

Keeping Up With Procurement

Small agencies, but all the same rules!

Information herein is presented for training and information purposes only and is not intended as legal advice on any matter.



Where Does This Stuff Come From?

Basics

Congress passes and the President signs

- Authorizations – additional info is in the takeaway slide deck!
- Appropriations

Policy is ‘codified’

- United States Code
- Title 49 – Transportation
- Chapter 53 – Public transportation

Federal agencies ‘promulgate’ rules to put the law into effect

- Federal Register
- Code of Federal Regulations
- Title 49 – Transportation
- Title 2 – Federal Financial Assistance
 - 2 CFR 200 – the ‘Super Circular’

Basics

Federal agencies provide additional guidance

FTA Circulars

- 4220.1G is FTA's procurement guidance
- 5010.1F – Award Management Requirements
- 9040.1H – Rural Areas Formula Grant Programs Guidance
- 9070.1H - Enhanced Mobility of Seniors and Individuals with Disabilities Program Guidance

The FTA Master Agreement and Annual Certifications and Assurances

FTA's Annual Triennial Review Contractor's Manual

Why Should I Worry About This?

- Conflicting requirements.
 - Required
 - Allowed
 - Barred
- Comply with federal, state, and local rules.
- Precedence in case of conflict.

Outside the Scope of Procurement

- Procurement = Third Party Contracting



Employment
contracts



Non-revenue
real estate
contracts



Art



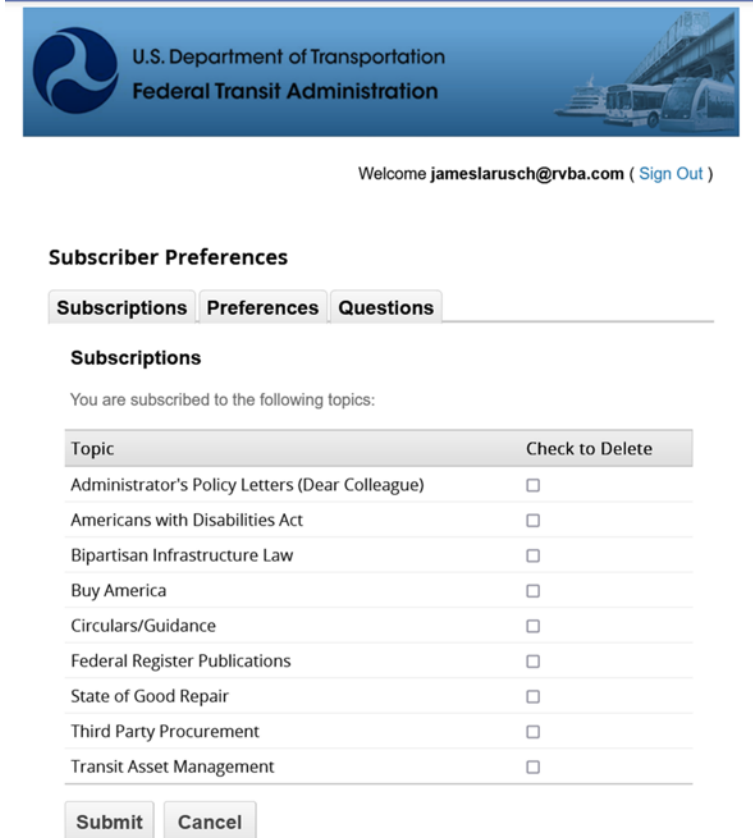
Some
intergovernmental
agreements



Non-federally
funded – but
be careful!

Keeping Up

- Get on FTA's mailing lists.
 - <https://public.govdelivery.com/accounts/USDOTFTA/s/ubscriber/new>
- Check the FTA Master Agreement.
 - www.transit.dot.gov/funding/grantee-resources/sample-fta-agreements/fta-grant-agreements
- Check the State Master Agreement.
- Check the annual certifications and assurances.
 - www.transit.dot.gov/funding/grantee-resources/certifications-and-assurances/certifications-assurances
- Stay current.
 - APTA and CTAA are good resources, if available to you.



U.S. Department of Transportation
Federal Transit Administration

Welcome jameslarusch@rvba.com ([Sign Out](#))

Subscriber Preferences

Subscriptions Preferences Questions

Subscriptions

You are subscribed to the following topics:

Topic	Check to Delete
Administrator's Policy Letters (Dear Colleague)	☐
Americans with Disabilities Act	☐
Bipartisan Infrastructure Law	☐
Buy America	☐
Circulars/Guidance	☐
Federal Register Publications	☐
State of Good Repair	☐
Third Party Procurement	☐
Transit Asset Management	☐

Audit Proof Your Procurements

- Get the Contractors Manual every year.
 - www.transit.dot.gov/sites/fta.dot.gov/files/2025-04/Fiscal-Year-2025-Contractor-Manual_0.pdf
- Attend oversight workshops.
 - www.transit.dot.gov/regulations-and-guidance/program-oversight/grantee-oversight-workshops
 - Last of the 2024 workshops was in late November but keep watching for the 2025 schedule.



The Contractors Manual

Review Area	Finding	FY22*	FY21	FY19	FY18
Procurement	P11-1 - Missing FTA clauses	✓	✓	✓	✓
Disadvantaged Business Enterprise	DBE5-1 - DBE uniform reports contain inaccuracies and/or are missing required information	✓	✓	✓	✓
Procurement	P10-2 - Lacking required cost/price analysis	✓			
Procurement	P10-1 - Lacking independent cost estimate	✓	✓	✓	✓
Title VI	TVI2-1 - Language Assistance Plan implementation deficiencies	✓	✓	✓	
Procurement	P5-1 - Incomplete written documentation of procurement history	✓	✓		
Technical Capacity – Award Management	TC-AM2-1 - Incorrect FFR reporting	✓	✓	✓	
Procurement	P4-1 - Responsibility determination deficiencies	✓	✓		✓
Procurement	P20-3 - Pre-award and/or post-delivery certifications lacking	✓	✓		✓
Financial Management and Capacity	F4-1 - ECHO documentation deficient	✓	✓		

The Contractors Manual

- Summary of changes in each edition

FY2021/2022	FY2023	FY2024	FY2025
9. PROCUREMENT	9. PROCUREMENT	9. PROCUREMENT	9. PROCUREMENT
Added two new Recipient Follow-Up items: • <u>Procurement files selected for review</u> • <u>FAIN for procurement files selected</u>	Included a note to reviewer, regarding the Build America, Buy America Act (BABA) requirements in the Infrastructure Investment and Jobs Act.	For Procurement: • Revised the entire Purpose of the Review Area. • Revised the Note to Reviewer and included the applicability regarding BABA.	Purpose of the Review Area was revised.
Added required elements to the list of requirements for procurement procedures for question P1.	Revised Deficiency code P1-3, to include the additional underlined language: "Procurement policies and procedures <u>contrary to [specific section]</u> "	For question P1 regarding written procurement and policies: • Revised the applicability to include the underlined language: <u>Non-state recipients.</u> • Revised the Detailed Explanation for Reviewer to include the underlined language: <u>unless there are specific circumstances in which noncompetitive procurement can be used.</u>	For question P1 regarding written policies and procedures, revised the following: • Detailed Explanation for Reviewer • Indicators of compliance • Instructions for Reviewer.

The Contractors Manual

- Review Area Question
- Basic Requirement
- Applicability
- Detailed Explanation for Reviewers
- Flexibilities and Administrative Relief
- Indicators of Compliance
- Instructions for Reviewer
- Potential Deficiency Determinations
- Governing Directive(s)



What is a Contract?



