 8a. As with any procurement action, grantees should ensure that their procurement files adequately document their decision making process. This record should include the rationale for the contract period of performance.

Period of Performance Criteria – Periodic re-competition of contracts preserves competition and keeps prices competitive. Without periodic competition the incumbent will not have the pressures of a competitive market to keep prices reasonable or an incentive to maintain satisfactory performance. There are, however, criteria that the grantee can employ when deciding upon the term of a contract. Some of these criteria are suggested below.

Supplies – Typically the contract period of performance for supplies will be dictated by the grantee's foreseeable needs and such factors as economic quantity breaks, warehousing space, shelf life, technology concerns, etc. When the grantee perceives that there may be an opportunity to increase competition through a larger purchase, the grantee may wish to conduct a *market survey* of potential suppliers to determine if they would make an offer under a different contracting scenario. For example, it may be that they were discouraged from bidding because the up-front investment (non-recurring costs of tooling, etc.) would be prohibitive over a relatively short contract period/limited quantity buy. However, if the period were extended and the quantity increased, these potential suppliers might be induced to participate. This is in effect what one large transit agency has done successfully. Thus, the shortest contract period/minimum quantity buy may not necessarily be the optimum decision. Grantees will need to exercise some diligence in determining if longer/larger contracts might be in their best interests. If they decide to do that, they should document their files showing the benefits obtained from the longer contract periods.

When deciding the best period of performance for on-going services contracts, grantees need to consider the up-front investment by potential offerors for specialized personnel training and other non-recurring start-up costs (e.g., relocation) that must be recovered over the life of the contract.

Once again, grantees should consider a pre-solicitation industry outreach to discuss with individuals in the industry what they may see as up-front investments that must be recovered from the profits anticipated by the contract. These discussions should reveal what the industry needs in terms of a contract life in order to submit competitive prices against the incumbent. These facts need to be documented in your contract files as you reach an agency decision on the proper period of performance of the services contract.

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

### **Excerpts from FTA's BPPM §5.1.1.**

#### General Standards of Responsibility

To be determined responsible, a prospective contractor must meet all of the following requirements:

- (a) Financial resources adequate to perform the contract, or the ability to obtain them.
- (b) Ability to meet the required delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments.
- (c) A satisfactory performance record;
- (d) A satisfactory record of integrity and business ethics;
- (e) The necessary organization, experience, accounting, and operational controls, and technical skills, or the ability to obtain them;
- (f) Compliance with applicable licensing and tax laws and regulations;
- (g) The necessary production, construction, and technical equipment and facilities, or the ability to obtain them;
- (h) Compliance with Affirmative Action and Disadvantaged Business Program requirements; and
- (i) Other qualifications and eligibility criteria necessary to receive an award under applicable laws and regulations.

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

### **Excerpts from FTA's BPPM §8.2.5.1**

#### Termination for Convenience

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.

#### **Best Practices**

You will 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 A.1, Model Contract Clauses, section 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 the contractor'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 you supplement these clauses 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 you will avoid problems which may otherwise arise in the negotiation of final costs.

The American Public Transit Association has published a procurement manual with a Termination for Convenience Clause referencing Part 49, Termination of Contracts, of the Federal Acquisition Regulations (48 CFR 49) as the basis for settlement of claims. Another approach is to reference the FAR, Part 31.205, which deals very comprehensively with Selected Costs and their allowability.

The APTA approach of referencing FAR Part 49 as the basis for settlement of terminations for convenience would seem to be a very effective solution to the problem of defining the basis for settlement. Part 49.113 of the FAR incorporates Part 31, Contract Cost Principles and Procedures, thus covering all the normal cost issues which arise on cost-type contracts, but going beyond the normal to define those costs and issues peculiar to terminations in the rest of FAR Part 49. The termination clauses themselves may be found in FAR Part 52, and you will see that they refer to both Part 31 and Part 49 of the FAR in order to define the cost standards to be used for the settlement.

Suggested termination clauses are also contained in the ABA's Model Procurement Code for State and Local Governments and implementing suggested regulations.

