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**DRAFT REPORT**

**Procurement System Review  
of  
METROPOLITAN COUNCIL**

**St. Paul, Minnesota**

**Dates of Site Visit: July 16-July 20, 2012**

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## EXECUTIVE SUMMARY

Under contract to the United States Department of Transportation, Federal Transit Administration (FTA), Leon Snead & Company, P.C., performed a Procurement System Review (PSR) of the Metropolitan Council, Minneapolis, Minnesota, during the period from July 16 through July 20, 2012. The review was made to determine whether Metro Council was deficient or not deficient with respect to the requirements of FTA Circular 4220.1F as it relates to procurements for the purpose of developing and administering transit related programs.

During the 24-month period ended June 30, 2012, covered by the PSR, Metro Council awarded 126 contracts and purchase orders that included FTA assistance funds for approximately \$875 million. The review covered 34 contracts and purchase orders valued at about \$829 million. The review assessed the recipient's compliance with the 56 "elements," or requirements, as defined in FTA Circular 4220.1F. The review assessment is divided into two categories: 1. Not Deficient (definition: in all instances the recipient complied with the requirement), and 2. Deficient (definition: in one or more of the applicable instances the recipient did not comply with the requirement).

Our review of the procurement operations disclosed that the recipient had no deficiencies with respect to 47 of the procurement requirements of the FTA Circular 4220.1F, and it had deficiencies relative to 8 of the requirements. Compliance with 1 element in the FTA Circular did not apply to the contract files reviewed (See Appendix I).

We found deficiencies that Metro Council needs to take additional action to correct. It has a contract administration system for construction contracting. A similar system needs to be established for all other types of contracts. Metro Council needs to update its policies and procedures to include FTA Circular requirements relating to Organizational Conflict of Interest, documentation of Micro-Purchases, Design-Build contract method, and Liquidated Damages requirements. In addition, Metro Council needs to ensure that its contracts comply with FTA requirements pertaining to Independent Cost Estimates, documenting evaluation of price and other factors, sound and complete contract forms, cost analysis required for sole source, exercise of options, advance payment prohibition, and requirements for Pre-Award and Post-Delivery certifications for bus and rail procurements.

Practices that could be followed by Metro Council as described in the FTA Best Practices Procurement Manual are included in this report. The report also includes advisory comments to correct elements with "deficiencies" and to assist Metro Council in its procurement practices.

We believe that when Metro Council implements the corrective actions recommended in the report, its procurement system will be strengthened and will be in compliance with the selected elements of FTA Circular 4220.1F.

## I. PROCUREMENT SYSTEM REVIEW BACKGROUND

### Background

This procurement system review (PSR) of Metropolitan Council (Metro Council) was performed in accordance with FTA procedures and included a risk assessment phase and contract review phase. During the risk assessment phase we obtained an understanding of the recipient's procurement system and assessed its risk for noncompliance. During the contract review phase we assessed the recipient's compliance with the FTA Circular 4420.1F and other regulatory requirements through a review of its procurement files. At the time of our review, the Metropolitan Council received four grants under the American Recovery and Reinvestment Act (ARRA) in the amount of \$70,0135, 723. We reviewed two ARRA (bus) contracts in the amount of rded with ARRA funds during the review period and all were included in our review.

The objectives of the PSR are to encourage and facilitate improved recipient procurement operations, promote the use of best practices, and assess Metro Council's compliance with all Federal requirements. Specifically, the PSR ensures improved and greater compliance with the requirements of FTA Circular 4220.1F and the Pre-Award and Post-Delivery Rule. The PSR is designed to be a customer-oriented review that encourages working relationships between FTA and the Metropolitan Council.

### Required Elements

The PSR looks at both systemwide elements and individual procurement elements. Systemwide procurement elements are FTA requirements that apply to the procurement system as a whole. Individual procurement elements are requirements evaluated on an individual contract-by-contract basis.

### Classification of Findings

The reviewer records deficiencies for each systemwide and individual procurement element. The reviewer determines deficiencies for systemwide elements based on the results of the Systemwide Requirements Review Check List. The reviewer determines deficiencies for each individual procurement element based upon all contract files reviewed.

Two levels of findings are used:

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

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

We discussed our findings and recommendations with Metro Council officials at an exit conference on July 20, 2012. The following officials were in attendance.

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\*Attended by phone

## II. DESCRIPTION OF THE RECIPIENT

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. 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.

The Council employs about 3,700 people and has an annual operating budget of \$739 million. Of which 19% is debt service for wastewater and transportation capital projects. On the operations revenue side, 45% of revenues are from user fees, such as wastewater charges and bus fares. The majority of the Council's employees operate the transit and wastewater treatment systems.

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. Future plans are to add a light-rail link between downtown Minneapolis and downtown St. Paul as well as developing enhanced express bus service throughout the region. Metro Transit operates the Hiawatha light-rail line, Northstar commuter rail line and 123 bus routes 66 are local-service routes and 51 are express routes and 6 contract service routes, using a fleet of 885 buses.

Metro Transit relies heavily on state and federal money to finance its operations and capital programs. Regional guidelines suggest that a third of Metro Transit's operating budget be generated from customers.

### **Transportation Division Operating Budget 2010**

Total Revenue	\$378, 509, 497
Total Expenses	\$378, 977, 975
Operating Income (Loss)	(\$468, 478)

### III. RESULTS OF THE REVIEW

The results of the review are summarized for each systemwide 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 deficiencies, presents best practices/advisory comments, and incorporates the grantee's corrective actions and schedule.

#### A. SYSTEMWIDE PROCUREMENT ELEMENTS

Systemwide procurement elements are requirements that apply to the procurement system as a whole. The systemwide procurement elements are primarily evaluated during the Assessment Phase. During the Assessment Phase, we interviewed senior management and reviewed the policies, regulations and procedures of the grantee to assess the procurement system environment. We also interviewed procurement staff to assess the effectiveness of the procurement system. The findings in this section are a result of these interviews, review of regulations, and additional insights gained during the Contract Review Phase.

#### NOT DEFICIENT

The recipient's system is "not deficient" with respect to the following elements:

- Element 1 – *Written Standards of Conduct*** [FTA C4220.1F, III, 1.a.,b.,&c.]
- Element 3 – *Written Protest Procedures*** [FTA C4220.1F,VII,1.a.(2)]
- Element 4 – *Prequalification System*** [FTA C4220.1F VI, 1. c.]
- Element 5 – *Procedures for Ensuring Most Efficient and Economic Purchase*** [FTA C4220.1F IV,1.b.,c.,& e.]

#### DEFICIENT

The recipient's system was deficient with respect to the following elements:

- Element 2 – *Contract Administration System*** [FTA C4220.1F III. 3.]

Third Party Contracting Capacity [FTA C 4220.1F, III, 3] As part of an FTA recipient's obligation to maintain adequate technical capacity to carry out its project and comply with the Common Grant Rules, the recipient's third party contracting capability must be adequate to undertake its procurements effectively and efficiently in compliance with applicable Federal, State, and local requirements. The Common Grant rules require the recipient to maintain a contract administration system to ensure that it and its third party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders and applicable Federal, State and local requirements. Many FTA recipients assign contracting duties to technical, financial or management personnel. If the recipient lacks qualified personnel within its organization to undertake the various procurement tasks, such as drafting specifications, evaluating contracts, or performing internal audits for the recipient, FTA expects the recipient to acquire the necessary services from sources outside the recipient's organization.