- A **mutually binding** legal relationship **obligating the seller** to furnish the supplies or services (including construction) **and the buyer** to pay for them.
- An **agreement**, enforceable by law, between two or more competent parties, **to do or not do something** not prohibited by law, for a **legal consideration**.

The Party of the What Part?

- FTA is the first party.
- The public owner (transit property) is the second.
- The contractor is the third party.
- Subcontractors are **not** parties to the prime contract between the owner and the contractor.

The Big Picture

- Checks and balances
- Who else plays a role?
- How do you accomplish this in a small agency?
- What could go wrong?

Building Your Policies



Activity 1

Conflicts of Interest

Which of the following signal a conflict of interest in procurement? Select all that apply.



Standards of Conduct



- FTA requires grantees to have written standards of conduct – the very first thing discussed under ‘the recipient’s responsibilities’ – with potential penalties.
 - Gifts – One-time, annual limits?
 - Personal Conflicts of Interest
 - Always lots of issues.
 - FTA cites immediate family, partner, employer.
 - What about adult children?
Domestic partners? Household?

Organizational Conflicts of Interests

Lack of impartiality

Conflicting roles vis-à-vis the agency

Unequal access to information

Nonpublic information

Biased ground rules

Author of specifications, evaluation factors, or similar

Does an incumbent have a conflict?

Written Procurement Procedures

- What does FTA expect to see in our policies?
 - In solicitations
 - **Clear descriptions**
 - **Nonrestrictive specifications**
 - Quality requirements
 - Performance specifications (preferred by FTA)
 - Brand name or equal specifications
 - **Only buying what you need**
 - Lease or purchase?
 - Energy efficiency preferred
 - **Methods of procurement**
 - Legal restrictions

Written Procurement Procedures

- What does FTA expect to see in our policies?
 - **Adequate contract provisions, including flowdown**
 - Sources of supplies and services
 - **Resolution of disputes**
 - **Record keeping**
 - **Procurement method**
 - **Contract type**
 - **Contractor selection**
 - **Cost or price reasonableness**
 - **Electronic commerce practices**



Competition

- “Full and open competition”
- Prequalification
- Reasonably anticipated needs
- Brand name or equal
- Excessive qualifications, experience
- Excessive bonding requirements
- Local geographic restrictions

Procurement Planning

Procurement Planning

- Acquisition planning
 - Strategic, long-term
- Annual planning
 - Tactical
- Procurement planning
 - Individual procurements



Starting the Record of Procurement

- Scope or specifications
- Independent cost estimate
- Method of procurement
- Contract type
- Contractor selection
- Cost or price analysis
- Schedule





Activity 2

Procurement Planning Builders

Activity 2: Breakout – Procurement Planning Builders

Timing

- 10 min: Group Work
- 10 min: Lightning Report-Outs (1–2 sentences per group)

Objective

- Each group identifies the required documentation for one assigned procurement method.
- **Goal:** Reinforce what belongs in the procurement file for each method.

Instructions

- Review your worksheet of 15 mixed documentation items.
- Select only those required for your assigned method.
- Justify one item you included and one you excluded.

How Should We Buy This?

Joint procurements

State and local government purchasing schedules

Assignment of Contract Rights

- “Piggyback” contracting
- Assignment of options

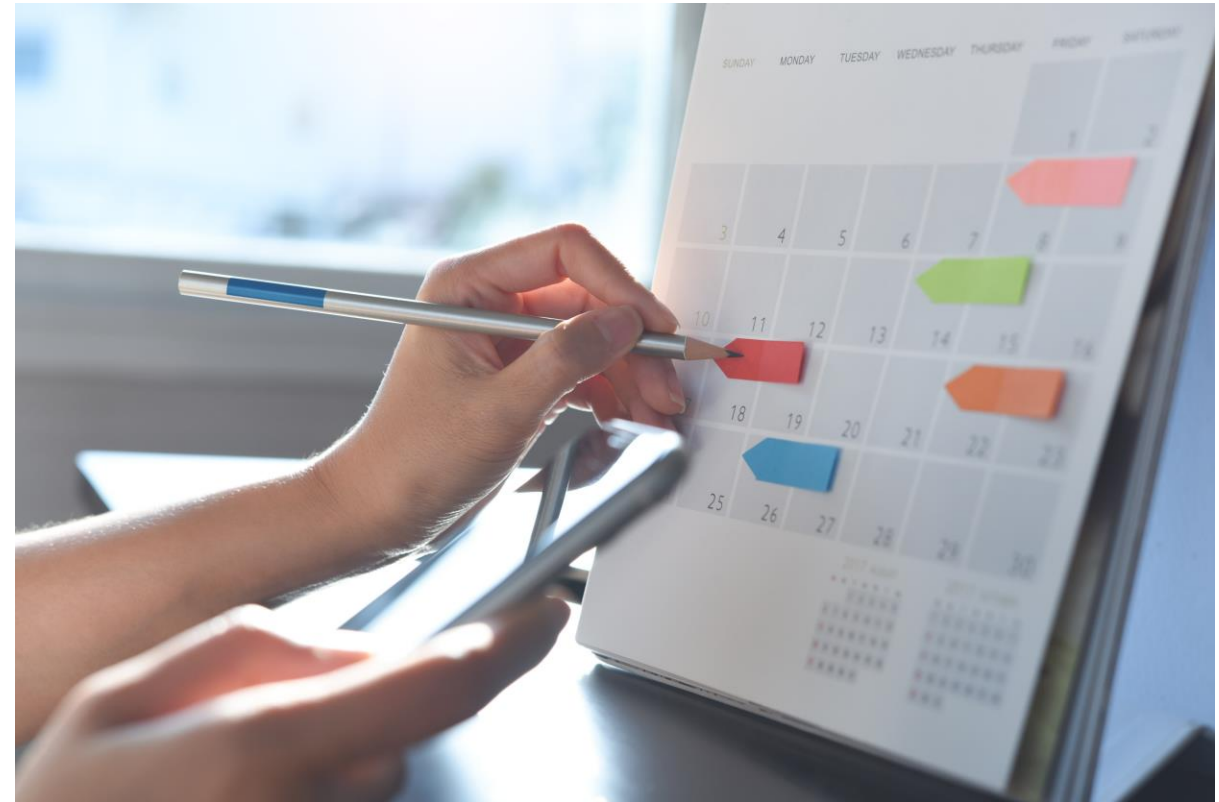
Leasing

Joint Procurement

- Two or more entities jointly agree to procure common goods or services.
- One agency is the lead agency.
- All participating agencies and their requirements are specified, but not necessarily broken out in the solicitation.
- The Lead Agency executes a contract with the successful Contractor. Other participating agencies issue Purchase Orders that incorporate the base contract terms and conditions.
- Agencies **MUST** commit – cannot simply be “interested” – unless the solicitation states that the participation is optional.

Schedules

- State or local schedules
 - Operated by state entity.
 - Available to in-state agencies – sometimes others!
 - Akin to a GSA schedule.
- FTA will allow addition of federal clauses in a purchase order with limited conditions.



Buying From a State Schedule

- Be sure to review and have copies of everything!
- Solicitation
 - Was there competition?
- Evaluation
 - Why was the vendor – or vendors – selected?
- Does the product meet our needs?
- Are we authorized to purchase under this contract?
- If there are more than one on the schedule or contract, do a mini-competition.
 - What are our agency criteria?
 - Which product best meets our needs, offers the best value?
 - This will be a paper review.
 - Do not re-negotiate pricing.

