

Procurement System Elements (PSE) References

1. Written Standards of Conduct

Basic Requirement: Chapter III, Section 1 (a)(b)(c) of [FTA Circular 4220.1F](#) requires that grantees maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. The section should also address potential conflicts, solicitation and acceptance of gifts, penalties and sanctions.

2. Contract Administration System

Basic Requirement: Chapter, III, 3. FTA C4220.1F The Common Grant Rules require the recipient to maintain a contract administration system to ensure that it and its third party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders and applicable Federal, State, and local responsibilities.

For sealed bid procurements and competitive negotiations, consider including as standard practice in the contract administration file the following:

- The executed contract and notice of award;
- Performance and payment bonds, bond-related documentation, and correspondence with any sureties;
- Contract-required insurance documentation;
- Post-award (pre-performance) correspondence from or to the contractor or other Government agencies;
- Notice to proceed;
- Approvals or disapprovals of contract submittals required by the contract and requests for waivers or deviations from contractual requirements;
- Modifications/changes to the contracts including the rationale for the change, change orders issued, and documentation reflecting any time and or increases to or decreases from the contract price as a result of those modifications;
- Documentation regarding settlement of claims and disputes including, as appropriate, results of audit and legal reviews of the claims and approval by the proper authority (i.e., city council, board of directors, executive director) of the settlement amount;
- Documentation regarding stop work and suspension of work orders and termination actions (convenience as well as default); and
- Documentation relating to contract closeout.

For an effective Contract Administration System the following planning process should be followed:

1. Determine the required level of contract surveillance
2. Determine what contract administration functions (if any) will be delegated
3. Delegate contract administration as applicable
4. Develop a contract administration plan
5. Identify qualified personnel (as authorized and necessary) to represent the Contracting Officer in administering contract requirements

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Implementing a central contract administration and management function will ensure improved management of contractor performance. This means that at the contract administration level, the contract file (standing alone and without need of interpretation or augmentation of the contract administrator or other staff element) must demonstrate that the Contracting Officer and the contractor have complied with the terms of the contract (i.e., bonds have been submitted, contractual issues requiring the approval of the Contracting Officer have been submitted and approved, requests for payment have been submitted, reviewed, approved, and processed, etc.), and that contractual and administrative issues in dispute have been addressed and settled in accordance with good administrative practice and sound business judgment.

3. Written Protest Procedures

Basic Requirement: Chapter VII, Section 1a.(2)(a) of [FTA C 4220.1F](#) requires that grantees have written protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding protests to FTA and to keep FTA informed about the status of the protest. All protest decisions must be in writing. When a grantee denies a bid protest, FTA expects the grantee to inform the FTA Regional Administrator or the FTA Associate Administrator for the program office depending on where the grant is being administered. A protester must exhaust all administrative remedies with the grantee before pursuing a protest with FTA.

There are three basic types of protests, based on the time in the procurement cycle when they occur. [BPPM Chpt 11.1](#)

- A **pre-bid** or solicitation phase protest is received prior to the bid opening or proposal due date.
- A **pre-award** protest is a protest against making an award and is received after receipt of proposals or bids, but before award of a contract.
- A **post-award** protest is a protest received after award of a contract.

4. Pre-Qualification System

Basic Requirement: Chapter VI, Section 1 (c) of [FTA C 4220.1F](#) states that grantees may prequalify people, firms, or products for participation in procurements provided that:

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

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Prequalification should not be confused with reviews of technical qualifications that are an essential process in two-step procurements and qualifications-based procurements, as discussed further in subsections 3.e and 3.f of this Chapter, respectively.

5. System for Ensuring Most Efficient and Economic Purchase

Basic Requirement: Chapter IV, Section 1. of [FTA C 4220.1F](#) requires that grantee procedures provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Ensuring an economic purchase could include breaking out or combining purchases, or using annual contracts and performing a lease versus buy analyses to ensure the most economical approach.

6. Procurement Policies and Procedures

Basic Requirement: Chapter III, Section 3(a) of [FTA C 4220.1F](#) requires that grantees and sub-grantees 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 4220.1F.

Basic Requirement: Chapter III, 3.a. of [FTA C 4220.1F](#) states The Common Grant Rule for non-governmental recipients requires the recipient to have **written procurement procedures**, and by implication, the Common Grant Rule for governmental recipients requires written procurement procedures as a condition of self-certification

C4220.1F Chpt III, para 3.f.(2)

- (2) Written Procedures. The recipient must establish adequate written procedures before any solicitation takes place. Those procedures must be sufficient to ensure that all the information FTA requires for project administration is entered into the recipient's electronic system and can be made readily available to FTA as needed.

7. Independent Cost Estimates

Basic Requirement: Chapter VI, Section 6 of [FTA C 4220.1F](#) requires that: “perform a cost analysis or price analysis in connection with every procurement action ... as a starting point, grantees must make independent estimates before receiving bids or proposals.” Establishing a cost estimate in advance of the offer using a method independent from the perspective of offerors ensures a clear basis for analysis of cost or price, and provides essential procurement and financial planning information. Independent cost estimates are made by qualified engineering and functional staff who have first-hand knowledge of the commodity or service being purchased. The cost estimate is developed based on product knowledge, experience, and market status, and is used in performing price and cost analysis. The ICE is a tool to assist in the determination of the reasonableness or unreasonableness of a bid or proposal being evaluated. Independent cost estimates can range from a simple budgetary estimate to a complex estimate based on inspection of the product itself and review of items like drawings, specifications and prior data. The independent cost estimate is especially critical whenever there is no price competition (e.g., for architect-engineer procurements where only one price proposal is received), or where offerors are submitting price proposals for goods or services that are not

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exactly comparable (e.g., for procurements of high-technology items or professional services). It is also useful in competitive procurements to alert the agency when all competitors are submitting unreasonably high cost proposals.