## **Discussion**

The recipient's system is "deficient" with respect to this element. The Metropolitan Council has a good contract administration system for its construction contracting activity. However, it does not have a documented contract administration system for all other types of contracts. In the case of non-construction, contract administration is a shared function between the program offices and the administrative office that has contract authority. However, specific responsibilities and duties for contract administration are not made specifically clear. Reporting and record keeping requirements are not specified. Contract administration duties such as tracking contract deliverables, schedules, progress payments with required incurred cost documentation, insurance, inspections, warranties, etc. are not specified. Program personnel are not informed of their authority or lack of authority to make changes to the contract or to direct the contractor within the scope of the contract.

## **Best Practices/Advisory Comments**

Within 120 days of the date of this report the Metropolitan Council should develop and implement a contract administration system (Manual) to ensure that it and its third party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders and applicable Federal, State and local requirements. The Contract Administration Manual should cover all contract administration functions from contract award thru to contract close-out. It should describe each function and assign responsibility for its accomplishment, recordkeeping and reporting.

A system for delegating contracting authority and setting the limits of that authority should be included in the Manual. [One effective method of assigning such responsibilities and also controlling the use of contracting officer authority is to use a letter of delegation to the employee responsible for the administration of a specific contract. The letter should list all functions the employee is responsible for and describe what contractual actions he or she may and may not take. A place is provided on the letter for the employee to also sign and date it.]

The Manual should include an effective "Change Control System" which ensures that all contract changes are priced and definitized in a timely manner. If a change cannot be priced before issuance because of some urgency, strict time limits should be set for the submission of the contractor's price proposal and negotiation of the final contract modification. This will prevent the contract modification from becoming a cost-plus-percentage-of-cost arrangement.

## **Corrective Action and Implementation Schedule**

[Corrective action and implementation schedule to be supplied by the recipient]

## **Element 6 – Procurement Policies and Procedures [FTA C4220.1F III. 3.a.]**

Grantees are required to have written 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 FTA Circular 4220.1F. If there is no State law on a particular aspect of procurement, then Federal contract law principles will apply.

## **Discussion**

The recipient's system is "deficient" with respect to this element. The Metropolitan Council's procurement policies and procedures were reviewed for the mandatory requirements of FTA C 4220.1F. The following FTA requirements, listed by the FTA Circular paragraph number, were not found in written policies or procedures or elsewhere:

Organizational Conflicts of Interest [FTA C 4220.1F, VI, 2, a (4)(h)] Engaging in practices that result in organizational conflicts of interest as prohibited by the Common Grant Rules:

2. Remedies. FTA expects the recipient to analyze each planned acquisition in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible, and avoid, neutralize, or mitigate potential conflicts before contract award.

[Metropolitan Council's policies and procedures contained a definition of organizational conflict of interest and a requirement that contractors report any conflicts that are discovered after award. However, it did not provide guidance on how to mitigate or eliminate such conflicts in its contracting. Such guidance and procedures are required to be implemented at the solicitation stage of the contracting process.]

Micro-Purchases [FTA C 4220.1F, VI, 3.a.(1)(2)]

Documentation. FTA's only documentation requirement for micro-purchases is a determination that the price is fair and reasonable and a description of how the recipient made its determination. FTA does not require the recipient to provide its rationale for the procurement method used, selection of contract type, or reasons for contractor selection or rejection."

[With respect to micro-purchases, the Metropolitan Council's regulation states that no documentation is required.]

Design-Build [FTA C 4220.1F, VI, 3.h.] The design-build procurement method consists of contracting for design and construction simultaneously with contract award to a single contractor, consortium, joint venture, team, or partnership that will be responsible for both the project's design and construction. FTA's enabling legislation expressly authorizes the use of FTA capital assistance to support design-build projects "after the recipient complies with Government requirements," 49 U.S.C. Section 5325(d)(2).

- (1) Procurement Method Determined by Value. First, the recipient must separate the various contract activities to be undertaken and classify them as design or construction, and then calculate the estimated total value of each. Because both design and construction are included in a single procurement, the FTA expects the recipient to use the procurement

method appropriate for the services having the greatest cost, even though other necessary services would not typically be procured by that method."

[The Metropolitan Council's policies and procedures do not contain coverage of Design-Build type contracting.]

Liquidated Damages [FTA C 4220.1F, IV.2.(b)(6)(b)(1)] FTA has determined that a recipient may use liquidated damages if the recipient reasonably expects to suffer damages through delayed contract completion, or if weight requirements are exceeded, and the extent or amount of such damages are uncertain and would be difficult or impossible to determine. The rate and measurement standards must be calculated to reasonably reflect the recipient's costs should the standards not be met, and must be specified in the solicitation and contract. The assessment for damages is often established at a specific rate per day for each day beyond the contract's delivery date or performance period. A measurement other than a day or another period of time, however, may be established if that measurement is appropriate, such as weight requirements in a rolling stock purchase. The procurement file should include a record of the calculation and rationale for the amount of damages established. Any liquidated damages recovered must be credited to the project account involved unless FTA permits otherwise. We also refer you to Chapter V, paragraph 5(a)(1) for a discussion of how liquidated damages can be used to encourage settlements."

[The Metropolitan Council's policies and procedures do not contain coverage regarding Liquidated Damages type remedies.]

#### **Best Practices/Advisory Comments**

Within 60 days of the date of this report the Metropolitan Council should develop and implement policies and procedures that include the FTA Circular requirements shown above.

#### **Corrective Action and Schedule**

[Corrective action and implementation schedule to be provided by the recipient]

## **B. INDIVIDUAL PROCUREMENT ELEMENTS**

As requested by the FTA Regional Office our review also included the review of American Recovery and Reinvestment Act (ARRA) contracts.

The individual procurement elements are applicable to the contract files reviewed. We compiled the findings from all contracts reviewed by each individual procurement element. The results of those findings and conclusions are presented below and organized by whether the element was evaluated as "not deficient" or "deficient." Those elements for which the recipient is "not deficient" are shown first and those defined as "deficient" with respect to that element are shown second. The elements classified as "not applicable" to the sample contract files reviewed are shown in Appendix I, Report Summary Table. Within each category the numbered elements appear as they are listed in FTA's Procurement System Review Guide.

**NOT DEFICIENT** (A full description of the elements for which the recipient is not deficient is in Appendix II.)

The recipient is "not deficient" with respect to the following elements:

- Element 8 – *A&E Geographic Preference***
- Element 9 – *Unreasonable Qualification Requirements***
- Element 10 – *Unnecessary Experience and Excessive Bonding***
- Element 11 – *Organizational Conflict of Interest***
- Element 12 – *Arbitrary Action***
- Element 13 – *Brand Name Restrictions***
- Element 14 – *Geographic Preferences***
- Element 15 – *Period of Performance Limitations***
- Element 16 – *Written Procurement Selection Procedures***
- Element 17 – *Solicitation Prequalification Criteria***
- Element 18 – *Award to Responsible Contractors***
- Element 20 – *No Splitting [Micro-Purchases]***
- Element 21 – *Fair and Reasonable Price Determination***
- Element 23 – *Price Quotations [Small Purchases]***
- Element 24 – *Complete Specifications***
- 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 Solicitation***
- 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 38 – *Sole Source if Other Award is Feasible***
- Element 40 – *Evaluation of Options***
- Element 41 – *Cost or Price Analysis***
- Element 42 – *Written Record of Procurement History***
- Element 44 – *Out of Scope Changes***
- Element 46 – *Progress Payments***
- Element 47 – *Time and Materials Contracts***
- Element 48 – *Cost Plus Percentage of Cost***
- Element 49 – *Liquidated Damages Provisions***
- Element 50 - *Piggybacking***
- Element 51 – *Qualification 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]***
- Element 56 - *Clauses***

#### **DEFICIENT**

The recipient is "deficient" with respect to the following elements:

#### **Element 7 - *Independent Cost Estimate***

Cost and Price Analysis [FTA C 4220.1F, VI, 6.] The Common Grant Rules require the recipient to perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis depends on the facts and circumstances surrounding each procurement, but as a starting point, the recipient must make independent estimates before receiving bids or proposals.