## Element (21) Fair and Reasonable Price Determination [Micro-purchase]

### *Excerpts from FTA's Best Practices Procurement Manual BPPM § 4.1*

#### **Discussion**

§ 9.a. of FTA Circular 4220.1E 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 \$3,000.
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 \$3,000 micro-purchase threshold.
5. The requirements of the Davis-Bacon Act apply to construction contracts between \$2,000 and \$3,000.
6. Other than the Davis-Bacon Act clauses for construction contracts between \$2,000 and \$3,000, 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.

**Note:** FTA believes that determination may be done quickly and efficiently in several ways. One possible method would be for the official tasked to review and authorize payment of a credit card bill to annotate (by stapling a preprinted sheet to the bill, stamping the bill with a rubber stamp, or even asking the credit card provider to print an appropriate statement on each bill) a finding such as "I have examined the expenditures reflected on this bill and determined that each reflects a reasonable price based on market prices offered by the vendors to the general public."

Another method would include a stamp or form providing the following information:

The price(s) paid for items received under this Purchase Order are determined to be fair and reasonable, based on the following (as checked):

- \_\_\_\_\_ Adequate competition (two or more quotes received and award made to lowest quoter)
- \_\_\_\_\_ Current price lists
- \_\_\_\_\_ Catalog price
- \_\_\_\_\_ Prices found reasonable on recent previous purchases
- \_\_\_\_\_ Advertisements
- \_\_\_\_\_ Similar items in a related industry

- \_\_\_\_\_ Independent price estimate (based on a good understanding of what the item should cost)
- \_\_\_\_\_ Other (cite basis)

#### **DEFINITION**

Micro-purchasing - A method of procuring goods and services under \$3,000. A micro-purchase does not require obtaining competitive quotations if you determine that the price to be paid is fair and reasonable.

#### **Discussion**

If permitted by state and local requirements, purchases under \$3,000 no longer require more than one price to satisfy Federal requirements, as long as you determine that the price paid is fair and reasonable. You can include a "fair and reasonable price" determination in your forms used for micro-purchases. Rotating through a list of the suppliers is one method to equitably distribute the micro-purchases among qualified suppliers.

#### **Best Practices**

A threshold question you must get an answer to is whether or not your state law allows you to implement a micro-purchase method of procurement that does not require "full and open competition." If you have the legal authority under your state law to implement a micro-purchase program, you must comply with the procedural requirements stated as items 1, 2, 4, & 5 under the Requirements portion of this section. Once you are satisfied that you can legally have a micro-purchase program under your state's laws, you need to develop a procedure or regulation that addresses the FTA requirements and provides practical guidance to your organization.

### **Element (39) Cost Analysis Required [Sole Source]**

#### *Excerpts from FTA's Best Practices Procurement Manual BPPM § 4.6*

#### **Discussion**

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 you are relying on justification (c) in the Circular. This places a heavy burden on you to ensure you use noncompetitive negotiation only in the public interest and according to the Federal requirements. State requirements may be more restrictive than Federal.

#### **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.

Even though we will address federal requirements in this section, you should also be aware of any limitations or restrictions that your state law or agency regulations may place on you.

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, your ability to use it requires justification and, frequently, pre-approval before you award a sole source contract. In this context, "justification" equates to paperwork and documentation, the bane of all procurement professionals but a necessary part of our genetic make-up.

**Best Practices**

As quoted above, FTA Circular 4220.1E establishes a matrix that should be followed in justifying the use of noncompetitive or sole source procurements.

Step One - You must first determine that your 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 your 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)?

- Stated another way, contracting officers 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 agency.
- If one of the three methods can be used (or is feasible), even if you would rather not, sole source is not an option for you.

Step Two - If one of the competitive processes is not feasible in your situation, you may 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, you will frequently address such factors as:

<p><b>Single Source Factors:</b> How did you arrive at the conclusion this item represents your minimum need or requirement? Is this a "nice to have" with all the "bells and whistles" or does it really represent your requirement or minimum need? How did you determine availability? Did you check on 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? 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?</p>	<p><b>Examples:</b> <i>Utility services</i> (how many sources do you have for electricity in your community?) <i>Limited rights in data, patent rights, copyrights, or secret processes</i> (If one entity owns the patent on a process or product you require, can anyone else meet your need?) <i>Relocation of a major natural gas distribution line from your rail right of way</i> (the natural gas utility company is the only source available to work on the gas line)</p>
--	--