8. A & E Geographic Preferences

Basic Requirement: Chapter VI, Section 2(a)(4)(g) of [FTA C 4220.1F](#) states that geographic location may be a selection criterion for A&E services if “an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project.”

9. Unreasonable Qualification Requirements

Basic Requirement: Chapter VI, Section 2(a)(4) (a) of [FTA C 4220.1F](#) indicates that unreasonable requirements placed on firms in order for them to qualify to do business are considered to be restrictive of competition.

10. Unnecessary Experience and Excessive Bonding

Basic Requirement: Chapter VI, Section 2.a (4) (e) of [FTA C 4220.1F](#) and BPPM 8.2 state that unnecessary experience and excessive bonding requirements are considered to be restrictive of competition.

11. Organizational Conflict of Interest

Basic Requirement: Chapter VI, Section 2(a)(4)(h) of [FTA C 4220.1F](#) states that an organizational conflict of interest is considered to be restrictive of competition. An organizational conflict of interest exists if:

- Because of other activities, relationships, or contracts, a contractor is unable, or potentially unable, to render impartial assistance or advice;
- A contractor's objectivity in performing the contract work is or might be otherwise impaired; or
- A contractor has an unfair competitive advantage.

12. Arbitrary Action

Basic Requirement: Chapter VI, Section 2(a)(4)(j) of [FTA C 4220.1F](#) indicates that any arbitrary action in the procurement process is considered to be restrictive of competition. Proper file documentation can help evaluate whether or not an arbitrary action occurred.

13. Brand Name Restrictions

Basic Requirement: Chapter III, Section 3.a(1)(e) of [FTA C 4220.1F](#) indicates that specifying only a “brand name” product instead of allowing “an equal” product to be offered without listing its salient characteristics is considered to be restrictive of competition.

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14. Geographic Preferences

Basic Requirement: Chapter VI, Section 2(a)(4)(g) of [FTA C 4220.1F](#) requires that grantees 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.

15. Contract Term Limitation

Basic Requirement: Chapter IV, Section 2(e)(10) of [FTA C 4220.1F](#) requires that grantees do not enter into any contract for rolling stock and replacement parts with a period of performance exceeding five (5) years inclusive of options. This promotes competition and effective contract management. In all other cases FTA requires grantees to exercise "sound business judgment," and "to establish contract terms no longer than necessary to accomplish the purpose of the contract."

16. Written Procurement Selection Procedures

Basic Requirement: Chapter III, Section 3(a) of [FTA C 4220.1F](#) requires that Grantees have written selection procedures for procurement transactions. "All solicitations shall identify all requirements that offerors must fulfill and all other factors to be used in evaluating bids or proposals." The solicitation and resulting contract must identify those Federal requirements that will affect contract scope and performance. This ensures procurements are awarded in a fair and equitable manner.

17. Solicitation Pre-Qualification Criteria

Basic Requirement: Chapter VI, Section 1(c)(1), (2), and (3) of [FTA C 4220.1F](#) requires that:

- Lists of prequalified persons, firms, or products that are used in acquiring goods and services must be current and include enough qualified sources to ensure maximum full and open competition.

- The process shall not preclude potential bidders from qualifying during the solicitation period.

18. Award to Responsible Contractors

Basic Requirement: Chapter VI, Section 8(b) of [FTA C 4220.1F](#) requires that grantees make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Responsibility may be affected by new information up to the time of contract award. Responsibility determination factors include whether the prospective contractor has:

- The appropriate financial, material, equipment, facility and personnel resources and expertise (or the ability to obtain them) necessary to indicate its capability to meet all contractual requirements;
- The capability to comply with the required delivery schedule considering all their existing business commitments;

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- A satisfactory record of performance;
- A satisfactory record of integrity;
- Legal qualification to contract with grantee; and supplied all necessary information in connection with the inquiry concerning responsibility.

19. Sound and Complete Agreement

Basic Requirement: Chapter III, Section 3.b. of [FTA C 4220.1F](#) requires that all contracts include provisions to define a sound and complete agreement. It should include proper specifications that allow for administrative, contractual, termination and legal remedies.

20. No Splitting [Micro-Purchases]

Basic Requirement: Chapter VI, Section 3(a)(2)(b) of [FTA C 4220.1F](#) indicates that micro-purchases are those purchases under \$3,500. Micro-purchases requirements follow these guidelines:

- May be made without obtaining competitive quotations.
- There should be equitable distribution among qualified suppliers and no splitting of procurements to avoid competition.
- Document that the price is fair and reasonable and how this determination was derived. The buyer must affirmatively state that he/she has determined the price is reasonable based on such facts as *recent agency purchases, prices published by vendors in catalogues, prices offered by local stores*, etc.
- With respect to micro-purchases (less than \$3,500) for non-construction contracts, there are no clause requirements; however, there are two clause requirements for construction contracts whose value is less than \$3,500 but in excess of \$2,000 — the Davis Bacon Act and Copeland Anti-Kickback Act, which may be found in Appendix A.1 as clauses #16 and #18

21. Fair and Reasonable Price Determination [Micro-Purchases]

Basic Requirement: Chapter VI, Section 3(a)(2)(c) of [FTA C 4220.1F](#) indicates that micro-purchases are those purchases under \$3,500. Micro-purchases requirements follow these guidelines:

- May be made without obtaining competitive quotations.
- There should be equitable distribution among qualified suppliers and no splitting of procurements to avoid competition.
- Document that the price is fair and reasonable and how this determination was derived.