#### **Discussion**

The recipient is "deficient" with respect to this element. We reviewed 25 procurement files involving request for proposals, invitations for bids, sole sources, and small purchases found one file lacked supporting documentation indicating an adequate independent cost estimate had been performed by the recipient before the transit authority received bids or proposals. Our review found the recipient does use a formal procurement requisition form to initiate the procurement process. This form is normally generated by the requiring organization. The independent cost estimate must be received before receipt of proposals and supported with detailed information as to its development and/or source; in other words how derived and by whom. The independent cost estimate becomes the first step in the cost/price reasonableness analysis.

#### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should implement management controls to ensure that one of the first steps to be taken in connection with every procurement action is an independent cost or price estimate.

## **Corrective Actions and Implementation Schedule**

[Corrective actions and implementation schedule to be provided by recipient.]

### ***Element 19 - Sound and Complete Agreement***

Third Party Contracting Capacity [FTA C 4220.1F, III, 3, b.] As part of an FTA recipient's obligation to maintain adequate technical capacity to carry out its project and comply with the Common Grant Rules, the recipient's third party contracting capability must be adequate to undertake its procurements effectively and efficiently in compliance with applicable Federal, State, and local requirements...

- b. Adequate Third Party Contract Provisions. The Common Grant Rules require that all third party contracts include provisions adequate to form a sound and complete agreement. Compliance with Federal laws and regulations will necessarily result in the addition of many other provisions to ensure compliance with those laws and regulations.

### **Discussion**

The recipient is "deficient" with respect to this element. We reviewed 23 procurement files involving request for proposals, invitations for bids, and sole source procurements to determine if the resulting contract (s) formed a sound and complete agreement. Fifteen procurement files were found to be adequate in meeting the requirements for this element and eight procurement files was found deficient. In one deficient procurement file the term of the contract was not cited. The contract stated "The term of this contract begins upon execution of this contract by both parties and continues through final delivery, inspection, and acceptance by the Council of all Vehicles, unless otherwise terminated or extended as provided in this contract." Another deficient procurement contract failed to include any FTA required clauses or any remedies for breach of contract and provisions covering termination for cause or convenience. The balance of deficient procurement files used a three page contract form that incorporated the various documents that constituted the total contract that were too vague and too general. An example of this contract format states; the CONTRACTOR, by executing this Contract, declares and asserts that it has read each and every clause in each of:

1. Bid Form;
2. Contract Agreement;
3. Performance bond;
4. Payment bond;
5. General Conditions;
6. Supplemental Conditions For FTA-Funded Projects, if applicable;
7. Supplementary Conditions, if applicable;
8. All other documents listed under Contract Requirements of the Table of Contents;
9. Technical Specifications;
10. Drawings;
11. All Addenda issued prior to the time of the opening of the Bids;"

The review found that the contract award documents were too general in the way they incorporated documents into the contract by reference. Any document incorporated into the contract by reference must be specific using titles and dates or identifying numbers of the documents. In addition there was no cited order of precedence for the contract documents listed.

#### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop procedures and implement management controls to ensure its requirements are covered by a contract that results in a sound and complete agreement and reflects the understandings of the parties. The contract should take precedence over all other contract documents. Where applicable, the contract or award documents must include all terms and conditions, the negotiated contract price and payment terms, the final statement of work or specification, the delivery schedules and the required clauses including termination for cause and termination for convenience and the basis for settlement. This document should be, as nearly as possible, a stand-alone document in which all the applicable attachments and exhibits are clearly identified as being part of the award. A requirement for management review of proposed contracts is a good method of assuring the completeness and soundness of contracts.

#### **Corrective Actions and Implementation Schedule**

[Corrective actions and implementation schedule to be provided by recipient.]

#### ***Element 37 – Price and Other Factors [RFP]***

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

#### **Discussion**

The recipient is "deficient" with regard to this element. We reviewed thirteen procurement files involving requests for proposals and found three files lacked documentation that would indicate that a determination had been made that the successful proposal was the most advantageous with respect to price and other factors. In fact these procurements used the Architect and Engineering (A&E) Services method of procurement [required by the Brooks Act] for services which were not A&E services. When not procuring A&E type services, price must be considered as part of the competitive process for award. There was no documentation in any procurement file reflecting the costs proposed, or any discussion of tradeoffs between the cost and technical and what would be the best value to the recipient.

#### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should establish policies, develop procedures, and implement management controls to ensure that its competitive negotiation process includes price as a factor during initial contractor selection. Awards must be made to the

responsible firm whose proposal is most advantageous to the recipient's program with price and other factors considered. Price is often separately evaluated from the technical proposals so that the price figures do not unduly influence the technical evaluation. However, one of the purposes of competitive proposals is to allow an enlightened trade-off between price and technical merit. In some procurement it may be more appropriate to permit an integrated and internally consistent evaluation of price and technical factors.

In architectural and engineering services procurements, the recipient may use competitive proposal procedures based on the Brooks Act, which requires selection based on qualifications and excludes price as an evaluation factor.

### **Corrective Actions and Implementation Schedule**

[Corrective actions and implementation schedule to be provided by recipient.]

### ***Element 39 – Cost Analysis Required [Sole Source]***

#### **Other Than Full and Open Competition [FTA C 4220.1F, VI. 3. i. (3), (c)]**

(3) Procurement Procedures. When less than full and open competition is available to the recipient, the Common Grant Rule for government recipients directs the recipient to:

(c) Cost Analysis. Prepare or obtain a cost analysis verifying the proposed cost data, the projections of the data, and the evaluation of the costs and profits.

### **Discussion**

We reviewed three noncompetitive procurement files and found one procurement file did not contain documentation to support that an adequate cost analysis had been performed. There was no element by element analysis or discussion of the cost or profit and no evidence of any negotiations being conducted. Detailed in-house cost estimates were not available to support cost comparisons.

### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop procedures and implement management controls to ensure that an adequate cost analysis is performed for all sole source procurements. A contract file checklist and a review by the manager or supervisor are a good way of ensuring compliance with this element. The analysis should be documented in the contract or purchase order file. The cost analysis should include an evaluation of labor, materials, other direct costs, overhead rates, G&A rates, and a profit factor. When negotiations take place, the file should be documented to reflect the results of the negotiations and the rationale behind the agreements reached.

### **Corrective Actions and Implementation Schedule**

[Corrective actions and implementation schedule to be provided by recipient.]



### **Element 43 – Exercise of Options**

Existing Contracts [FTA C 4220.1F, V, 7, a. (1), (a)&(b)] Occasionally a recipient may find it advantageous to use existing contract rights... FTA permits a recipient to:

(1) Exercise of Options A recipient may use contract options held by another recipient with the following limitations:

- (a) FTA expects the recipient to ensure that the terms and conditions of the option it seeks to exercise are substantially similar to the terms and conditions of the option as stated in the original contract at the time it was awarded. A recipient must ensure that the exercise of an option is in accordance with the term and conditions of the option stated in the initial contract awarded.
- (b) The recipient may not exercise an option unless it has determined that the option price is better than prices available in the market, or that when it intends to exercise the option, the option is most advantageous.”