Buying From a State Schedule

- Prepare to purchase.
 - Conduct any required pre-award Buy America audit.
 - If the product is compliant, FTA allows us to add Buy America at this advanced stage.
 - If the product does not comply, we cannot move forward with FTA funds.
- If the state conducted a Buy America pre-award audit, review it carefully.
 - Did an **independent** auditor review the vendor's proposed scope of final assembly, anticipated costs, and preliminary Buy America certifications from the vendor's suppliers?
 - Be sure to review the pre-award audit report.
 - If anything is out of place, conduct an independent audit.

Buying From a State Schedule

- Prepare your purchase order documents.
 - Be certain all required FTA clauses not already in the contract go into your purchase order.
 - This is the ONLY time FTA authorizes agencies to 'federalize' a contract by adding the required clauses in the P.O.
 - Be sure to document that the price remains fair and reasonable.
 - Be sure to document that the vendor is still responsible.
 - For rolling stock, be sure the OEM is on the FTA Transit Vehicle Manufacturer list. Take a screen shot.
- Use the 'piggybacking worksheet' to ensure you have received and reviewed all the documents. Put it right in the front of your file.
 - www.transit.dot.gov/sites/fta.dot.gov/files/docs/BPPM_appB16.doc

How About an Option?

- Options, as an option.
 - Your own
 - Someone else's
 - Assignment of options
 - “Piggybacking”
 - Use the checklist in the *Best Practices Procurement & Lessons Learned Manual*

Leasing?

- Leasing (FAST Act) changes
 - Provides for clarification and encouragement of capital lease arrangements in lieu of purchases.
 - Encourages capital leasing of zero emission vehicle components, particularly power sources.
 - For rolling stock, conduct Pre-Award Buy America audit and execute required certificates.
 - Reporting required on evaluation of overall costs and benefits of leasing.

But Not ...

- Improper Contract Expansion
 - Requirements beyond the agency's reasonably anticipated needs.
 - Excess option quantities have been added for later assignment to agencies not a party to the procurement.

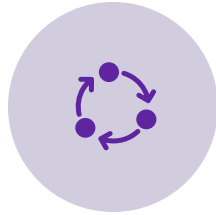
And Never ...

- Cardinal Changes – “Tag-ons”
 - Out-of-scope changes.
 - Major deviation from the original purpose of the work.
 - Cannot be easily identified based on a specific percentage, dollar amount or number of changes.
 - Test – could it have affected competition if known during the procurement?

Procurement Plan



Identity of
potential
sources



Method of
procurement



Contract type
selected



Contractor
selection criteria



Independent
cost estimate



Schedule

Independent Cost Estimate (ICE)

- What should this stuff cost?
- When do I need one?
 - C. 4220.1G, Chapter VI, Section 6 and 2 CFR 200.323(a) – “every procurement ... in excess of the Simplified Acquisition Threshold”
- The ICE should be in the same format we expect bids or proposals to follow.
- Be sure it is ‘independent’ – not just a price someone got from a potential vendor.
- Not having an ICE is always a top ten finding.
- Your ICE will support your finding that the ultimate price is fair and reasonable.
 - Deficient cost or price analysis is always another top ten finding.

Price Estimate

- Comparison and analysis of:
 - Published catalog prices
 - Historical prices paid
 - Market survey information
 - Vendor price quotes
 - Previous prices and quantity purchased



Cost Estimate

- Cost is a component of price.
 - Review all cost elements anticipated in performance of the contract.
- Generally used for:
 - Services
 - Construction
 - Non-commercial supplies



Contract Types

Picking the Right Type



- How will we pay?
 - Prohibition against cost plus percentage of cost contracts (CPCC)
 - Fixed price contracts
 - Cost reimbursement contracts
 - Time and materials contracts/labor hours

Cost Plus Percentage of Cost

- **U.S. Supreme Court:**
 - “the purpose of Congress (in prohibiting CPPC contracts) was to protect the Government against the sort of exploitation so easily accomplished under cost-plus-a-percentage-of-cost contracts under which the Government contracts and is bound to pay costs, undetermined at the time the contract is made and to be incurred in the future, plus a commission based on a percentage of these future costs.”



Fixed Prices

- Fixed price contracts
- Firm fixed price
 - Imposes maximum risk on contractor
 - Imposes minimum administrative burden on owner



Variations on a Theme

- Fixed price with economic price adjustment
 - Objective criteria for increases over time
- **Fixed price incentives**
 - Objective criteria for 'bonus' payments
- Price redetermination
- Award fee

Cost Reimbursement

- Cost plus fixed fee
 - Calculating the fee
- Other variations
 - Cost contract
 - Cost sharing contract
 - Cost plus incentive fee contract
 - Cost plus award fee contract
- More administrative burden and risk on owner



How Much Do We Want?



Delivery and quantity parameters

Infinite delivery contracts

Requirements contracts

Blanket purchase agreement



Task order contracts

A close-up photograph of a person's hands working at a desk. One hand is pressing a button on a white calculator, while the other hand holds a black and gold pen over a document. The document features a bar chart with blue and red bars. The background is a blurred office setting. The image is partially covered by a large blue and purple circular graphic on the right side of the slide.

Activity 3

ICE vs. Quote –
Documentation Gaps in
Professional Services

Activity 3: Poll – ICE vs. Quote

Participants answer five (5) quick questions Poll Everywhere:

1. Which document must be prepared before solicitation?

- a) Purchase order
- b) Independent Cost Estimate (ICE)
- c) Invoice
- d) Bid Tabulation

2. Which document reflects vendor pricing?

- a) Independent Cost Estimate (ICE)
- b) Technical Specification
- c) Vendor Quote
- d) Scope of Work (SOW)

3. Which document compares multiple vendor prices?

- a) Bid Tabulation
- b) Independent Cost Estimate (ICE)
- c) Sole Source Justification
- d) Contract Modification

4. Who is responsible for preparing the ICE?

- a) Selected vendor
- b) Procurement Officer or Requesting Agency
- c) DRPT
- d) Finance Department

5. What's the risk of using a quote as an ICE?

- a) Speeds up the process
- b) Guarantees competitive pricing
- c) May reflect vendor bias and compromise cost reasonableness
- d) Satisfies FTA documentation requirements

ICE vs. Quote

0 surveys completed

0 surveys underway

Which document must be prepared before solicitation?

Purchase order

Independent Cost Estimate (ICE)

Invoice

Bid Tabulation

Which document reflects vendor pricing?

Independent Cost Estimate (ICE)

Technical Specification

Vendor Quote

Scope of Work (SOW)

Which document compares multiple vendor prices?

Bid Tabulation

Independent Cost Estimate (ICE)

Sole Source Justification

Contract Modification

Who is responsible for preparing the ICE?

Selected vendor

Procurement Officer or Requesting Agency

DRPT

Finance Department

What's the risk of using a quote as an ICE?

Speeds up the process

Guarantees competitive pricing

May reflect vendor bias and compromise cost reasonableness

Satisfies FTA documentation requirements



Activity 4

Knowledge Check
Integration: Red Flag
Bingo

Micro and Small Purchases

Micro Purchases

- FTA Threshold
 - \$15,000
- Credit cards?
- Petty cash?



Requirement Splitting

- Potential for requirement splitting.
 - Dividing a purchase requirement to avoid the competition requirements or dollar thresholds.
 - Splitting can also arise at any level.
 - May be suggested by customer or buyer.
- Customer modifies stated requirement to avoid quotation delay or simply lack of planning.
 - Separating requirement into separate lots.
 - Ordering only a portion of full requirement.
 - Purchasing more frequently than is economical.