22. Micro-Purchase Davis Bacon

Basic Requirement: Chapter VI, Section 3.a.(1) of [FTA C 4220.1F](#) indicates that Davis-Bacon prevailing wage and hour restrictions apply to construction contracts exceeding \$2,000.

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23. Price Quotations [Small Purchases]

Basic Requirement: Chapter VI, Section 3.b.(2)(a) of [FTA C 4220.1F](#) defines small purchase procedures as those relatively simple and informal procurement methods for securing services, supplies, or other property that cost more than \$3,500, but do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. § 403(11) (currently set at \$150,000). It also indicates that price or rate quotations shall be obtained from an adequate number of qualified sources.

24. Clear, Accurate, and Complete Specification

Basic Requirement: Chapter III, Section 3(a)(1)(a), (b), and (d) of [FTA C 4220.1F](#) requires that grantees have a clear and accurate description of the technical requirements for the material, product, or service to be procured. Complete and accurate specifications are required to ensure that all potential bidders are given equal knowledge on grantee's requirements

25. Adequate Competition- Two or More Competitors

Basic Requirement: Chapter VI, Section 3(i)(1)(a) and (i)(1)(b)(2) of [FTA C 4220.1F](#) indicates that adequate competition exist when two or more responsible bidders are willing and able to compete effectively for the business.

26. Firm Fixed Price [Sealed Bid]

Basic Requirement: Chapter VI, Section 3(c)(1)(c) of [FTA C 4220.1F](#) indicates that the procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

27. Selection on Price [Sealed Bid]

Basic Requirement: Chapter VI, Section 3(c)(1)(d) of [FTA C 4220.1F](#) indicates that the procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

28. Discussion Unnecessary [Sealed Bid]

Basic Requirement: Chapter VI, Section 3(c)(1)(e) of [FTA C 4220.1F](#) indicates that the sealed bid method of procurement is appropriate when no discussion with bidders is needed.

29. Advertised/Publicized

Basic Requirement: Chapter VI, Section 3(c)(2)(a) of [FTA C 4220.1F](#) requires that the invitation for bids be publicly advertised and that bids 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. The requirement for advertisement generally takes the form of requiring a notice inviting bids be published at least once in at least one newspaper of general circulation in the state not later than the fourteenth day before the day set for receipt of bids -- the numbers vary from state to state but these parameters are typical.

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30. Adequate Number of Sources Solicited

Basic Requirement: Chapter VI, Section 3(c)(2)(b) of [FTA C 4220.1F](#) requires that proposals are solicited from an adequate number of qualified sources and RFPs are publicized.

31. Sufficient Bid Time [Sealed Bid]

Basic Requirement: Chapter VI, Section 3(c)(2)(d) of [FTA C 4220.1F](#) requires that the invitation for bids are publicly advertised and bids are solicited from an adequate number of known suppliers, providing them sufficient time to prepare bids prior to the date set for opening the bids.

32. Bid Opening [Sealed Bid]

Basic Requirement: Chapter VI, Section 3(c)(2)(e) of [FTA C 4220.1F](#) requires that all bids be publicly opened at the time and place prescribed in the invitation for bids. An important part of this process is that bids remain sealed until bid opening. Also, it is important that there is proper notation of the time and receipt of the bid to ensure that all bids are eligible for consideration. This ensures fairness in the competitive process.

33. Responsiveness [Sealed Bid]

Basic Requirement: Chapter VI, Section 3(c)(2)(f) of [FTA C 4220.1F](#) indicates that a firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder.

A responsive bidder is a bidder who responds to the requirements of the solicitation. Responsiveness is a fairly objective concept and is ascertainable at the time of bid opening. Requiring strict responsiveness enables bidders to stand on equal footing and maintains the integrity of the sealed bid system

34. Lowest Bid [Sealed Bid]

Basic Requirement: Chapter VI, Section 3(c)(2)(f) of [FTA C 4220.1F](#) requires that bidding documents specify the factors, such as discounts, transportation costs, and life cycle costs that will be considered in determining which bid was lowest. The grantee is thus obliged to review lowest total cost when awarding on low price, if the aspects of this type of evaluation were specified in the solicitation.

35. Rejecting Bids [Sealed Bid]

Basic Requirement: Section 9(c)(2)(e) of FTA Circular 4220.1E, states that “any or all bids may be rejected if there is a sound documented business reason.” Reasons for possible bid rejection include lack of responsiveness to the solicitation and lack of responsibility of the offeror. Chapter VI, Section 3.c (2)(g) of [FTA C 4220.1F](#) indicates that any or all bids may be rejected if there is a sound documented business reason.

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36. Evaluation [RFP]

Basic Requirement: Chapter VI, Section 3.d.(2)(b) of [FTA C 4220.1F](#) requires that:

- All evaluation factors are identified along with their relative importance;
- Grantees have a method in place for conducting technical evaluations of the proposals received and for selecting awardees.

37. Price and Other Factors [RFP]

Basic Requirement: Chapter VI, Section 3(d)(2)(e) of [FTA C 4220.1F](#) requires that awards be made to the firm whose proposal is most advantageous to the grantee's program with price and other factors considered. Grantees may award to the proposer whose proposals offer the greatest business value to the Agency based upon an analysis of a tradeoff of qualitative technical factors and price/cost to derive which proposal represents the “best value.” “Best value” language must be in the solicitation.