- 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 your agency's need for the supplies or services is of such an unusual or compelling urgency that the agency 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 agency 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 agency 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 it 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 that you should 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 you intended to do competitively next month anyway.
- While many state laws parallel the other conditions under which Federal funds may be used for non-competitive proposals, state laws for emergency situations are often more restrictive. Furthermore, *the most critical delay in an emergency may be obtaining your agency's authority*, e.g. at a monthly board meeting; inquire about (and recommend changes to, if appropriate) your Board's policy for emergency procurements.
- FTA authorizes noncompetitive negotiations - You may have a situation you feel warrants the utilization of sole source procurements but it doesn't quite fit into one of the other circumstances. You are a small transit property with a vehicle monitoring system you installed last year. The accuracy and utility of the system is exceeding all expectations and you now need to display the schedule adherence information in three new downtown transfer locations. Could you go sole source to Brand X? If you justify why (compatibility requirements, interfaces with proprietary software, unavailability of interested competition, etc.), this may be the sort of procurement you should discuss with the FTA and request its permission to use sole source.
- After solicitation of a number of sources, competition is determined inadequate - You have issued an IFB and only received one bid from a responsible contractor, but you cannot determine its price to be reasonable. If you are satisfied about the bidding environment and the reasons why you only received one bid, you can negotiate a sole source contract to arrive at a reasonably priced contract.
- The item is an associated capital maintenance item as defined in 49 U.S.C. Section 5307(a)(1) that is procured directly from the original manufacturer or supplier of the item to be replaced. - This topic is discussed in greater detail in Section 4.6.3, "Associated Capital Maintenance Item."

Step Three - DOCUMENTATION of justification. It is recommended that you document very thoroughly and carefully the rationale you went through to justify your sole source procurement. Your agency may have very specific requirements for "Findings and Determinations" that must be followed. You may have pre-approval requirements at a certain dollar threshold that must be met - your Board of Directors may require its approval of any proposed sole source procurement in excess of \$250,000 prior to the commencement of the negotiations. You may have other documentation requirements peculiar to your agency, state, or local government that you must meet prior to the initiation of negotiations which must be met.

## Element (41) Cost or Price Analysis

### Excerpts from FTA's BPPM §5.2

#### Price Analysis

The accepted forms of price analysis techniques discussed in the Pricing Guide for FTA Grantees are:

1. Adequate price competition;
  2. Prices set by law or regulation;
  3. Established catalog prices and market prices;
  4. Comparison to previous purchases;
  5. Comparison to a valid grantee independent estimate; and
  6. Value analysis.
1. Adequate price competition requires the following conditions:
    - At least two responsible offerors respond to a solicitation.
    - Each offeror must be able to satisfy the requirements of the solicitation.

- The offerors must independently contend for the contract that is to be awarded to the responsive and responsible offeror submitting the lowest evaluated price.
- Each offeror must submit priced offers responsive to the expressed requirements of the solicitation.

If the four conditions above are met, price competition is adequate unless:

- The solicitation was made under conditions that unreasonably deny one or more known and qualified offerors an opportunity to compete.
- The low competitor has such an advantage over the competitors that it is practically immune to the stimulus of competition.
- The lowest final price is not reasonable, and this finding can be supported by facts.

2. Prices set by law or regulation are fair and reasonable. Grantees should acquire a copy of the rate schedules set by the applicable law or regulation. Once these schedules are obtained, verify that they apply to your situation and that you are being charged the correct price. For utility contracts, this policy applies only to prices prescribed by an effective, independent regulatory body.

3. Established catalog prices require the following conditions:

- Established catalog prices exist.
- The items are commercial in nature.
- They are sold in substantial quantities.
- They are sold to the general public.

The idea behind catalog prices is that a commercial demand exists and suppliers have been developed to meet that demand. You are trying to ensure that you are getting at least the same price as other buyers in the market for these items. You need to be sure that the catalog is not simply an internal pricing document. Request a copy of the document or at least the page on which the price appears.