The Rules

- Equitable distribution of micro-purchases.
 - Distributing purchases among suppliers
 - Rotation
 - Use of small businesses
 - Ethics
- Firm fixed price contracts.
- Selection on rotation.
- Document fair and reasonable pricing.
 - Your policies will cover why you use micro purchases (small dollar) and rotation policy.

More Rules

- Fair and reasonable price
 - Found reasonable on recent purchase
 - Current price list
 - Catalogs
 - Market prices from advertisements
 - Similar items in related industry
 - Personal knowledge of the item procured
 - Regulated rates (utilities)

Short Cuts

- Fair and reasonable price determination

I hereby determine the price to be fair and reasonable based on at least one of the following:

___ Found reasonable on recent purchase

___ Obtained from current price list

___ Obtained from current catalog

___ Commercial market sales price from internet search

___ Other _____

Signed _____ Date _____

Short Cuts

In accordance with the requirements of Chapter VI.7.3.a, FTA Circular 4220.1G, I hereby determine that items bought from Home Depot stores in the greater _____ County, _____ area are fair and reasonable because adequate commercial price competition exists between _____ and stores offering the same or similar products and also because of that store's policy of matching all competitor's prices found to exist on the same item within 30 days of the date of purchase of that item from _____.

This determination is effective for purchases made today through one year from today.

Signature: _____

Name: _____

Title: _____

Date: _____, 20__

Activity 5

Split or Legit?



Activity 5: Breakout - Split or Legit?

A transit agency buys \$9,500 in bus parts from Vendor A in March, then \$9,800 in similar parts from the same vendor in April. Both purchases are coded as micro-purchases. No documentation explains the timing or need.

Group Task:

- **Decide:** Split or Legit?
- **If split:** What threshold was avoided? What method should have been used?
- **If legit:** What documentation would make that clear?
- **Bonus:** Draft 1–2 sentences of justification language for the file.

Small Purchases

- FTA Threshold
 - \$350,000
- ~~Virginia Public Procurement Act (VPPA) Threshold~~
 - ~~\$100,000~~ Contact Aaron Clark or your DRPT program manager for clarification on VPPA.
- Requisition?
- “Adequate number of sources”

Small Purchases

- What initiates the process?
 - Requisition?
- How much competition is required?
- How many small businesses should I use?
- What happens if prices/quotes received are higher than the threshold?
- How do I award a small purchase?

Small Purchases

- Obtain limited competition from an “adequate” number of “qualified” sources (at least 2).
- Solicitations and quotations may be oral or written.
- Some FTA clauses apply to small purchases.
 - Either include required clauses in the solicitation or request for quote OR post a matrix and clauses on the agency website.
- Typically, firm fixed price contracts are selected on the basis of price alone.

Small Purchase Documents

- Requisition (including Independent Cost Estimate?)
- Specification used
- Bid/quote form – Who did you request quotes from and who were quotes received from?
- Responsibility determination (over \$350,000 ‘documentation’)
- Lobby Certificate (over \$100,000)
- www.sam.gov screenprint required over \$25,000

Small Purchase Documents

- Written record of Procurement History including:
 - Rational for method of procurement
 - Rational for contract type
 - Reason for contractor selection
 - Cost/Price Analysis? – Price to be paid fair and reasonable?
- Purchase order

Formal Procurements

Full and Open Competition

Price and
quality

No favoritism
or
profiteering

Equal access
to taxpayer-
funded
business

Perception

Bids or Proposals?

- How important is price?
- Status of specifications
- Need for discussions with offerors
- How soon needed?



Either Way ...

- Bids and proposals must be **responsive** – meeting terms and conditions of the solicitation.
- Bidders and proposers must be **responsible** – able to perform the work.

Common Elements

- Advertising and publicizing solicitation
 - FTA Circular 4220.1G requires that procurements are to be “publicly advertised.”
 - State law frequently addresses manner of advertisement.
- Vendor list

Common Elements

- Solicitation instructions
- General provisions
- Special provisions
- Offeror representations and certifications
- DBE program requirements
- Unique federal requirements
- Specifications or scope of work
- A form signed by the offeror that will be signed by the agency to form the contract

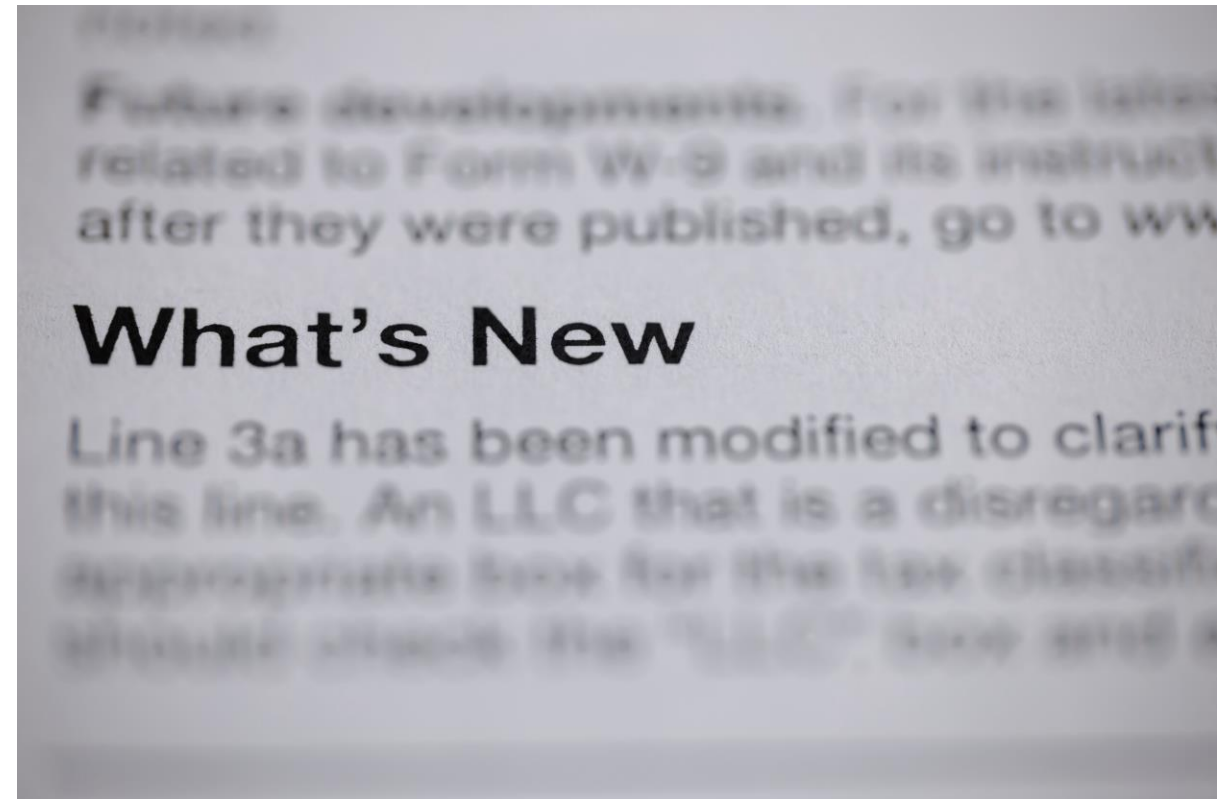


Common Elements

- Pre-bid or pre-proposal conference
 - Notice included in solicitation.
 - **Advise all participants that nothing said will modify the solicitation – wait for an addendum.**
 - Prepare agenda of points to cover.
 - Be responsive to questions - furnish a list of all questions and answers in solicitation amendment.
 - **Should NOT be mandatory!**

Common Elements

- Amending the solicitation
 - What's included in the addendum?
 - Use to correct or update the solicitation.
 - Avoid leaving a solicitation “on the streets” you know is defective – make the changes now or you will pay later.