38. Sole Source If Other Award Is Infeasible

Basic Requirement: Chapter VI, Section 3(i)(1)(b) of [FTA C 4220.1F](#) allows for procurements by non-competitive proposal only when the contract award is inadequate under other procurement methods and at least one of the conditions outlined below exists:

1. Item or service is only available from a single source;
2. Public exigency or emergency for the requirement will permit a delay from competitive bidding;
3. FTA authorizes non-competitive negotiations; or
4. Competition is deemed inadequate.

Title 49 U.S.C., Paragraph 5307(a)(1) defines such a capital maintenance item as one that is procured directly from the original manufacturer or supplier of the item to be replaced and the grantee first certified in writing to the FTA: (i) that such manufacturer or supplier is the only source for such item; and (ii) that the price of such item is no higher than the price paid for such item by like customers.

If the recipient decides to solicit an offer from only one source, the recipient must justify its decision adequately in light of the standards of subparagraph 3.i(1)(b) of Chapter VI. **FTA expects this sole source justification to be in writing.** A cost analysis verifying the proposed cost data, the projections of the data, and the evaluation of the costs and profits must accompany the written justification unless the agency can justify price reasonableness of the proposed contract based on a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation.

39. Cost Analysis Required [Sole Source]

Basic Requirement: Chapter VI, Section 6(a) of [FTA Circular 4220.1F](#) confirms that a cost analysis must be obtained when the offeror submits elements (labor hours, overhead, materials, etc.), when the price competition is inadequate, when there is only a sole source available, or when an order is changed. The recipient is not obligated to obtain a cost analysis where price reasonableness of the proposed contracts can be justified on the basis of a catalog or market price

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of a commercial product sold in large quantities to the general public, or where law or regulation have established price.

40. Evaluation of Options

Basic Requirement: Chapter VI, Section 7(b) of [FTA C 4220.1F](#) requires that the option quantities or periods contained in the contractor's bid or offer are 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.

41. Cost or Price Analysis

Basic Requirement: Chapter VI, Section 6.a.b.c. of [FTA C 4220.1F](#) requires that grantees perform a cost or price analysis in connection with every procurement action, including contract modifications.

Cost Analysis:

A cost analysis will be necessary whenever adequate price competition is lacking and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalogue 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. A cost analysis entails the review and evaluation of the separate cost elements and the proposed profit of an offeror's cost or pricing data and the judgmental factors applied in estimating the costs. A cost analysis is generally conducted to form an opinion on the degree to which the proposed cost, including profit, represents what the performance of the contract should cost, assuming reasonable economy and efficiency.

Price Analysis:

A price analysis involves examining and evaluating a proposed price without evaluating its separate cost and profit elements. Price analysis is based essentially on data that is verifiable independently from the offeror's data. The accepted forms of price analysis techniques are: Adequate price competition; Prices set by law or regulation; Established catalog prices and market prices; Comparison to previous purchases; Comparison to a valid grantee independent estimate; and Value analysis.

42. Written Record of Procurement History

Basic Requirement: Chapter III, Section 3(d)(1) of [FTA C 4220.1F](#) requires that grantees maintain records detailing the history of each procurement. The basis for contract price requirement applies to all procurements except micro-purchases. At a minimum, the following must be included in the record:

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

Procurement Self-Assessment Guide (Deficient Documentation of Procurement History)

http://www.fta.dot.gov/12831_6326.html#c1

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One of the most consistent findings in all procurement system reviews is that the contract file, in whatever form or location, does not contain adequate documentation of decisions and determinations made, the rationale/justifications used, reviews and analyses completed, approvals and all other official contract actions taken. The minimum procurement history requirements stated in this FTA standard relate to the public policy of fair and open competition and achieving the most efficient and economical use of public funds. However, all of the FTA standards, in one way or another, require documentation. This documentation may be in the form of written policies, directives, procedures and forms or in the written record contained in the official contract file. If some contract documentation, such as technical analyses or contract administration actions, are located in another division, such as engineering, a reference to it or “copy” should be contained in the official contract file. This will ensure that the public record is complete for every acquisition using Federal, State and local public funds. A contract file checklist is a good method for both the preparer and the reviewer to ensure the completeness of the contract file.

BPPM: 2.4.1

A properly documented procurement file provides an audit trail from the initiation of the acquisition process to the beginning of the contract. The file provides the complete background, including the basis for the decisions at each step in the acquisition process. A well-documented file speaks for itself, without need of interpretation from the contract administrator. A well-documented file also supports actions taken, provides information for reviews and investigations, and furnishes essential facts in the event of litigation or legislative inquiries. This documentation is the history of the public procurement. Many hours of reconstructing events and decisions, stretching memories, and evaluating scenarios can be saved with a concise file that factually answers the questions typically raised.