### **Discussion**

The recipient is “deficient” with respect to this element. We reviewed two procurement files wherein the recipient had exercised a priced option and found one procurement file to be not deficient. The second file was deficient in that no documentation was found to support the reasonableness of the prices for the exercised optional buses. The file did not indicate the recipient had made and documented the determination that the option prices were still better than prices available in the market and that the option was the most advantageous offer at the time the option was exercised.

### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should establish policies and develop procedures that facilitate management controls to document the determination that the option price is fair and reasonable at the time the option is exercised.

### **Corrective Actions and Implementation Schedule**

[Corrective actions and implementation schedule to be provided by recipient.]

### **Element 45 – Advance Payments**

Federal Requirements that may Affect a Recipient’s Acquisitions [FTA C 4220.1F, IV, 2, b. (5) (b)]

- b. Administrative Restrictions on the Acquisition of Property and Services. The following Federal laws and regulations impose administrative requirements, many of which will affect specific third party procurements.
- (5) Payment Provisions.

(b) Advance Payments. Advance payments are payments made to a contractor before the contractor incurs contract costs. The recipient may use its local share funds for advance payments. However, if there is no automatic preaward authority for its project, then advance payments made with local share funds before FTA assistance has been awarded, or before a letter of no prejudice has been issued or other preaward authority has been provided, or before FTA approval for the specific advance payment has been obtained, are ineligible for reimbursement..”

### **Discussion**

The recipient is "deficient" with respect to this element. We reviewed 23 procurement files involving request for proposals, invitation for bids, and sole source procurements and found one procurement file to have not complied regarding no payments to contractors prior to the incurrence of costs.

The deficient procurement file was for the Central Corridor Low Floor Light Rail Vehicles. This contract awarded in the amount of \$153,211,516 provided for the payment of 20% of the contract price, or some \$30,642,303 upon the “Contractor’s award of sub-contracts for the following main systems: Car Body, Truck Frame, Propulsion, Friction Brake, Coupler, Doors, HVAC, Auxiliary Power Supply, and Seats.”.

Although some costs are incurred in the awarding of sub-contracts the costs incurred do not come close to the 20% dollar figure and thus become advance payments..

### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop procedures and implement management controls to ensure that advance payments are not the result of the contract payment terms or that FTA approvals are obtained prior to entering into any contract, options under a contract, or into any task orders under a contract that contains advance payments where FTA funds are involved.

[Chris, there's some duplication hereafter. Check with John and I'll review on the next round.]

### **Corrective Actions and Implementation Schedule**

[Corrective actions and implementation schedule to be provided by recipient.]

## **C. PRE-AWARD AND POST-DELIVERY REVIEW REQUIREMENTS**

A recipient purchasing revenue service rolling stock with funds obligated by FTA on or after October 24, 1991, must certify to FTA that it will conduct or cause to be conducted pre-award and post-delivery audits as prescribed in this part. In addition, such a recipient must maintain on file the certifications required under subparts B, C, and D of this part. [49 CFR § 663.7]

### ***Pre-Award***

A recipient purchasing revenue service rolling stock with FTA funds must ensure that a pre-award audit under this part is completed before the recipient enters into a formal contract for the purchase of such rolling stock. [49 CFR § 663.21]

A pre-award audit under this part includes - (a) A Buy America certification as described in § 663.25 of this part; (b) A purchaser's requirements certification as described in § 663.27 of this part; and (c) Where appropriate, a manufacturer's Federal Motor Vehicle Safety certification information as described in § 663.41 or § 663.43 of this part. [49 CFR § 663.23]

The recipient shall ensure before signing a contract with a supplier that the Buy American Certification has been reviewed and verified for both the 60% domestic content; and the proposed U.S. final assembly location, operations, and total costs. The recipient, before signing a contract with a supplier, shall have performed the "Purchaser's Requirements Certification" and checked bid specification compliance with the solicitation specifications and completed the manufacturer capability study. The recipient before signing a contract with a supplier for buses shall have requested and received the manufacturer's letter satisfying the "Federal Motor Vehicle Safety Standards (FMVSS) Certification". In the event any of the foregoing has not been accomplished, the recipient has requested and received a waiver from FTA.

### **Discussion**

The recipient is "deficient" with respect to this element. We reviewed two procurement files covering buses and one for light rail vehicles relative to the required reviews and certifications. One bus procurement file had certifications furnished by a contractor but not signed by the recipient. The second bus procurement file showed the certifications were signed by the recipient after the award of the contract. The required certifications must be signed by the recipient before any award is made. The light rail vehicle procurement file was not deficient.

### **Best Practices/Advisory Comments**

Refer to the Best Practices/Advisory Comments following the Post-Delivery Review Element.

### ***Post-Delivery***

A recipient purchasing revenue service rolling stock with FTA funds must ensure that a post-delivery audit under this part is completed before title to the rolling stock is transferred to the recipient. [49 CFR § 663.31]

A post-delivery audit under this part includes - (a) A post-delivery Buy America certification as described in § 663.35 of this part; (b) A post-delivery purchasers certification as described in § 663.37 of this part; and (c) When appropriate, a manufacturer's Federal Motor Vehicle Safety Standard self-certification information as described in § 663.41 and § 663.43 of this part. [49 CFR § 663.33]

The recipient shall insure before using the vehicles in transit service that the "Buy American Certification" has been reviewed and verified for both the 60% domestic content; and the actual U.S. final assembly location, operations, and total costs. In addition, the Purchaser's Requirements Certification for procurements of rail vehicles or more than ten buses or modified vans is completed for the Resident Inspector's report and the Visual Inspections and Road Tests or Performance Tests in the case of rail vehicles. Finally, the recipient has verified that the Federal Motor Vehicle Safety Standards (FMVSS) sticker is affixed to each bus. In the event that any of the foregoing has not been accomplished the recipient has requested and received a waiver from the FTA.

### **Discussion**

The recipient is "deficient" with respect to this element. We reviewed two procurement files covering buses and one procurement for light rail vehicles relative to the required reviews and certifications. The Post-Delivery Certifications for Buy America and the Purchaser's Requirement were found for the two bus procurements. However the Federal Motor Vehicle Safety Standards (FMVSS) were not verified as being affixed to each bus. It should be noted the required FMVSS Certifications are to certify that the FMVSS Stickers have been affixed to the buses in addition to compliance to the FMVSS Standard. There were no deliveries yet for the light rail vehicles. It should also be noted that further reviews for other bus vehicles and option releases for buses under these contracts could not be completed due to time constraints and the fact the certifications are scanned and reside in the computer and hard copies were not readily available.

### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop procedures and implement management controls to insure compliance with the Pre-Award and Post-Delivery requirements. The FTA Administrator's *Dear Colleague Letter C-97-03*, dated March 18, 1997, and outlines the steps that a Recipient must take in performing pre-award and post-delivery reviews of rolling stock procurements to ensure their compliance with Buy America Act requirements. This *Dear Colleague Letter* may be found in Appendix A.2 of the Best Practices Procurement Manual. It must be stressed that Recipients are to document their reviews and include this documentation in their contract files as evidence that they have performed the required reviews. FTA has published manuals that provide detailed guidance to Recipients concerning which Buy America certifications and documents are needed to support the procurement process from issuance of the solicitation to title transfer, as well as the procedures that the Recipient may follow when conducting the pre-award and post-delivery reviews. There are also examples of Buy America calculations and responses to frequently asked questions. The

manuals are: *Conducting Pre-Award and Post-Delivery Reviews for Bus Procurements*; Document No: FTA DC-90-7713-93-1, Rev. B, dated May 1, 1995 and *Conducting Pre-Award and Post-Delivery Reviews for Rail Vehicle Procurements*; Document No: FTA DC-90-7713-94-1, Rev. B, dated May 1, 1995.