Common Elements

- Respond to offerors' requested changes.
 - All requested changes should be resolved by sending addenda or denying requests.
 - Some requested changes may be deferred to negotiations when seeking proposals.
 - Changes are critical as exceptions can render a bid “non-responsive.”
- Send to all on final solicitation mailing list.
- Require acknowledgment of addenda at time of receipt of bids or proposals.

Common Elements

- Receipt of offers
 - Pre-opening administrative issues
 - Handling late bids or proposals and withdrawals for bids or proposals

Common Elements

- Statutory requirement that contractors not be debarred, suspended, or otherwise excluded from federal contracts.
 - Contractors and subcontractors over \$25,000.
 - Excluded Parties Listing System – www.sam.gov.
 - Require offerors to submit certifications about their status.
 - Make screen shot to show you checked the list.
 - Responsibility question, not responsiveness.

Keeping Up With Procurement

Small agencies, but all the same rules!

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Digital Presentation Slides

Common Elements

- Buy America certification
 - Statutory requirement for rolling stock, steel, iron, or manufactured products – interpreted to only apply to contracts over \$150,000.
 - Now also for construction materials.
 - Responsiveness question – Must be submitted with offer.



Common Elements

- Lobbying certification
 - Interpreted to be required in all solicitations where the contract award is expected to exceed \$100,000. (This limit does NOT change under 2 CFR200).
 - Submission is a responsibility question, not responsiveness.



Common Elements

- Disadvantaged Business Enterprise (DBE) requirements
 - Your DBE program includes requirements which must be included in all solicitations.
 - Agency decision on whether or not submissions comply with your program is a responsiveness or responsibility question.
- The Interim Final Rule adopted earlier this month means you **must** stay in step with DRPT and counsel!
- Payments to subcontractors and an emphasis on small businesses is not deleted or deferred by the IFR.

Common Elements

- Cancellation of solicitation
 - Reserve to the agency the right to cancel the solicitation, without penalty, at your sole discretion.
 - By making this part of the solicitation, you may avoid a claim for damages in the event you have to cancel for some reason either before or after offers are received.



Sealed Bidding

Sealed Bids

- **Basic elements**

- Circular contains five (5) requirements that should be present in order for sealed bidding to be appropriate:
 1. Precise specifications
 2. Adequate sources
 3. Fixed price contract
 4. Price determinative
 5. Discussions unnecessary



CIRCULAR

FTA C 4220.1G

January 17, 2025

Subject: **THIRD-PARTY CONTRACTING GUIDANCE**

1. **PURPOSE.** This circular is a reissuance of guidance for Third Party Contracting Guidance activities for all applicable Federal Transit Administration (FTA) Federal assistance programs. This circular incorporates provisions of the Infrastructure Investment and Jobs Act (IIJA; Pub. L. 117-58 (2021)) and the most current guidance as of the date of publication. In cases where this circular is inconsistent with changes in any statute or regulation, the statute or regulation will supersede this circular. This circular is applicable as of January 17, 2025.

This circular revision also incorporates provisions of U.S. Department of Transportation (USDOT) regulations, "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards," 2 CFR Part 1201. These regulations incorporate by reference the Office of Management and Budget (OMB), "Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards," 2 CFR Part 200, which supersedes the former OMB circulars on Uniform Administrative Guidance (49 CFR Parts 18 and 19). The most recent updates to 2 CFR Part 200 were published on April 22, 2024, (89 FR 30046) and are effective October 1, 2024. The date of an award or amendment adding funds may determine the application of the specific regulatory requirements.

These requirements are intended to assist recipients in administering FTA-funded projects and in meeting the responsibilities and reporting requirements of FTA awards. Recipients have a responsibility to comply with regulatory requirements and to be aware of all pertinent materials to assist in the management of their Federally assisted awards. Recipients should familiarize themselves with all applicable legal authorities relevant to their transit operations and Federal awards.

2. **CANCELLATION.** This circular cancels FTA Circular 4220.1F, "Third Party Contracting Requirements," dated March 18, 2013.

Sealed Bids

- **Basic elements**

- Circular lists seven (7) procedures if this method is used:
 1. Publicly advertised
 2. Adequate sources
 3. Adequate specifications
 4. Sufficient time
 5. Public opening
 6. Fixed price contracts
 7. Rejection of bids

Sealed Bids

- **Pre-Award Process**

1. Conduct market research and determine method of procurement.
2. Develop unrestrictive specifications.
3. Prepare independent cost estimate.
4. Prepare bid documents.
5. Advertise requirements.
6. Receipt of bids from 2 or more bidders (otherwise use single bid methodology).
7. Bid opening.
8. Responsiveness check.
9. Complete cost or price analysis.
10. Determine lowest responsive bidder.

Sealed Bids

- **Pre-Award Process (continued)**

11. Conduct pre-award Buy America audit or obtain waiver (if applicable)
12. Complete responsibility check including screenprint from www.sam.gov
13. Review the process for arbitrary action
14. Award contract
15. Prepare purchase order or contract documents

Sealed Bids

- **Bid Opening**

- Bids are publicly opened at time and place prescribed in the IFB.
- How are bids actually received at your agency?
- Bid opening is a public event – cannot exclude anyone.
- Does your solicitation address consequences of the late bid?
- What happens at your agency if you only get a single bid when the bids are opened?

Sealed Bids

- **Single Bid**

- If bidder is responsive and responsible and you can determine competition was adequate and price is fair and reasonable, you may be able to award the contract.
- No sole source justification.
- Ability to negotiate.

Sealed Bids

- **Single Bid – Why Only One?**

- You should attempt to ascertain why only one bid and document that reason.
- May have been multiple bidders, but all but one were determined to be non-responsive.
 - Problem with specifications?
- Were the specifications restrictive? Minimum needs still okay?
- Have you talked with offerors you expected to bid but did not?

Sealed Bids

- **Responsive Bid**

- Conforms in all material aspects to the requirements of the solicitation at the scheduled time of submission and does not require further discussions with the bidder.
 - Definition may vary from jurisdiction to jurisdiction.
- Concept of PDQ Price.
 - Product, Delivery, Quality, Price

Sealed Bids

- **Bid Mistakes – How Are They Discovered?**
 - Review by procurement official.
 - Low bid reviewed by second low bidder who finds mistake.
 - Low bidder left “too much money on the table” and wants out.

Sealed Bids

- **Bid Mistakes – What Do We Do?**

- Generally, if either minor informalities or irregularities or apparent clerical mistakes are alleged before award and proven, the bidder will be allowed to correct the mistake.
- When to allow a bid to be withdrawn.
- Consult legal counsel regarding bid mistakes!

Conflicting Rules

- In FTA practice, you may only negotiate with a bidder when you have a single bid resulting from full and open competition.
- In Virginia...
 - Virginia Admin Code § 2.2-4318: Unless canceled or rejected, a responsive bid from the lowest responsible bidder shall be accepted as submitted, except that if the bid from the lowest responsible bidder exceeds available funds, the public body may negotiate with the apparent low bidder to obtain a contract price within available funds. However, the negotiation may be undertaken only under conditions and procedures described in writing and approved by the public body prior to issuance of the Invitation to Bid and summarized therein.
- Only do this with non-federal funding!