Where appropriate, per **BPPM 2.4.1**, the procurement documentation file should contain:

- Purchase request, acquisition planning information, other presolicitation documents,
- Evidence of availability of funds,
- Rationale for the method of procurement (negotiations, formal advertising),
- List of sources solicited,
- Independent Cost Estimate,
- Statement of Work/ Scope of services,
- Copies of published notices of proposed contract action,
- Copy of the solicitation, all addenda, and all amendments,
- Liquidated damages determination,
- An abstract of each offer or quote,
- Contractor’s contingent fee representations and other certifications and representations,
- Source selection documentation, if applicable,
- Contracting Officer’s determination of contractor responsiveness and responsibility,
- Cost or pricing data,

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- Determination that price is fair and reasonable, including an analysis of the cost and pricing data,
- Required internal approvals for award,
- Notice of award,
- Notice to unsuccessful quoters or offerors and record of any debriefing,
- Record of any protest,
- Bid, Performance, Payment, or other bond documents, and notices to sureties,
- Required insurance documents, if any,
- Notice to proceed, and
- Negotiation Memorandum.

43. Exercise of Options

Basic Requirement: Chapter V, Section 7.a. (1) (a)(b)(c) 2 of [FTA C 4220.1F](#) requires 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 it is determined that the option price is better than prices available at the time the option is exercised.

44. Out of Scope Changes

Basic Requirement: Chapter VI, Section 3(i)(1)(b) of [FTA C 4220.1F](#) indicates that a contract change that is not within the scope of the original contract is considered a sole source procurement. The grantee must justify why an amendment was the only feasible course of action, and must comply with FTA requirements for cost analysis and profit negotiation.

45. Advance Payments

Basic Requirement: Chapter IV, Section 2.b (5)(b) of [FTA C 4220.1F](#) indicates that 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.

46. Progress Payments

Basic Requirement: Chapter IV, Section 2.b. (5) (c) of [FTA C 4220.1F](#) indicates that progress payments are allowed if:

- 1) They are only made to the contractor for costs incurred in the performance of the contract.
- 2) Adequate security is obtained (such as taking title, letter of credit or equivalent means)

47. Time and Materials Contracts

Basic Requirement: Chapter VI, Section 2.c. (2) (c) of [FTA C 4220.1F](#) indicates that Time and Materials Contracts should be used only:

- After a determination that no other type of contract is suitable

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

48. Cost Plus Percentage of Cost

Basic Requirement: Chapter VI, Section 2(c)(2) (a) of [FTA C 4220.1F](#) indicates that the cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

49. Liquidated Damages Provisions

Basic Requirement: Chapter IV, Section 2.b.(6)(b)1 of [FTA C 4220.1F](#) indicates that 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. In addition, the assessment for damages shall be at a specific rate per day for each day of the overrun in contract time. The rate must be pre-determined and specified in the third party contract. FTA expects the recipient to credit any liquidated damages recovered to the project, unless FTA permits other uses of the liquidated damages

50. Piggybacking

Basic Requirement: Chapter V, Section 7a.(2) of [FTA C 4220.1F](#) defines Piggybacking as an assignment of existing contract rights to purchase supplies, equipment, or services. Grantees piggybacking on another agency's contract must ensure that the original contract contained an **assignability clause** and that the terms and conditions of that contract meet the FTA requirements.

51. Qualifications Exclude Price [A & E]

Basic Requirement: Chapter VI, Section 3(f)(3)(b) of [FTA C 4220.1F](#) indicates that qualifications-based competitive proposal procedures require that:

- 1) An offeror's qualifications be evaluated
- 2) Price be excluded as an evaluation factor

52. Serial Price Negotiations [A&E]

Basic Requirement: Chapter VI, Section 3(f)(3)(d) of [FTA C 4220.1F](#) indicates that:

- Negotiations be conducted with only the most qualified offeror
- 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.

53. Bid Guarantee [Construction over \$100,000]

Basic Requirement: Chapter IV, Section 2.i.(1)(a) of [FTA C 4220.1F](#) requires that the Bid Security:

- Equal five (5) percent of the bid price.

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- Firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will execute contractual documents as may be required within the time specified.

54. Performance Bond [Construction over \$100,000]

Basic Requirement: Chapter IV, Section 2.i.(1)(b) of [FTA C 4220.1F](#) requires that the Performance Security:

- Is executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract;
- Amount is equal to 100 percent of the contract price.

55. Payment Bond [Construction over \$100,000]

Basic Requirement: Chapter IV, Section 2.i.(1)(c) of [FTA C 4220.1F](#) requires that the Payment Security:

- Assures payment of all persons supplying labor and material.
- Includes required amounts as follows:
 - 1) Fifty percent of the contract price if the contract price is not more than \$1 million;
 - 2) Forty percent of the contract price if the contract price is more than \$1 million but not more than \$5 million; or
 - 3) Two and a half million dollars if the contract price is more than \$5 million.

56. Clauses

Basic Requirement: Chapter IV, Section 2 and Appendix D of [FTA C 4220.1F](#) indicate that:

- A current but not all inclusive and comprehensive list of statutory and regulatory requirements applicable to grantee procurements (such as Davis-Bacon Act, Disadvantaged Business Enterprise, Clean Air, and Buy America) is contained in the FTA Master Agreement.
- Grantees are responsible for evaluating these requirements for relevance and applicability to each procurement.

It is not acceptable to simply reference the [Master Agreement/C4220.1F](#) and leave contractors the responsibility to decide which statutes and regulations apply to that particular contract (note that many may not apply). Grantees cannot avoid the responsibility for determining which requirements apply (e.g., Buy America) and so stating in their solicitations and contracts with suitable contract language, as well as representations and certifications. We would also note that FTA evaluates grantee contract clauses as part of their Procurement System Reviews (PSRs), and a failure to include the specific contract clauses would be cited as a deficiency that would be unacceptable to FTA. Finally, we would add that certain statutory requirements such as Buy America, if not included in the contract, would result in FTA not funding that contract.