**Corrective Actions and Implementation Schedule**

[Corrective actions and implementation schedule to be provided by recipient.]

**APPENDIX I**

**SUMMARY REPORT TABLE**

	<b>Element</b>	<b>Basic Requirement</b>	<b>ND</b>	<b>D</b>	<b>NA</b>	<b>Total</b>	<b>Corrective Actions</b>
1	Written Standards of Conduct	FTA C 4220.1F, III, 1.a.b.c.	1				
2	Contract Administration System	FTA C 4220.1F, III, 3.		1			Establish Policies Develop Procedures
3	Written Protest Procedures	FTA C 4220.1F, VII, 1.a.b.	1				
4	Prequalification System	FTA C 4220.1F, VI, 1.c.	1				
5	Procedures for Ensuring Most Efficient and Economic Purchase	FTA C 4220.1F, IV, 1.b.c.e.	1				
6	Procurement Policies & Procedures	FTA C 4220.1F, III, 3.a.		1			Establish Policies Develop Procedures
7	Independent Cost Estimate	FTA C 4220.1F, VI, 6.	24	1		25	Establish Mgt Controls
8	A&E Geographic Preference	FTA C 4220.1F, VI, 2.a.(4)(g)	2			2	
9	Unreasonable Qualification Requirements	FTA C 4220.1F, VI, 2.a.(4)(a)	23			23	Establish Mgt Controls
10	Unnecessary Experience and Bonding	FTA C 4220.1F, VI, 2.a.(4)(e); BPPM §8.2	22			22	
11	Organizational Conflict of Interest	FTA C 4220.1F, VI, 2.a.(4)(h)	8		15	8	Establish Mgt Controls
12	Arbitrary Action	FTA C 4220.1F, VI, 2.a (4)(j)	25			25	
13	Brand Name Restrictions	FTA C 4220.1F, VI, 2.a (3)(4)(f)	6		19	6	
14	Geographic Preferences	FTA C 4220.1F, VI, 2.a.(4)(g)	25			25	
15	Contract Term Limitation	FTA C 4220.1F, IV, 2.e.(12)	25			25	
16	Written Procurement Selection Procedures	FTA C 4220.1F, III, 3.a.; VI, 2.e.	20			20	
17	Solicitation Prequalification Criteria	FTA C 4220.1F, VI, 1.c.(1)(2)(3)	11		9	11	
18	Award to Responsible Contractors	FTA C 4220.1F, VI, 8.b.	22			22	
19	Sound and Complete Agreement	FTA C 4220.1F, IV, 2.b (6) 2; IV, 2.b.(6) 4	13	8	2	21	Establish Mgt Controls
20	No Splitting [Micro-Purchase]	FTA C 4220.1F, VI, 3.a.(2) (b)	9			9	
21	Fair and Reasonable Price Determination [Micro-purchase]	FTA C 4220.1F, VI, 3.a.(2) (c)	9			9	

APPENDIX I

SUMMARY REPORT TABLE

	Element	Basic Requirement	ND	D	NA	Total	Corrective Actions
22	Micro-Purchase Davis Bacon	FTA C 4220.1F, VI, 3.a.(1)			9		
23	Price Quotations [Small Purchase]	FTA C 4220.1F, VI, 3.b.(2)	2			2	
24	Clear, Accurate, and Complete Specification	FTA C 4220.1F, III, 3.a.(1)(b)(d); VI, 2.a.; VI, 3.c.(2) (c)	25			25	
25	Adequate Competition - Two or More Competitors	FTA C 4220.1F, VI, 3.c.(b); VI, 3.d.(2)(c)	20			20	
26	Firm Fixed Price [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(1)(c)	7			7	
27	Selection on Price [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(1)(d)	7			7	
28	Discussions Unnecessary [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(1)(e)	7			7	
29	Advertised/Publicized	FTA C 4220.1F, VI, 3.c.(2)(a)	20			20	
30	Adequate Solicitation	FTA C 4220.1F, VI, 3.c.(2)(b)	20			20	
31	Sufficient Bid Time [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(2)(d)	7			7	
32	Bid Opening [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(2)(e)	7			7	
33	Responsiveness [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(2)(f)	7			7	
34	Lowest Price [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(2)(d)	4		3	4	
35	Rejecting Bids [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(2)(g)	1		6	1	
36	Evaluation [RFP]	FTA C 4220.1F, VI, 3.d.(2)(b)(d)	13			13	
37	Price and Other Factors [RFP]	FTA C 4220.1F, VI, 3.d.(2)(e)	10	3		13	Establish Mgt Controls
38	Sole Source if Other Award is Infeasible	FTA C 4220.1F, VI, 3.i.(1); VI, 3.i (b); VI	3			3	
39	Cost Analysis Required [Sole Source]	FTA C 4220.1F, VI, 6.a.	2	1		3	Establish Mgt Controls
40	Evaluation of Options	FTA C 4220.1F, IV, 1.d.; VI, 7.b; V, 7.a.(1)(c)1	4		18	4	
41	Cost or Price Analysis	FTA C 4220.1F, VI, 6.a.(2); VI, 6.b.; VI, 6.a.(3)	22			22	
42	Written Record of Procurement	FTA C 4220.1F, III, 3.d.	25			25	
43	Exercise of Options	FTA C 4220.1F, V, 7.a.(1)(a)(b)(c)2	1	1	21	2	Establish Mgt Controls
44	Out of Scope Changes	FTA C 4220.1F, VI, 3.i.(1)(b)	6		17	6	

APPENDIX I

SUMMARY REPORT TABLE

	Element	Basic Requirement	ND	D	NA	Total	Corrective Actions
45	Advance Payments	FTA C 4220.1F, IV, 2.b.(5)(b)1, 2; IV, 2.b.(5) (b) 2, b; IV, 2.b.(5)(b)2 b	22	1		23	Establish Mgt Controls
46	Progress Payments	FTA C 4220.1F, IV, 2.b.(5)(c)	16		7	16	
47	Time & Materials Contracts	FTA C 4220.1F, VI, 2.c.(2)(b)	1		22	1	
48	Cost Plus Percentage of Cost	FTA C 4220.1F, VI, 2.c.(2)(a)	23			23	
49	Liquidated Damages Provisions	FTA C 4220.1F, IV, 2.b.(6)(b)1	10		13	10	
50	Piggybacking	FTA C 4220.1F, V, 7.a.(2)	1		22	1	
51	Qualifications Exclude Price [A&E]	FTA C 4220.1F, VI, 3.f.(3); VI, 3.f.(3)(b); VI, 3.h	2			2	
52	Serial Price Negotiations [A&E]	FTA C 4220.1F, VI, 3.f.(3)	2			2	
53	Bid Security [Construction Over \$100,000]	FTA C 4220.1F, IV, 2.h.(1)(b)	5			5	
54	Performance Security [Construction Over \$100,000]	FTA C 4220.1F, IV, 2.h.(1)(b)	5			5	
55	Payment Security [Construction Over \$100,000]	FTA C 4220.1F, IV, 2.h.(1)(c); IV, 2.h.(1)(e)	5			5	
56	Clauses	FTA C 4220.1F, IV, 2	23			23	

ND – Not Deficient  
D – Deficient  
NA – Not Applicable



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**DESCRIPTION OF NOT DEFICIENT ELEMENTS**


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**Element 1 - *Written Standards of Conduct***

- (1) "The Common Grant Rules require each recipient to maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts."
- (a) "...no employee, officer, agent, or board member, or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing may participate in the selection, award, or administration of a contract supported with FTA assistance if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when any of those previously listed has a financial or other interest in the firm selected for award."
  - (b) "The recipient's officers, employees, agents, or board members may neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements. The recipient may set minimum rules when the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value."
  - (c) "To the extent permitted by State or local law or regulations, such standards of conduct will provide for penalties, sanctions, or other disciplinary action for violation of such standards by the recipient's officers, employees, agents, board members, or by contractors or subrecipients or their agents." [FTA C 4220.1F, III, 1.a, b, c.]