Activity 6

Responsiveness vs.
Responsibility

Which best describes a "responsive" bid?

The vendor has the capacity to perform.

0%

The bid meets all material requirements .

0%

The vendor has a clean financial record.

0%

The vendor is not debarred.

0%

Competitive Proposals

Competitive Proposals

- **Basic elements**

- Circular lists four (4) requirements that apply if this procurement method is appropriate:
 1. Type of specifications
 2. Uncertain number of sources
 3. Price alone not determinative
 4. Discussions expected

Competitive Proposals

- **Basic elements**

- Procurement procedures
 - Circular lists six (6) procedures that are used:
 1. Publicly advertised
 2. Evaluation factors
 3. Adequate sources
 4. Evaluation method
 5. Price and other factors
 6. Best value



Competitive Proposals

- Evaluation Methods – Best Value.
- Selection of the most advantageous offer to obtain technical superiority even if the agency must pay a premium price (the premium must be justified).
- The agency must disclose evaluation factors in its solicitation.
- May include →

Technical design

Technical approach

Length of delivery schedules

Quality of proposed personnel

Past performance

Management plan

Competitive Proposals

- **Pre-Award Process**

1. Conduct market research and determine method of procurement.
2. Develop unrestrictive statement of work.
3. Develop evaluation criteria and weights.
4. Prepare independent cost estimate.
5. Prepare solicitation documents.
6. Advertise requirements.
7. Proposal opening.
8. Responsiveness check.
9. Receipt of proposals from 2 or more proposers (otherwise use single proposal methodology).
10. Evaluate proposals according to criteria in RFP.

Competitive Proposals

- **Pre-Award Process (continued)**

11. Conduct discussions, clarifications and/or negotiations (if applicable).
12. Receive revised submittals and/or Best and Final Offers.
13. Complete cost or price analysis.
14. Negotiate final price with top scoring vendor.
15. Conduct pre-award Buy America review or obtain waiver (if applicable).
16. Complete responsibility check.
17. Review the process for arbitrary action.
18. Award contract.
19. Prepare purchase order or contract documents.

Competitive Proposals

- **Importance of Source Selection Plan (SSP)**
 - SSP elements
 - Evaluation criteria – technical, cost, and relative importance of criteria
 - Evaluation team

Competitive Proposals

- **Solicitation**

- Evaluation criteria and relative importance or weights
- Award criteria – technical vs. cost
- Award may be made on basis of original proposals

Competitive Proposals

- **Receipt of Proposals**

- Proposals opened privately.
- Register of proposals maintained and available after contract award.

Competitive Proposals

- **Evaluation Concerns**

- Maintain integrity of procurement process.
- Do not discuss outside of meetings of evaluation teams.
- Form for team members to execute acknowledging confidentiality issues.
- Team members should also execute conflict of interest certifications prior to starting evaluations.

Competitive Proposals

- **Evaluation of Proposals**

- Follow criteria
- Evaluate against criteria, not other offers
- Discussions among members
- Forms
 - Insist on narrative support for scores

Competitive Proposals

- **Competitive Range**

- Determined on the basis of cost and technical factors stated in the RFP.
- Include all proposals that have a reasonable chance of being selected for award – If in doubt, include.
- Do not pre-determine the competitive range.

Activity 7

Competitive Range

Request For Proposal

Please provide a proposal for the

PROJECT OVERVIEW

This project is to develop a database
and implement a system to in
applications listed below.

Which statement best describes the purpose of establishing a competitive range in proposal evaluations?

- To select the lowest-priced offer 0%
- To eliminate non-responsive bids 0%
- To identify proposals most likely to be awarded 0%
- To finalize contract terms with the selected vendor 0%

Competitive Proposals

Scores	
A	80
B	63
C	81
D	70
E	85

Scores	
E	85
C	81
A	80
D	70
B	63



**Competitive
Range**

Competitive Proposals



- **Negotiations – discussions and clarifications**
 - If you hold negotiation sessions with one offer or, you must hold a session with all offerors in the competitive range.
 - Do not give a competitive advantage.

Competitive Proposals

- Pre-negotiation/discussion memorandum
 - Planning
 - Purpose
 - Team
 - Documentation



Competitive Proposals

- Additional submissions
 - Can be requested
 - Request for revised proposals
 - Technical and/or cost/price
- Debriefing unsuccessful offerors
 - Consider this “Protest Avoidance”
 - Debrief offeror’s proposal against evaluation criteria, not other offerors



Except ...

Other Than Full and Open Competition

- Sole Source authorized when:
 - Item available only from a single source.
 - Public exigency or emergency.
 - FTA authorizes non-competitive proposals.
 - After solicitation of a number of sources, competition is determined inadequate.
- May require a cost analysis.
- Importance of documentation.

A&E Services

- The Brooks Act Process
 - The process is nearly identical to a normal RFP except that price is prohibited from being an evaluation criterion.
 - Proposals or Qualification Statements, including separate sealed price proposals, are solicited.
 - Proposals are evaluated and firms are ranked from most qualified to least qualified.
 - Evaluate the price proposal from ONLY the most qualified firm.
 - Serial price negotiations
 - Conduct negotiations with ONLY the most qualified firm.
 - If agreement cannot be reached on a fair and reasonable price, stop negotiations with that firm.
 - Attempt to negotiate a fair and reasonable price with the next most qualified firm, etc.

A&E Services

- The Brooks Act process (continued)
 - A cost analysis is required to determine that the price is fair and reasonable because there is no price competition.
 - If the firm has audited overhead rates that are not in dispute, the agency is required to accept the overhead rates.
 - If an audit has not been done, an audit may be required to establish the provisional overhead rates.

A&E Services – More Conflicting Rules

- Virginia has a “mini-Brooks Act” statute that addresses this same method of procurement.
- Look to the funding source when deciding which rule to apply.
- In Virginia, accounting, actuarial services, law, dentistry, medicine, optometry, pharmacy, and professional engineering all are treated as Brooks Act procurements.
 - Only use this if no federal funding is on the project.

All of Those Clauses ...

Federal Requirements

- FTA Circular 4220.1G requires that all contracts include provisions to define a “sound and complete agreement.”
 - Leaves a lot of discretion to grantee.
- Grantees are responsible for evaluating all statutory and regulatory requirements for relevance and applicability to each procurement.
 - Watch out for changes and additions to the federal clauses.

Disadvantaged Business Enterprise

- Applies to all DOT-assisted contracts.
- Referenced in 49 CFR Part 26.
- Grantee and contractor agree it will take all necessary and reasonable steps required by DOT regulations to ensure eligible DBEs have the maximum feasible opportunity to participate in third-party contracts.
- Annual goals for agencies and TVMs.
- Documented analysis of shortfalls.

Disadvantaged Business Enterprise

- Applies to all DO
- 49 CFR Part 26
- Grantee and contractor must take all reasonable steps to ensure eligible DBEs have the opportunity to participate in this
- Annual goals for
- Documented an



all necessary and
ations to ensure
le opportunity to

Disadvantaged Business Enterprise

- “The Interim Final Rule removes race- and sex-based presumptions from the definitions of “socially and economically disadvantaged individual,” and instead provides that the owner of a DBE or ACDBE applicant must demonstrate on a case-by-case basis that the individual meets the criteria described in 49 CFR §26.67.”
- “Each Unified Certification Program (“UCP”) established pursuant to 49 CFR § 26.81 must immediately begin to apply these new certification standards.”