57. Veterans Preference/Employment

Basic Requirement: Chapter IV, 2.c. (1)(c) C4220.1F of [FTA C 4220.1F](#) Recipients and sub-recipients of Federal financial assistance under this chapter shall ensure that contractors working on a capital project funded using such assistance give a hiring preference, **to the extent practicable**, to veterans (as defined in section 2108 of title 5) who have the requisite skills and abilities to perform the construction work required under the contract. This subsection shall not

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be understood, construed or enforced in any manner that would require an employer to give preference to any veteran over any equally qualified applicant who is a member of any racial or ethnic minority, female, an individual with a disability, or former employee.

58. SAM(EPLS) Debarment/suspension

Basic Requirement: Chapter IV, 2.a(2)(b) C4220.1F, Even though the recipient may collect a debarment and suspension certification from the prospective third party contractor, or include a clause in the third party contract requiring disclosure, FTA strongly recommends that the recipient check the Excluded Parties List System (EPLS). Now a part of the System for Awards Management (SAM), the EPLS is an electronic, web-based system (www.sam.gov) that identifies those parties excluded from receiving Federal contracts, certain subcontracts, and certain types of Federal financial and non-financial assistance and benefits.

59. Disputes/Breach

Basic Requirement: Chapter VII, 3.a. & 4.a. C4220.1F, Third party contracts exceeding \$100,000 must include administrative, contractual, or legal remedies for violations or breach of the contract by the third party contractor. 2 CFR Part 200, assigns responsibility to the recipient for resolving all contractual and administrative issues arising out of their third party procurements, including source evaluation and selection, including protests of awards, disputes, and claims using good administrative practices and sound business judgment.

The Federal Transit Administration (FTA) also encourages the recipient to use appropriate alternative dispute resolution procedures.

60. Terminations

Basic Requirement: Chapter IV, 2.b(6)(b) 4 C4220.1F, 2 CFR Part 200 for non-governmental recipients requires administrative, contractual, or legal contract remedies in instances in which a contractor violates or breaches terms of a contract that exceeds the small purchase threshold, which FTA recognizes as the simplified acquisition threshold. Termination for cause and termination for convenience provisions must be included in contracts exceeding \$10,000.

61. Disadvantaged Business Enterprise (DBE)

Basic Requirement: Chapter IV, 2.a.(6)(a), Section 1101 (b) of MAP-21, 23 U.S.C. Section 101 note, extends the Federal statutory requirements that FTA make available at least 10 percent of its funding under that Act for contracts with small business concerns owned and controlled by socially and economically disadvantaged people. Each FTA recipient and sub-recipient of FTA funding assists FTA in meeting this national goal. To receive FTA assistance, each FTA recipient and sub-recipient of FTA funding must comply with applicable requirements of DOT regulations, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs," 49 CFR Part 26.

The FAST ACT Section 1101 (b) extends the Federal statutory requirements that FTA make available at least ten (10) percent of its funding under that Act for contracts with small business concerns owned and controlled by socially and economically disadvantaged people. Each FTA recipient and sub-recipient of FTA funding assists FTA in meeting this national goal. To receive

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FTA assistance, each FTA recipient and sub-recipient of FTA funding must comply with applicable requirements of DOT regulations, “Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs,” 49 CFR Part 26.

The contractor shall maintain compliance with “DBE Approval Certification” throughout the period of contract performance. The contractor shall not discriminate on the basis of race, color, national origin, sex, age, or disability in the performance of the contract.

62. Buy America Pre-Award Review – (Steel or manufactured products)

Basic Requirement: Chpt IV, 2.i.(9) of FTA C 4220.1F states, for any FTA assisted project having third party construction contracts exceeding **\$150,000**, FTA’s Buy America law and regulations require the third party contractor to provide property produced or manufactured in the United States for use in the construction project that the recipient acquires, unless FTA has granted a waiver authorized by those regulations.

49 CFR 661:

(a) Except as provided in § [661.7](#) and § [661.11](#) of 49 CFR 661, no funds may be obligated by FTA for a grantee project unless all iron, steel, and manufactured products used in the project are produced in the United States.

(b) All steel and iron manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives.

(c) The steel and iron requirements apply to all construction materials made primarily of steel or iron and used in infrastructure projects such as transit or maintenance facilities, rail lines, and bridges. These items include, but are not limited to, structural steel or iron, steel or iron beams and columns, running rail and contact rail. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured products or rolling stock, or to bimetallic power rail incorporating steel or iron components.

(d) For a manufactured product to be considered produced in the United States:

(1) All of the manufacturing processes for the product must take place in the United States; and

(2) All of the components of the product must be of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.

63. Pre-Award Review / Post-Delivery Review

Basic Requirement: Chpt IV, 2.e.(6) of C 4220.1F states each third party contract to acquire rolling stock must include provisions for compliance with applicable requirements of 49 U.S.C. Section 5323(m) and those provisions of FTA regulations, “Pre-Award and Post-Delivery Audits of Rolling Stock Purchases,” 49 CFR Part 663, that do not conflict with 49 U.S.C. Section 5323(m). 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.*

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49 C.F.R. 663

Basic Requirement: Chpt IV, 2.e.(6) of C 4220.1F states that each third party contract to acquire rolling stock must include provisions for compliance with applicable requirements of 49 U.S.C. Section 5323(m) and those provisions of FTA regulations, “Pre-Award and Post-Delivery Audits of Rolling Stock Purchases,” 49 CFR Part 663, that do not conflict with 49 U.S.C. Section 5323(m). 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

64. Brooks Act/Qualifications-Based procurements

Basic Requirement: Chapter IV, 2.h.(1); (2)(a) C4220.1F For projects related to or leading to construction, an FTA recipient must use the qualifications-based procurement procedures of 40 U.S.C. Chapter 11 (“Brooks Act” procedures) when contracting for A&E services and other services described in 49 U.S.C. Section 5325(b), which include program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, or related services.