**Element 2 - *Contract Administration System***

"The Common Grant Rules require the recipient to maintain a contract administration system to ensure that it and its third party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders and applicable Federal, State and local responsibilities."  
[FTA C 4220.1F, III, 3.]

**Element 4 - *Prequalification System***

Prequalification lists are most commonly used in procurements of property involving lengthy evaluations needed to determine whether it satisfies the recipient's standards. The Common Grant Rule for governmental recipients permits a recipient to prequalify people, firms, and property for procurement purposes if:

- (1) Lists. The recipient ensures that all prequalification lists it uses are current.
- (2) Sources. The recipient ensures that all prequalification lists it uses include enough qualified sources to provide maximum full and open competition.
- (3) Qualification Periods. The recipient permits potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date). FTA, however, does not require a recipient to hold a particular solicitation open to accommodate a potential supplier that submits property for approval before or during that solicitation. Nor must a recipient expedite or shorten prequalification evaluations of bidders, offerors, or property presented for review during the solicitation period. Prequalification should not be confused with reviews of technical qualifications that are an essential process in two-step procurements and

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**DESCRIPTION OF NOT DEFICIENT ELEMENTS**


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qualifications-based procurements, as discussed further in subsections 3.e. and 3.f. of this Chapter, respectively. [FTA C 4220.1F, VI, 1.c.]

**Element 5 - *Procedures for Ensuring Most Efficient and Economic Purchase***

Proposed procurements should be reviewed to avoid the purchase of property and services the recipient does not need (including duplicative items and unnecessary options)...Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase...[FTA C 4220.1F, IV, 1.b,c,e.]

**Element 8 - *A&E Geographic Preference***

Geographic location may be a selection criterion [in procurements for architectural and engineering (A&E) services] provided an appropriate number of qualified firms are eligible to compete for the contract, given the nature and size of the project. [FTA C 4220.1F, VI, 2.a.(4)(g); BPPM § 6.5]

**Element 9 - *Unreasonable Qualification Requirements***

Unreasonable requirements placed on bidders or offerors in order for them to qualify to do business. [FTA C 4220.1F, VI, 2.a.(4)(a); BPPM § 2.4.2.1]

**Element 10 - *Unnecessary Experience and Excessive Bonding***

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

**Element 11 - *Organizational Conflict of Interest***

Example of situation restrictive of competition: “Organizational Conflict of Interest. An organizational conflict of interest occurs when any of the following circumstances arise:

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

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**DESCRIPTION OF NOT DEFICIENT ELEMENTS**


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**Element 12 - Arbitrary Action**

Taking any arbitrary action in the procurement process [FTA C 4220.1F, VI, 2.a.(4)(j); BPPM § 2.4.2.1]

**Element 13 - Brand Name Restrictions**

Example of situation restrictive of competition: "Specifying only a 'brand name' product instead of allowing an 'or equal' product to be offered or failing to specify the brand name product's salient characteristics" [FTA C 4220.1F, VI, 2.a.(4)(f); BPPM § 2.4.2.1 and 2.4.2.2.1]

- (a) Detailed product specifications should be avoided if at all possible in favor of performance specifications. [FTA C 4220.1F, VI, 2.a.(1)]
- (b) When it is impractical or uneconomical to make a clear and accurate description of the technical requirements of the property... a 'brand name or equal' description may be used as a means to define the performance or other salient characteristics of a specific type of property. The recipient, however, must state the salient characteristics of the named brand that offerors must provide. [FTA C 4220.1F, VI, 2.a.(3); BPPM § 4.3.2, 4.4.1, 4.5.1, and 4.5.2]

**Element 14 - Geographic Preferences**

Example of situation restrictive of competition: "Specifying statutorily or administratively imposed in-State or local geographical preferences or evaluating bids and proposals in light of such in-State or local geographical preferences. Specifically, an FTA recipient is prohibited ...from limiting their bus purchases to in-State dealers." [FTA C 4220.1F, VI, 2. a. (4) (g)]

**Element 15 - Period of Performance Limitations**

- (a) To comply with 49 U.S.C 5325 (e)(1), a multi-year third party contract to purchase additional rolling stock and replacement parts may not have options that extend more than five years after the date of the original contract.
- (b) FTA interprets this five-year period as covering the recipient's rolling stock and replacement needs from the first day when the contract becomes effective to those at the end of the fifth year. This means that the contract may not encompass more rolling stock and replacement parts than the recipient needs within five years. The five-year rule does not mean delivery, acceptance, or even fabrication must be completed in five years – only that a contract is limited to purchasing no more than the recipient's rolling stock or replacement parts needs for five years based on the effective date of the contract. [FTA C 4220.1F, IV, 2.e.(12)]

**Element 16 - Written Procurement Selection Procedures**

The Common Grant Rule...requires the recipient to have written procurement procedures...FTA expects the recipient to consider all evaluation factors specified in its solicitation documents, and

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**DESCRIPTION OF NOT DEFICIENT ELEMENTS**


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evaluate the bids or offers only on the factors included in those solicitation documents.” [FTA C 4220.1F, III,3,a & VI,7, a ]

**Element 17 - Solicitation Prequalification Criteria**

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

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

**Element 18 - Award to Responsible Contractors**

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

- (1) Integrity. The contractor’s integrity;
- (2) Public Policy. The contractor’s compliance with public policy;
- (3) Past Performance. The contractor’s past performance;
- (4) Financial and Technical Resources. The contractor’s financial and technical resources, and;
- (5) Debarment/Suspension. Contractor’s status with respect to DOT regulations, Governmentwide Debarment and Suspension (Nonprocurement),’ 49 CFR Part 29. [FTA C 4220.1F, VI, 8.b.]

**Element 20 - No Splitting [Micro-purchases]**

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

**Element 21 - Fair and Reasonable Price Determination**

FTA’s only documentation requirement for micro-purchases is a determination that the price is fair and reasonable and a description of how the recipient made this determination. [FTA C 4220.1F, VI, 3.a.(2)(c); BPPM § 4.1]

**Element 22 - Micro-Purchase Davis Bacon**

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

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**DESCRIPTION OF NOT DEFICIENT ELEMENTS**


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**Element 23 - Price Quotations [Small Purchase]**

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

**Element 24 - Complete Specifications**

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

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

- (a) In order for sealed bidding to be feasible, the following conditions should be present: ...Two or more responsible bidders are willing and able to compete effectively for the business. [FTA C 4220.1F, VI, 3.c.(b)]
- (b) a Competitive proposal is a procurement method normally conducted with more than one source submitting an offer or proposal. [FTA C 4220.1F, VI, 3.d.(2)(c)]

**Element 26 - Firm Fixed Price [Sealed Bid]**

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

**Element 27 - Selection on Price [Sealed Bid]**

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

**Element 28 - Discussions Unnecessary [Sealed Bid]**

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

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**DESCRIPTION OF NOT DEFICIENT ELEMENTS**


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**Element 29 - *Advertised/Publicized***