Virginia's SWaM Program

- Small, Women, and Minority-owned Business (SWaM)
- Commonwealth goal is 42%

CERTIFIED

SWaM Small,
Women and
Minority-Owned

Supplier Diversity Strengthens the Commonwealth

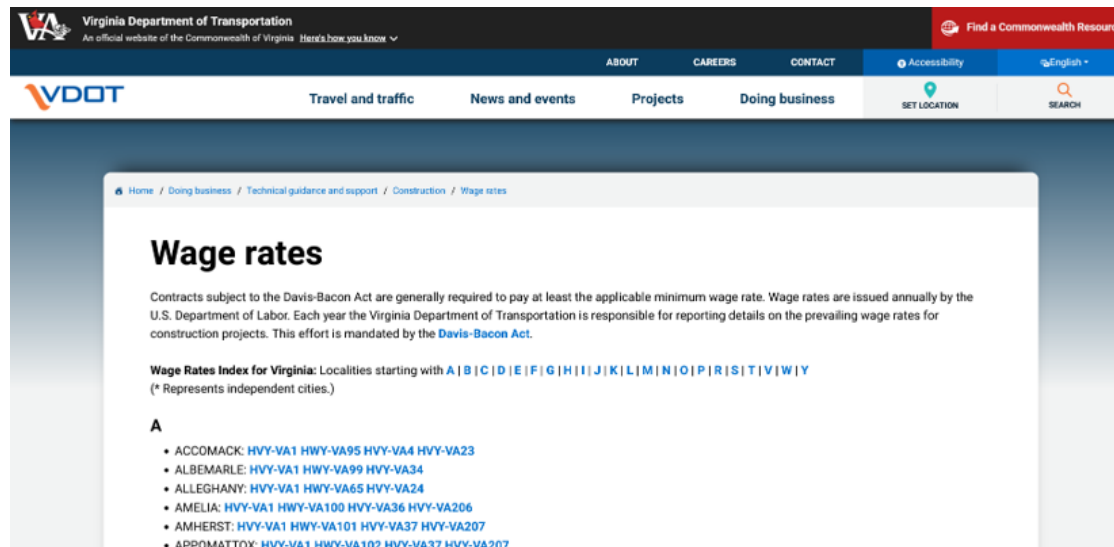
by the Virginia Department of Small Business & Supplier Diversity

Davis-Bacon Act

- Construction contracts more than \$2,000.
- Construction = construction, alteration, or repair of public buildings or works.
- Laborers and mechanics to receive no less than prevailing wage rates.
- Wage rates now available online:
 - www.sam.gov

Virginia Prevailing Wages

- www.vdot.virginia.gov/doing-business/technical-guidance-and-support/construction/wage-rates/
- Must comply with both!



Cargo Preference Act

- Applies to all contracts involving equipment, materials, or commodities that may be transported by ocean vessels.
- Requires contractor to use U.S. flag commercial vessels.
 - At least one half of total tonnage
 - “Fair and reasonable rates”

Fly America Provisions

- U.S. Federal Government will not participate in costs of air transportation of any person involved in or property acquired for the project, unless that transportation is provided by U.S. air carriers to the extent service by those carriers is available.



Buy America Provisions

- 49 CFR Part 661
 - Offeror must certify whether or not it will comply for:
 - Structural steel or iron
 - Manufactured products
 - Rolling stock
 - And now, eight (8) designated 'construction materials'
- Certification of compliance (or non-compliance) mandatory with receipt of bid/proposal

How Does it Work?

- Contracts in excess of \$150,000
 - Waivers
 - Small Purchase
 - Vans
 - Public interest
 - Non-availability
 - Price differential (25% of *project*)
 - Rolling stock



Activity 8

BABA or Not?

Activity 8: Pairs/Groups – BABA or Not?

Objective: Practice identifying which materials and projects trigger BABA compliance, and what documentation is needed.

- Partner with one or two people sitting near you.

Your agency is using FTA funds to build a new bus maintenance facility. The specs include reinforced concrete, steel framing, and HVAC systems.

- Does BABA apply? (Yes / No / Not sure)
- What documentation would you need?

Mini Tutorial

- Iron and steel – construction projects
- Construction materials
 - Defined by OMB
- Manufactured product
 - Manufactured/final assembly in US
 - 100% of components manufactured in US
 - Subcomponent source immaterial
- Defining components and subcomponents
- Defining adequate manufacturing

Construction Projects Have Several End Products!

- Bob Hope Airport – Regional Intermodal Transportation Center – July 11, 2014
 - “FTA considers the fire alarm system, lighting system, and power system addressed in your letter to be ‘manufactured end products’ having separate Buy America obligations, rather than as ‘components’ of the larger project.”
- Second Avenue Subway Project's Water Mist Fire Suppression System – Jan. 6, 2015
 - “I find that a water mist fire suppression system is a manufactured end product, and that each of its components—pipe tubing, pipe fitting, pipe and tube support, valves, a pump controller unit, nozzles and fittings, alarm devices, pressure gauges, and Schedule 40 pipe—must be manufactured in the United States.”

Construction Materials

Material	Standard
Non-ferrous metals	Melted (and everything after) in the US. Look for certificate of inspection and test results – should say “Country of Melt: United States” among other information.
Drywall	Initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels. Look for the codes.
Lumber	Initial debarking and everything after. Look for the stamp for the Mill Identification Number.
Glass	Initial batching and melting of raw materials through annealing, cooling, and cutting. No real marking, but look for the manufacturer.

Construction Materials

Material	Standard
Plastic and polymer-based products	Initial combination of constituent, plastic or polymer-based inputs until the item is in a form in which it is delivered to the work site. No common means of identifying the source of materials given the breadth of this material category – can only rely on the vendor’s certification and check for markings on the materials and wrappings.
Engineered wood	Initial combination of constituent materials until in its final form. Some – not all – engineered wood will carry mill identification numbers, just like lumber.
Fiber optic cable	Ribboning, buffering, stranding, and jacketing.
Optical fiber	Initial preform fabrication through the draw.

Termination of Contracts

- FTA Circular 4220.1G provides requirements for contract clauses that allow for termination **for cause** and **for convenience** by the grantee, including the manner by which it will be affected and the basis for settlement.
 - All contracts in excess of \$10,000



Termination of Contracts

- No prescribed language
- For default (for cause)
 - Notice and opportunity to be heard
 - Likely to end up in court
 - www.youtube.com/watch?v=-rziE39JWfs
- For convenience
 - Unilateral right for public owner – not mutual right
- Payment will be different – coming later

Changes

- Again, no prescribed language.
- Different clauses for different goods and services.
- Directs the contractor to act – even without agreement on pricing.
- Note – the FTA generally expects profit to be negotiated separately on all change orders.
 - 4220.1G recognizes that may not be possible or appropriate in all situations.

Dispute Resolution

- FTA requires the grantee to have dispute procedures.
- Typically, disputes and claims come up in change orders or contract interpretation.
- FTA will not substitute its judgment for that of the grantee unless the matter is primarily a federal concern.



Dispute Resolution

- How, and in what forum, the dispute is resolved may be a matter of state or local law.
 - Should always be Virginia law (without choice of law provisions) and exclusive jurisdiction in local state and federal courts.
- Consider Alternative Dispute Resolution possibilities, rather than formal proceedings.
 - Mediation
 - Arbitration
 - Should always be arbitration or mediation in your hometown!
- Your administrative record will be absolutely critical.

Prompt Payment to Subcontractors

- 49 CFR § 26.29 requires a prompt payment to subcontractors clause in all DOT-assisted contracts, including A&E contracts.
- Requires contractors to pay all subcontractors for satisfactory performance of their contract work no later than 30 days from receipt of payment from the agency. (Individual agencies may require faster payment.).
- Also requires prompt and full payment of retainage within 30 days after the subcontractor's work is satisfactorily completed.