65. Design-Bid-Build

Basic Requirement: Chapter VI, Section 3.g. A construction project under which a recipient commissions an architect or engineer to prepare drawings and specifications under a design services contract, and separately contracts for construction, by engaging the services of a contractor through sealed bidding or competitive negotiations to complete delivery of the project. The design-bid-build procurement method requires separate contracts for design services and for construction.

- (1) Design Services. For design services, the recipient must use qualifications-based procurement procedures, in compliance with applicable Federal, State and local law and regulations.
- (2) Construction. Because the recipient may not use qualifications-based procurement procedures for the actual construction, alteration or repair of real property, the recipient generally must use competitive procedures for the construction. These may include sealed bidding or competitive negotiation procurement methods, as appropriate.

It has been traditional in the construction industry to employ an *architect/engineer (A/E)* to complete a detailed design of the entire project before soliciting bids from construction contractors. This traditional approach is known as *sequential design and construction*. This sequential design/construction approach requires that a detailed design package of the entire project be complete before bids are solicited from construction contractors. Following award of

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the construction contract, the A/E is often retained by the owner for the construction phase, and acts as the owner's agent, to inspect the construction work to ensure that the structures are built according to the designs and specifications.

Advantages - A major advantage of the sequential design and construction approach is that complex or one-of-a-kind projects can be thoroughly planned and thought through before construction begins. The traditional approach thus produces, in the design phase of the project, the most accurate estimate of final project costs, and this is an advantage of the traditional technique. If problems are encountered with design aspects for the latter stages of the project, the earlier design features or phases can be modified before any construction work has been done, thus avoiding construction contractor claims and delays. Another advantage is that the Agency is given a fixed price for completion of the entire project before construction begins. There may also be advantages in obtaining the necessary financing and project approvals. Overall management of the project should also be simplified by this approach.

Disadvantages - *Sequential design and construction* requires a longer time to complete the project than *phased design and construction* ("*fast tracking*"). And since time pressures are often the most intense issues confronting the Agency, the sequential method may not be feasible. Alternative contracting approaches have arisen to shorten the project completion time. These include *phased design and construction* ("*fast tracking*"), which often involves the use of a *construction manager*, and *turnkey (design-build)* contracting.

66. Design-Build

Basic Requirement: Chapter VI, Section 3.h. As defined in 49 U.S.C. Section 5325(d)(1), means (1) a project under which a recipient enters into a contract with a seller, firm, or consortium of firms to design and build a public transportation system, or an operable segment of such system, that conforms to specific performance criteria; and (2) may include an option to finance, or operate for a period of time, the system or segment or any combination of designing, building, operating, or maintaining such system or segment. Apart from the definition at 49 U.S.C. Section 5325(d)(1), a "design-build project" also means a construction project under which a recipient enters into a contract with a seller, firm, or consortium of firms both to design and construct a public transportation facility that is the subject of the project.

67. Cardinal Changes (Tag Ons)

Basic Requirement: Chapter V, Section 7. b.(2) A significant change in contract work (property or services) that causes a major deviation from the original purpose of the work or the intended method of achievement, or causes a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract, is a cardinal change. Such practices are sometimes **informally referred to as "tag-ons."** A change within the scope of the contract (sometimes referred to as an "in-scope" change) is not a "tag-on" or cardinal change. A tag-on is defined as the adding on to the contracted quantities (base and option) as originally advertised, competed, and awarded, whether for the use of the buyer or for others, and then treating the add-on portion as though it met the requirements of competition.

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68. Federal Cost Principles

Basic Requirement: Chapter IV, Section 2.b.(4) C4220.1F The Common Grant Rules require project costs to conform to applicable Federal cost principles for allowable costs. In general, costs must be necessary and reasonable, allocable to the project, authorized or not prohibited by Federal law or regulation, and must comply with Federal cost principles applicable to the recipient

Chapter IV, Section 4 C4220.1F states FTA assistance may support contract costs or prices based on estimated costs only if the costs incurred or cost estimates included in negotiated prices comply with applicable Federal cost principles, and the property or services are eligible for Federal assistance under the terms of the underlying grant or cooperative agreement.

69. Revenue Contracts

Basic Requirement: Chapter II, Section 2.(4) of FTA C 4220.1F states a revenue contract is a contract in which the recipient or sub-recipient provides access to public transportation assets for the primary purpose of either producing revenues in connection with an activity related to public transportation, or creating business opportunities with the use of FTA assisted property. The recipient has broad latitude in determining the extent and type of competition appropriate for a particular revenue contract. Nevertheless, to ensure fair and equal access to FTA assisted property and to maximize revenue derived from such property, the recipient should conduct its revenue contracting as follows:

- (a) Limited Contract Opportunities. If there are several potential competitors for a limited opportunity (such as advertising space on the side of a bus), then the recipient should use a competitive process to permit interested parties an equal chance to obtain that limited opportunity.
- (b) Open Contract Opportunities. If, however, one party seeks access to a public transportation asset (such as a utility that might seek cable access in a subway system), and the recipient is willing and able to provide contracts or licenses to other parties similarly situated (since there is room for a substantial number of such cables without interfering with transit operations), then competition would not be necessary because the opportunity to obtain contracts or licenses is open to all similar parties.