- (a) ...sealed bidding (is) a procurement method in which bids are publicly solicited. [FTA C 4220.1F, VI, 3.c.]
- (b) The invitation for bids will be publicly advertised. [FTA C 4220.1F, VI, 3.c.(2) (a)]
- (c) Procurement Procedures. The following procedures apply to procurements by competitive proposals: Publicity. The request for proposals is publicly advertised. [FTA C 4220.1F, VI, 3.d.(2)(a)]

**Element 30 - *Adequate Solicitation***

- (a) Bids shall be solicited from an adequate number of known suppliers.... [FTA C 4220.1F, VI, 3.c.(2)(b)]
- (b) Procurement Procedures. The following procedures apply to procurements by competitive proposals: (c) Adequate Sources. Proposals are solicited from an adequate number of qualified sources. [FTA C 4220.1F, VI, 3.d.(2)(c)]

**Element 31 - *Sufficient Bid Time [Sealed Bid]***

The Common Grant Rule for governmental recipients acknowledges sealed bidding to be a generally accepted procurement method...Procurement using sealed bids is appropriate if: ...Bidders are allowed sufficient time to prepare bids before the date of bid opening. [FTA C 4220.1F, VI, 3.c.(2)(d)]

**Element 32 - *Bid Opening [Sealed Bid]***

All bids will be publicly opened at the time and place prescribed in the invitation for bids [FTA C 4220.1F, VI, 3.c.(2)(e)]

**Element 33 - *Responsiveness [Sealed Bid]***

The Common Grant Rule for governmental recipients acknowledges sealed bidding to be a generally accepted procurement method...Procurement using sealed bids is appropriate if: ...A firm fixed price contract is...awarded to the lowest responsive and responsible bidder [FTA C 4220.1F, VI, 3.c.(2)(f)]

**Element 34 - *Lowest Price [Sealed Bid]***

A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder.

- (a) When specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest;
- (b) Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of. [FTA C 4220.1F, VI, 3.c.(2)(f)]

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**DESCRIPTION OF NOT DEFICIENT ELEMENTS**


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**Element 35 - *Rejecting Bids [Sealed Bid]***

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

**Element 36 - *Evaluation [RFP]***

The Common Grant Rule for governmental recipients acknowledges the use of competitive proposals to be a generally accepted procurement method when

- (a) All evaluation factors and their relative importance are specified in the solicitation...
- (b) A specific method is established and used to conduct technical evaluations of the proposals received and to determine the most qualified offeror. [FTA C 4220.1F, VI, d,(2)(b)(d)]

**Element 38 - *Sole Source if Other Award is Infeasible***

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

- (a) When the supplies or services are available from only one responsible source, and no other type of supplies or services will satisfy the recipient's requirements; or [FTA C 4220.1F, VI, 3.i.(b)]
- (b) When the recipient's need for the supplies or services is of such unusual and compelling urgency that the recipient would be seriously injured unless the recipient is permitted to limit the number of sources from which it solicits bids or proposals, or when the public exigency or emergency for the requirement will not permit a delay resulting from a competitive solicitation; or [FTA C 4220.1F, VI, 3.i.2(e)]
- (c) FTA authorizes noncompetitive negotiations; or [FTA C 4220.1F, VI, 3.i.2(e)]
- (d) After solicitation of a number of sources, competition is determined inadequate" [FTA C 4220.1F, VI, 3.i.2]

**Element 40 - *Evaluation of Options***

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

**Element 41 - *Cost or Price Analysis***

Grantees must perform a cost or price analysis in connection with every procurement action, including, contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation . . . [FTA C 4220.1F, 10.]

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**DESCRIPTION OF NOT DEFICIENT ELEMENTS**


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**Element 42 - *Written Record of Procurement***

The Common Grant Rules require the recipient to maintain...written records detailing the history of each procurement, as follows:

- a. Procurement Method. ...the rationale for the method of procurement, including a sole source justification for any acquisition that does not qualify as competitive;
- b. Contract Type. ...state the reasons for selecting the contract type (fixed price, cost reimbursement, etc.);
- c. Contractor Selection. ...state the reasons for contractor selection or rejection... include a written responsibility determination for the successful contractor.
- d. Cost or Price. Each recipient must evaluate and state its justification for the contract cost or price. [FTA C 4220.1F, III, 3.d.(1)]

**Element 44 - *Out of Scope Changes***

A contract change that is not within the scope of the original contract is considered a sole source procurement....[FTA C 4220.1F, VI, 3.i.(1)(b)]

**Element 46 - *Progress Payments***

Progress payments are payments for costs incurred by the contractor in the performance of the contract before the contract work has been completed. FTA assistance may be used to support progress payments provided:

- (a) the recipient obtains adequate security for those payments, and
- (b) has sufficient documentation to substantiate the work performed for which payment is requested.
- (c) Progress payments for construction contracts may be made on a percentage of completion basis (as described in the Common Grant Rules). This payment method may not be used in non-construction contracts." [FTA C 4220.1F, IV, 2.b.(5)(c)]

**Element 47 - *Time and Materials Contracts***

The Common Grant Rule ...permits the use of time and material type contracts only:

- (1) Restricted Use. After a determination that no other type of contract is suitable; and
- (2) Firm Ceiling Price. If the contract specifies a ceiling price that the contractor shall not exceed except at its own risk. [FTA C 4220.1F, VI, 2.c.(2)(b)]

**Element 48 - *Cost Plus Percentage of Cost***

The Common Grant Rules expressly prohibit the use of the cost plus a percentage of cost and percentage of construction cost methods of contracting. [FTA C 4220.1F, VI, 2.c.(2)(a)]



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**DESCRIPTION OF NOT DEFICIENT ELEMENTS**

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**Element 49 - Liquidated Damages Provisions**

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

**Element 50 - Piggybacking**

Assignment of Rights. Although FTA does not encourage the practice, a recipient may assign its contractual rights to purchase property and services to other recipients if the original contract contains an appropriate assignability clause that provides for the assignment of all or a portion of the specified deliverables as originally advertised, competed, evaluated, and awarded, or other appropriate assignment provisions. Some refer to this process as 'piggybacking.

**Element 51 - Qualifications Exclude price [A&E]**

When Required. Qualifications-based proposal procedures are required for projects related to or leading to a construction project. These procedures must be used not only when contracting for architectural and engineering services, but also for program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services. Recipients shall use qualifications-based competitive proposal procedures [i.e. Brooks Act Procedures when contracting for A&E services as defined in 40 U.S.C. Sections 1212-1214 and 49 U.S.C. Section 5325(b)(1)]. When this procurement method is used, the following requirements apply: [FTA C 4220.1F, VI, 3.f.(3)]

**Element 52 - Serial Price Negotiations [A&E and Other Services]**

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

- (a) Most Qualified. Negotiations are conducted with only the most qualified offeror; and
- (b) Next Most Qualified. Failing agreement on price, negotiations with the next most qualified offeror and, if necessary, negotiations with successive offerors in descending order must be conducted until a contract award can be made to the offeror whose price the recipient believes is fair and reasonable." [FTA C 4220.1F, VI, 3.f.(3)]

**Element 53 - Bid Security [Construction over \$100,000]**

Bonding. The Common Grant Rules require bonds for all construction contracts except to the extent FTA determines that the Federal interest is adequately protected through other arrangements. [FTA C 4220.1F, IV, 2.h.(1)(a)]

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**DESCRIPTION OF NOT DEFICIENT ELEMENTS**


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**Element 54 - Performance Security [Const. Over \$100,000]**