Established market prices are based on the same principle as catalog prices except there is no catalog. A market price is a current price established in the usual or ordinary course of business between buyers and sellers free to bargain. These prices must be verified by buyers and sellers who are independent of the offeror. If you do not know the names of other commercial buyers and sellers, you may obtain this information from the offeror.

4. Comparison to previous purchases -

Changes in quantity, quality, delivery schedules, the economy, and inclusion of non-recurring costs such as design, capital equipment, etc. can cause price variations. Each differing situation must be analyzed. Also ensure that the previous price was fair and reasonable. This determination must be based upon a physical review of the documentation contained in the previous files.

5. Comparison to a valid grantee independent estimate -

Verify the facts, assumptions, and judgments used by your estimator. Have the estimator give you the method and data used in developing the estimate. For example, did prices come from current catalogs or industry standards? Be sure that you feel comfortable with the estimate before relying on it as a basis for determining a price to be fair and reasonable.

6. Value analysis requires you to look at the item and the function it performs so you can determine its worth. The decision of price reasonableness remains with the contracting officer; however, the requiring activity should always be consulted for their expertise, and they should participate in making the decision.

## **Element (42) Written Record of Procurement History**

### **Excerpts from FTA's BPPM §5.4**

Section 2.4.1, *File Documentation*, contains a listing of the various types of contract file documentation which are typically required to document the history of a procurement. Section 9.1, *Documentation of Contract Administration*, contains guidance for documenting contract administration activity.

The purpose of this section is to discuss the documentation requirements which are closest to and relate most directly to the award of the contract. It might be helpful to note that documentation of contract decisions and actions is a perennial problem reported with regularity by review teams doing Procurement System Reviews for FTA's grantee community. These documentation problems are in the very areas of FTA's highest priority concerns, and some are concerned with documentation related to contract awards. The most commonly noticed problems include:

- No independent cost analysis prior to solicitation,
- No cost or price analysis of contractors' proposals,
- No documented rationale for the selected contract type,
- No documentation for the contractor selection decision,
- No documentation describing how the price was determined/negotiated.

#### **5.4.1 Sealed Bid Procurements**

##### **5.4.1.1 Abstract of Bids**

###### **Best Practices**

At the time of bid opening there should be a public reading of the bids and a recording of them, usually referred to as an Abstract of Bids. An example of an abstract is in Appendix B.4 which contains the GSA Forms 1409/1410, *Abstract of Offers*, used in Federal procurements for the recording of bids. Abstracts of bids should be available for public inspection.

##### **5.4.1.2 Documentation of Award Decision**

###### **Best Practices**

A written record of the award decision needs to be made. The elements of the award decision which need to be documented are:

*A tabulation and evaluation of bids. This will include a determination that the low bid is fully responsive to the IFB. Responsiveness is discussed in Section 4.4.4, Responsive Bidder. When there are lower bids than the bid being accepted for award, the award decision document must give the reasons for rejecting the lower bids. When there are equal low bids, the documentation must describe how the tie was broken.*

*A determination that the low bidder is responsible. Responsibility is discussed in Section 5.1, Responsibility of Contractor.*

*A determination of the reasonableness of the price. Section 5.2, Cost and Price Analysis, discusses the FTA Circular requirement that every procurement action must include a cost or price analysis to determine the reasonableness of the proposed contract price. The starting point for this cost or price analysis should be the independent cost estimate. Significant differences between the independent cost estimate and the low bid need to be discussed.*

#### **5.4.2 Negotiated Procurements**

##### **5.4.2.1 File Documentation of Selection Decision**

### **Best Practices**

*Having considered all of the available proposal evaluation data, the selection official must document the basis for the decision to select that offeror "whose proposal is most advantageous to the grantee's program with price and other factors considered." The contract file documentation should include the following:*

*Determination of Competitive Range (See Section 4.5.3, Competitive Range). The Competitive Range Determination identifies those proposals that had a reasonable chance of being selected for award, given their relative technical strengths and weaknesses, and their relative prices.*

*The Technical Evaluation (See Section 4.5.2, Evaluation of Proposals and Appendix B.1). The technical evaluation information indicates the relative strengths and weaknesses of the proposals, together with the technical risks (if any) of the various approaches.*