All revenue generated activity involving third party contracts must follow an important requirement of FTA Circular 4220:

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

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

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70. State or Local Government Purchasing Schedules

Basic Requirement: Chapter V, Section 4.a.b.c. of FTA C 4220.1F

When obtaining property or services in this manner, the recipient must ensure all Federal requirements, required clauses, and certifications (including Buy America) are properly followed and included, whether in the master intergovernmental contract or in the recipient's purchase document. One way of achieving compliance with FTA requirements is for all parties to agree to append the required Federal clauses in the purchase order or other document that effects the recipient's procurement. When buying from these schedules, the recipient should obtain Buy America certification before entering into the purchase order. **You must also determine that the State contracts were awarded with full and open competition and were not subject to geographical preferences** (e.g., giving in-state vendors a bidding preference - as some states have such practices that are prohibited by FTA).

Under the FAST Act, a grantee may purchase rolling stock and related equipment from any State's cooperative procurement contract or schedule. State cooperative purchasing contracts or state schedules are subject to federal requirements, including, but not limited to, (1) full and open competition, (2) no geographic preferences, (3) Buy America, and bus testing, and (4) must include all FTA required clauses and certifications with its purchase orders issued under the State contract. Pursuant to Section 3019 of the FAST Act, recipients may purchase rolling stock and related equipment from another State's schedule.

71. Oversight of Sub-Recipients

Basic Requirement: Chapter I, Section 5. z. of FTA C 4220.1F states a recipient is responsible for assuring that each of its sub-recipients complies with the applicable requirements and standards of this circular, and that each of its sub-recipients is aware of the Federal statutory and regulatory requirements that apply to its actions as a sub-recipient.

All direct recipients of FTA grants, grant amendments, and cooperative agreements in excess of \$25,000 are subject to the requirements of the Federal Funding Accountability and Transparency Act of 2006 ("FFATA"). The Grantee shall submit sub-recipients' sub-award information to the FFATA Sub-award Reporting System at the end of the month after the month

As a Designated Recipient, the Grantee is responsible for the routine monitoring of sub-recipients.

The Grantee shall be responsible for the following:

- a. Applying for and receiving FTA grants on behalf of its Grant 5307 sub-recipients and performing on-going project management;
- b. All direct recipients of FTA grants, grant amendments, and cooperative agreements in excess of \$25,000 are subject to the requirements of the Federal Funding Accountability and Transparency Act of 2006 ("FFATA"). The Grantee shall submit sub-recipients' sub-award information to the FFATA Sub-award Reporting System at the end of the month after the

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month in which any sub-award under the grant has been made and not the month after which FTA awarded the direct grant;

- c. Ensuring adherence to federal program guidelines through contractual agreements with all sub-recipient;
- d. Receiving, verifying, and submitting for reimbursements from the FTA for all eligible project expenses;
- e. Passing through the reimbursements received from FTA for all eligible project expenses;
- f. Receiving financial and status reports from all sub-recipients;
- g. Completing financial and progress status reports in the FTA electronic grants management system (TEAM); and
- h. Other such grant administrative actions as necessary to ensure project completion in accordance with all applicable federal rules, regulations, and guidance.

As a Designated Recipient of FTA Grant 5307 funds, the Grantee and its sub-recipients or partners are responsible for establishing and maintaining adequate internal controls over all functions which affect the implementation of a project utilizing such funds.

For proper management of the projects, each sub-recipient shall utilize internal controls in all of its operating, accounting, financial, and administrative systems. To assure proper accountability for grant or cooperative agreement funds, internal controls shall be integrated with the management systems used by the recipient to regulate and guide its operations.

Resources shall be used in accordance with all applicable state, local, and Federal laws, regulations, and policies, as well as the terms of the grant or cooperative agreement. Resources shall be safeguarded against waste, loss, and misuse. In addition, reliable data on resource use and safeguards must be accumulated, maintained, and fairly disclosed in reports to the Designated Recipient manager and FTA.

The Grantee shall be responsible for monitoring sub-recipients no less than once per contract year and more often, should it be necessary. The Grantee shall assist any of its sub-recipients in setting up the monitoring in order to ensure adherence to FTA guidelines.

The Grantee's annual monitoring shall include a physical site visit to the location where the sub-recipient maintains its project records. The timing of the site visit shall occur six months from the beginning of any contract and occur at annual intervals while the contract is in force. Any deficiencies noted will result in more frequent inspections or the implementation of a corrective action plan until the deficiencies have been resolved.

Procedures for monitoring sub-recipients shall include:

- a. Review of operation of project for scope of work accuracy and efficiency.

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- b. Review of the filing system, the system maintenance, and presence of grant information.
- c. Review of the grant matching documentation.
- d. Review of the sub-recipients Drug and Alcohol Policy.
- e. Review of the sub-recipients Title VI Plan and access, if there are current complaints.
- f. Review of marketing efforts associated with the project.

72. Signature Authority

Who signs for what & at what dollar threshold

Single Bid or Single Proposal

Basic Requirement: FTA Chapter IV, Section 3.i.(1)(b)2 of C4220.1F

Upon receiving a single bid or single proposal in response to a solicitation, the recipient should determine if competition was adequate. This should include a review of the specifications for undue restrictiveness and might include a survey of potential sources that chose not to submit a bid or proposal.