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

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

**Element 55 - Payment Security [Const. Over \$100,000]**

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

- (a) Payment Bond. A 'payment bond' is one executed in connection with a contract to assure payment as required by law of all people supplying labor and material in the execution of the work provided for in the contract. FTA has determined the following payment bond amounts are adequate to protect FTA's interest and will accept a local bonding policy that meets the following minimums:
- (1) Less Than \$1 Million. Fifty percent of the contract price if the contract price is not more than \$1 million;
  - (2) More Than \$1 Million but Less Than \$5 Million. Forty percent of the contract price if the contract price is more than \$1 million but not more than \$5 million; or
  - (3) More Than \$5 Million. Two and a half million dollars if the contract price is more than \$5 million." [FTA C 4220.1F, IV, 2.h.(1)(c)]

A recipient that wishes to adopt less stringent bonding requirements, for a specific class of projects, or for a particular project, may submit its policy and rationale to its FTA Regional Office for approval. [FTA C 4220.1F, IV, 2.h.(1)(e)]

**Element 56 - Clauses**

Federal Requirements that may Affect a Recipient's Acquisitions [FTA C 4220.1F, IV, 2.] Before FTA assistance may be used to support an acquisition of property or services, all applicable Federal requirements, whether or not addressed in the Common Grant Rules, must be fulfilled.

[FTA Circular 4220.1F, Appendix D, contains a matrix of Federally required clauses and contractor certifications for various dollar values and types of procurements, such as construction, A&E, rolling stock, materials, etc. Instructions for these clauses and suggested clause language may be found in the FTA "Best Practices Procurement Manual," Appendix A.1]

## Program Evaluation and Audit

### 2012 FTA PROCUREMENT SYSTEMS REVIEW

#### Findings, responses, and status

**Note:** *The Metropolitan Council, until 2010, had two procurement offices, both of which handled some activities related to Transit. In late 2010, the offices were merged under a single Director. Since then, significant changes have been made in department practices. Some of the items included in this review date back to the time when there were separate departments (2007, for one procurement). For many of those issues, action has already been taken to address problems. The practices already changed are indicated as such in the grantee responses.*

1. Contract administration system – There is a good contract administration system for construction contracts, but not for other, non-construction contracts. Duties like tracking, deliverables, schedules and progress payments, are not spelled out in contracts or policy. Personnel are not informed of or trained in their responsibilities for contract administration. An administrative manual for contracts to clarify roles and responsibilities is recommended.

#### **Response**

*The Metropolitan Council will conduct meetings between Procurement and project managers (mostly in Engineering and Facilities or the Green Line Project Office) to work out a contract administration procedure/manual that clarifies roles, responsibilities and reporting.*

Documenting a formal set of procedures will provide all staff with clear expectations for performance on contract administration activities.

#### **Person(s) Responsible:**

*Micky Gutzmann, Director of Procurement*

#### **Timeline:**

*June 30, 2013.*

2. Elements missing from policies and procedures. Recommendation is to revise them to include the following:
  - a. Organizational conflicts of interest
  - b. Contract administration for design/build projects
  - c. Liquidated damages
  - d. Fair and Reasonable rationale even in low dollar solicitations

**Response**

*The Contracts and Procurement Unit is working with the Office of General Counsel on revising current policies and procedures to include the elements identified by the reviewer.*

**Person(s) Responsible:**

*Micky Gutzmann, Director of Procurement  
Don Mueting, General Counsel*

**Timeline:**

*Completed by December 31, 2012*

3. Independent Cost Estimates – 1 file reviewed had no documentation that an adequate ICE was done before the Council received proposals/bids.

**Response**

*The current Procurement Department procedure does not allow a procurement to proceed into the bidding stage without an ICE completed and on file. There are checklists in each file to ensure that all required elements are included. In addition, the Council is hosting NTI training on FTA procurement requirements to ensure that both procurement staff and project managers understand the process, and the best way they can fulfill their responsibilities in the process.*

**Person(s) Responsible**

*Micky Gutzmann*

**Timeline:**

*Procedure changes have been completed. NTI training will be completed by December 31, 2012*

4. Sound and complete agreement – Lacking in 8 of 23 files.
  - a. Term of contract not specified (1) – Commenced at execution, ends with final delivery, but no specific date required
  - b. FTA clauses were missing from the contract (1)
  - c. Based on a 3 page template form that was too vague and too generalRecommendation is to put in place and document controls to ensure sound and complete agreement. The template incorporates too much by reference and is non-specific.

**Response**

*In the revised procurement practices (since 2010), a contract term is required to even begin to draft a contract. FTA clauses are also reviewed prior to beginning a solicitation.*

*The Office of General Counsel is working on appropriate revisions to the contract boilerplate to ensure that it is sufficiently detailed to meet FTA regulations.*

**Person(s) Responsible**

*Micky Gutzmann, Director of Procurement  
Don Mueiting, General Counsel*

**Timeline:**

*Process changes already completed.*

*Contract boilerplate – Significantly complete – remainder by December 31, 2012*

5. Price and other factors – 3 of 13 files without documentation that the selected proposal was the most advantageous with respect to price and other factors. When not procuring A&E type services, price must be considered as part of the competitive process for award.
  - a. No discussion noted about cost or of trade-offs between cost and what is best for the Council.

**Response**

*The current Procurement Department has already stopped the practice of treating non-Brooks Act procurements like Brooks Act procurements. Training has been held and is repeated regularly.*

**Person(s) Responsible:**

*Micky Gutzmann*

**Timeline:**

*Completed.*

6. Cost Analysis Required – (sole source) 1 of 3 files had no documentation that an adequate cost analysis was performed. No independent cost estimates were in the file, nor was there evidence of a detailed in-house cost estimate.

**Response**

*The procurement department has implemented a check list of what is required with sole sources before a purchase can be made. One of those items is a documented cost analysis.*

**Person(s) Responsible:**

*Micky Gutzmann*

**Timeline:**

*Completed.*

7. Exercise of Options – 1 of 2 files reviewed had no documentation to support the reasonableness of costs for the buses, which is still required when exercising an option on an existing contract. Recommendation is to document controls that will ensure documentation of reasonable cost determinations.

**Response**

*In prior years, Bus Maintenance had the authority to initiate bus procurements when exercising options from a contract, as was the case here. Under the new Procurement Department, that is no longer the case. Bus procurements are initiated by the Procurement Department, where a fair and reasonable determination is part of exercising options, as well as the record of the number of options utilized.*

**Person(s) Responsible:**

*Micky Gutzmann*

**Timeline:**

*Completed.*

8. Advance payments – CCLRT vehicles paid 20% of contract up-front. That amount is greater than the cost incurred by the vendor, and thus constitutes an advance payment, which is not allowed by regulation. The recommendation is a control system to prohibit such payments.

**Response**

*Procurement is providing training for project managers on contracting requirements, and does not permit advance payments. Procurement also discusses with the project offices if there is a percentage based payment outlined in the scope or contract.*

**Person(s) Responsible:**

*Micky Gutzmann*

**Timeline:**

*December 31, 2012 and ongoing*

9. Pre and Post-Delivery Certifications – 2 procurements for buses were deficient.
  - a. One had all of the pre and post-delivery certifications, signed by the vendor, but not by the grantee.
  - b. The other showed the recipient signed the certifications after the procurement.
  - c. A third procurement, for light rail vehicles, was not deficient.

**Response**

*Procurement now directly oversees all vehicle procurements and exercise of options. The check list that has been developed and the process that was developed ensure that certifications are in place, accurately documented and in the file.*

**Person Responsible:**

*Micky Gutzmann*

**Timeline:**

*Completed.*