*A Cost/Price Analysis (See Section 5.2, Cost and Price Analysis). In all instances, the contract file must reflect evidence of a cost or price analysis. You may wish to prepare a separate Cost/Price Analysis memorandum analyzing the costs or prices proposed against: (a) the independent cost estimate prepared prior to solicitation, (b) specific company information in the proposals, such as the particular technical approach being offered, and (c) any other pertinent information such as a technical evaluation of the cost proposal, an advisory audit of the offeror's cost proposal, or a comparison of prices offered with prior procurements. If the contract being awarded is a cost-reimbursement type, the Cost/Price Analysis needs to address the realism of the various cost elements proposed, and where the costs are unrealistically low, an adjustment should be made to reflect what the agency believes the effort will actually cost given that offeror's specific technical approach as well as its direct and indirect cost rates. This cost realism assessment must be carefully considered when determining which offeror's proposal represents the best value for the procuring agency. All too often contractors are unrealistically optimistic in estimating costs in competitive cost-type situations (known as "buying in"). The result is that the lowest proposed/estimated cost is not necessarily the most advantageous choice for the procuring agency.*

*Determination of Selected Contractor's Responsibility (See Section 5.1, Responsibility of Contractor). Documentation regarding the selected contractor's responsibility should be included in the file.*

## **Element (56) Clauses**

### **Excerpts from FTA's BPPM § 8.1.1**

Appendix A.1 of this Manual contains a discussion of each of the most generally applicable requirements, including the types of contracts to which each applies, any specific wording that must be incorporated in your contracts, suggested wording where specific wording is not mandatory, and the applicability to subcontracts.

FTA grantees recognize that the most significant of the strings attached to the receipt of federal funds is the requirement to comply with federal statutes and regulations applicable to their project or particular contract.

You will want to be able to determine exactly which clauses are required for a specific procurement because the incorporation of unnecessary or loosely drafted clauses can:

- discourage competitors,
- cause confusion for anyone involved with the contract, and
- ultimately result in additional costs for your agency.

Appendix A.1 of this manual discusses each of the most generally applicable clauses. Knowing that a particular law must be complied with and that appropriate language must be included in a third party contract, still leaves the grantee trying to draft or incorporate a clause that meets those requirements. The clause-by-clause discussions in Appendix A.1 have been developed by FTA to assist you.

### **Best Practices**

Appendix A.1 of this Manual contains thirty model contract clauses that are either federally required or are suggested model clauses that you may include in contracts. The clauses contained in this Appendix include the following common elements which will be helpful to grantees in deciding if a specific clause is required in a particular procurement:

Applicability to Contracts - discusses the types of contracts for which the clause is applicable.

Flow Down - discusses to which prime contractors and which level of subcontractors the clauses apply.

Mandatory Clause/Language - includes the model clause, identified by FTA as either a required (specified) clause or a suggested language clause.

The narratives provided with the individual clauses in the Appendix indicate the source of the clause, if required. Many of the required clauses come directly from requirements in various sections of the Code of Federal Regulations (CFR) which is published by various executive departments of the federal government. The most common requirements for FTA grantees come from various parts of Title 49 of the CFR, published by the Department of Transportation. Requirements of the Department of Labor (such as Davis Bacon Act clauses) originate as specific language in Title 29 of the CFR. Where clauses are not mandated by an executive department, they are frequently modeled after clauses in the Federal Acquisition Regulations (FAR) which are applicable to those executive departments.

Even though the FAR does not apply to grantee procurements, one advantage of using FAR clauses in the absence of a specific requirement imposed upon your Agency is that a body of federal law has been developed which interprets those clauses. Your State, local jurisdiction, or transit Agency may have enacted a procurement code or body of regulations that actually establishes specific clauses which you must use. In that case, you will be obligated to use what has been established for you. Many of the recent enactments of those codes or regulations are adaptations of the American Bar Association's Model Procurement Code for State and Local Governments.

You may have the ability to incorporate clauses by reference (such as, title, date and where it can be found) in your contracts. To the extent clauses you want to incorporate are published in a Federal, State, or local statute, code, or ordinance, or in an official regulation such as the CFR, you should be able to incorporate those provisions directly into your contractual document by reference only. You can check with your supporting legal counsel on what clauses you can and cannot incorporate by reference and the manner in which they may be incorporated.