Veterans Hiring Preference

- Applies to capital projects involving construction.
- Requires contractors to give a hiring preference to veterans, to the extent practicable, who have the requisite skills and abilities to perform the construction work.
- A hiring preference is not required over an equally qualified applicant who is a member of a racial or ethnic minority, female, an individual with a disability, or a former employee.

Anti-Discrimination Clauses

- Each third-party contractor at any tier will comply with the requirements of the Title VI of the Civil Rights Act of 1964, as amended.
 - Will not discriminate on the basis of race, color, creed, sex, disability, age, or national origin.
 - “Flow down”
- Additional Equal Employment Opportunity (EEO) requirements for construction activities.
 - Master Agreement Section 15 updated the required clause.

Protection of Environment

- Clean Air Act
- Clean Water Act
- Required at \$150,000 threshold



Performance/Payment Bonds

- Only required for construction contracts.
- 2 CFR 200.325 allows FTA to accept grantee policies.
- Default is 100% performance and 100% payment bonds.
- 4220.1G requires 100% performance but a sliding scale on payment bonds.
- 4220.1G also contemplates accepting grantee policies for reduced bonding.

Options

- Unilateral right
- Your own or someone else's?
 - Assignability
- Exercising any option
 - Validity
 - Priced and evaluated within solicitation process
 - Confirm 'fair and reasonable' pricing
 - Never negotiate established pricing

Liquidated Damages

- Never required
- Must be supported and reasonable, not a penalty
- Consider in conjunction with incentives
- A word on uncapped liquidated damages
- Coordination with schedule
- Collecting or compromising

Payments



- Must accommodate 49 CFR Part 26 rule and Virginia law.
 - Construction contracts – prime must pay within seven (7) days of payment and sixty (60) days where no agency payment has been made
 - Code of Virginia, Title 2.2, Chapter 43, Section 2.2-4354
- Likely different for different contracts.
 - 100% on acceptance
 - Progress payments
 - Advance payments
- Be certain prerequisites are met.

Progress Payments

- Milestones
 - Percentage of completion
- Monthly billing
- Adequate security
- Adequate documentation – called out by FTA!
- Now contemplated for bus purchases

Advance Payments

- When would you use them?
- Using FTA money
 - Generally, no, except...
 - FTA agrees – ‘sound business reasons’
 - Customary advance payments
 - Adequate security

Rights in Data and Copyrights



- Section 18 of the Master Agreement contains a detailed (and confusing) discussion regarding federal and grantee obligations in rights in data and copyrights.
- Limited to R&D contracts.
- Consider having your own clause to ensure you own your data!

Patent Rights



- Section 17 of the Master Agreement contains an equally confusing and detailed discussion regarding federal and grantee obligations in patent rights.
- Also limited to R&D contracts.
- Generally inapplicable unless you have a very exotic grant agreement and contract.

And Always a 'Gotcha'

- Recycled products
- On the triennial list for 2019 forward
- \$10,000 threshold
- Must refer to 40 CFR 247 (EPA) to know what products it applies to!

McCain Act

- Certifications as a means of ensuring compliance.
- VENDOR hereby acknowledges that the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115232, §889 (Aug. 13, 2018) (the Act) prohibits the Agency from procuring certain “covered telecommunications equipment or services,” as defined in the Act, in federally assisted procurements and that the instant procurement is a federally assisted procurement subject to that prohibition. VENDOR represents and warrants that it has performed a due diligence review of its supply chain and that no such “covered telecommunications equipment or services” shall be provided to the Agency that would cause the Agency to be in violation of the prohibition contained in the Act.

Handling Clauses

- Be sure you have them in there, but don't just dump everything in.
- Suppliers without a significant transit practice generally have no idea what is in the federal clauses.
- Industry outreach to small and disadvantaged businesses can help coax local businesses to bid or propose on your work.
- Always keep your clause matrix current!

Contract Award

Awarding the Contract

- Determinations of responsiveness and responsibility
- Price or cost analysis
- Resolution of protests
- Post-award submissions by contractor
- Notification to unsuccessful bidders/proposers
- Documentation of everything!

Responsiveness

- PDQ Price
- A bid is responsive if it conforms in all material aspects to the requirements of the solicitation at the scheduled time of submission and does not require further discussions with the bidder.

Responsibility

- What makes a contractor responsible?
 - Financial resources to perform the work
 - Appropriate administrative, technical, equipment/facility/production, and personnel
 - Ability to comply with required schedule
 - Satisfactory past performance record
 - Record of integrity and ethics
 - Compliance with license and tax law

Cost or Price Analysis?

- When do I need one?
 - Above the small purchase threshold.
- Which one should I use?
 - **Price Analysis** is used if it is determined that competition was adequate and price was within the expected range established by the ICE.
 - **Cost Analysis** is used if it is determined that competition is inadequate or price is inconsistent with the expected range established by the ICE.

Protests



- Three basic types of protests
 1. Protest received prior to bid opening or proposal due date.
 - Usually, if a known issue is not protested at this time, it is waived.
 2. Protest received after bids or proposal received, but prior to award.
 3. Protest received after award of the contract.

Protests

- Written procedures should address:
 - Procedures for each type of protest
 - Who is eligible to protest
 - Deadlines to file protest
 - Contents of protest
 - Identity and location of official to receive protest
 - Effect on pending actions
 - Promise to respond
 - Finality of decision
 - Reconsideration rights
 - Administrative appeal rights, if any

Protests

- Actions during the protest
- Notification to FTA
- Should you stay award of contract pending resolution of protest?

Manner of Award

- Who authorizes the award?
 - Typically, dollar thresholds determine who must approve.
 - Contracting Officer
 - CEO
 - Board of Directors
- Notice of proposed award
 - Start the protest clock.
 - Sent to all competitors – watch the timing!
 - Any Buy America requirements?
- Award
 - May be just furnishing a copy of the executed contract.

Post-Award Submissions by Contractor

- Performance and payment bonds for construction contracts
- Insurance policies or certificates
- Licenses, etc.

Notification to Unsuccessful Bidders/Proposers

- Follows that earlier notice of intent to award.
- Let them know the procurement process is over.
- Be prepared to debrief.

Documentation of Everything

- Close out this part of the procurement process by documenting all actions relating to award.
 - Determination of responsibility
 - Protests settled or times out
 - Award authority
 - All required submissions received and complete
 - Contract execution





We're Done, Right?

Contract Administration

- Activities
 - Pre-performance and “kick off” post-award conferences
 - Team-building technique referred to as “partnering”
 - Submission review and approvals
 - Notice to proceed
 - Respond to requests for contract interpretation
 - Ensure compliance with terms of contract
 - ~~Special DBE terms compliance issues~~
 - Prompt payment to subcontractors
 - Davis-Bacon monitoring
 - Buy America monitoring

Contract Administration

- Modifying the contract
 - Scope of authority – changes clause
 - Authority within agency to modify contracts
- Termination
 - Convenience
 - Default

Other Post-Award Tasks

- Task orders
- Purchase orders
- Mini- competition in multiple award contracts
- Inspection and acceptance
 - Services
 - Things
- Disputes
- Audits – financial and Buy America



Contract Closeout

- Documentation retention
 - FTA's Master Agreement requires that “during the course of the **project** and for three years thereafter, it will maintain intact and readily accessible all data, documents, reports, records, contracts, and supporting materials relating to the Project as the Federal Government may require for the Project.”



Final Knowledge Check