U.S. Department of
Transportation
**Federal Transit
Administration**

CIRCULAR

FTA C 4220.1E

Subject: THIRD PARTY CONTRACTING REQUIREMENTS

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1. PURPOSE. This circular sets forth the requirements a grantee must adhere to in the solicitation, award and administration of its third party contracts. These requirements are based on the common grant rules, Federal statutes, Executive Orders and their implementing regulations, and FTA policy.[1]

2. CANCELLATION. This circular cancels FTA Circular 4220.1D "Third Party Contracting Requirements," dated 4-15-96.

3. REFERENCES.

a. Federal Transit Laws, 49 U.S.C. Chapter 53.

b. Transportation Equity Act for the 21st Century 1998 (TEA-21), P.L. 105-178 as amended, TEA-21 Restoration Act 1998, P.L. 105-206.

c. Sections 4001 and 1555 of the Federal Acquisition Streamlining Act of 1994, 41 U.S.C. § 403(11) and 40 U.S.C. § 481(b), respectively,

d. 49 C.F.R. part 18, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

[1] FTA's purpose in re-issuing Circular 4220.1 is to incorporate policy updates contained in several Dear Colleague letters issued since 1996. At the same time, we have attempted to ease unnecessary requirements applied in our grantees' procurement processes while remaining consistent with applicable law and regulations, particularly the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments at 49 CFR Part 18 (the Common Grant Rule). We believe many of these 'requirements' have evolved from earlier versions of the circular through varying interpretations or as unintended consequences of the language as it was drafted. To help avoid this, we have compiled these interpretive comments to better explain what FTA believes the law and regulations conveyed through the circular actually require of our grantees. As applicable laws, regulations, and contracting practices evolve, we will use these interpretive comments to continue conveying our views to our grantees and the transit industry as a whole.

Distribution: FTA Headquarters Offices (T-W-2)
FTA Regional Offices (T-X-2)

OPI: Office of Procurement

e. 49 C.F.R. part 19, Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations.

f. Executive Order 12612, "Federalism," dated 10-26-87.

g. FTA Circular 5010.1C, "Grant Management Guidelines," dated 10-1-98.

h. FTA Master Agreement.

i. Appendix D, Best Practices Procurement Manual.

4. APPLICABILITY. This circular applies to all FTA grantees and subgrantees that contract with outside sources under FTA assistance programs. FTA grant recipients who utilize FTA formula funds for operating assistance are required to follow the requirements of this circular for all operating contracts. These requirements do not apply to procurements undertaken in support of capital projects completely accomplished without FTA funds or to those operating and planning contracts awarded by grantees that do not receive FTA operating and planning assistance.[2]

Congestion Mitigation and Air Quality (CMAQ) and Job Access/Reverse Commute (JARC) project funds may be used for operations. Although grantees must follow circular requirements for any specific contracts that utilize CMAQ or JARC funds, the use of CMAQ and JARC funds for operations does not trigger the applicability of the circular to all other operating contracts.[3]

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[2] As a general rule, the circular, along with the underlying requirements in the Federal transit laws and regulations, applies whenever Federal funds are involved.

Those grantees authorized to use formula funds for operating assistance must apply the circular to all operating contracts – even if they are able to administratively segregate the federal funds to non-contract operating expenses. The ability to use formula funds for operating assistance hinges upon a grantee's total operating expenses and the portion of those expenses not offset by operating income. Since the entire range of operating expenses is considered in this calculation, each segment of those operating expenses must be subject to Federal standards.

Grantees that are not authorized to use formula funds for operating assistance are not required to apply the circular to their operating contracts.

FTA also applies the requirements of this Circular to recipients of cooperative agreements through provisions of those agreements.

[3] Congestion Mitigation and Air Quality (CMAQ) and Job Access/Reverse Commute (JARC) funds may be used for operations by all grantees. The circular must be applied to all contracts that are funded, in part, by CMAQ or JARC funds. Using CMAQ or JARC funds for a specific operating contract or contracts does not trigger the requirement to apply the circular to other operating contracts. This is because the calculation required to use formula funds for operations contracts is not required as a prerequisite to using CMAQ or JARC funds for operating contracts.

Grantees that utilize formula capital funds for preventive maintenance contracts are subject to the following requirements of the circular: If FTA formula capital funds are fully allocated to discrete preventive maintenance contracts, then the requirements of this circular will apply only to those discrete contracts and must be identified and tracked by the grantee. If the FTA formula funds are not allocated to discrete contracts then all preventive maintenance contracts are subject to the requirements of the circular.[4]

a. States. When procuring property and services under a grant, a State will follow the same procurement policies and procedures that it uses for acquisitions that are not paid for with Federal funds. States must, at a minimum, comply with the requirements of paragraphs 7m, 8a and b, and 9e of this circular and ensure that every purchase order and contract executed by it using Federal funds includes all clauses required by Federal statutes and executive orders and their implementing regulations.[5]

b. All Other Recipients. Subgrantees of states and all other FTA grantees (to include regional transit authorities) will administer contracts in accordance with this circular.

5. POLICY. FTA's role in grantee procurements is reflective of Executive Order 12612, Federalism. The executive order directs Federal agencies to refrain from substituting their judgment for that of their recipients unless the matter is primarily a Federal concern and to

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[4] Grantees who use formula capital funds for preventative maintenance contracts must apply the circular to those contracts. If, through their accounting procedures, these grantees are able to allocate the Federal funds to discrete maintenance contracts, only those discrete contracts must adhere to the circular. If unable to allocate federal funds to discrete maintenance contracts, the circular applies to all maintenance contracts.

Capital projects that don't include Federal funding are not required to conform to the circular.

Procurements of real property and art are beyond the scope of Circular 4220.1E and covered in separate guidance. [*added October 2003* – Real property acquisition is covered in 49 CFR, Part 24. FTA Circular 9400.1A discusses art in transit projects. The Best Practices Procurement Manual includes extensive non-binding guidelines for applying C.9400.1A and related requirements.]

[*added February 2004* – Grants under the Rural Transportation Accessibility Incentive Program, section 3038, Pub.L. 105-178, as amended, are subject to the standards described at 67 FR 16799 (April 8, 2002).]

[5] The language of this paragraph was adjusted to comport with the Common Grant Rule. FTA believes that only States – not their sub-grantees, regional transit authorities, local agencies, or any other grantees or sub-grantees – are free to apply only limited portions of the circular to their procurements.

All other grantees and sub-grantees are obligated to apply the circular to their procurements as described above.

defer, to the maximum extent feasible, to the States to establish standards rather than setting national standards.

In 1996, FTA reduced its role in grantee third party procurement activity in several important respects. To ensure compliance with Federal procurement requirements, FTA will continue to provide guidance and technical assistance to its grantees consistent with its Federal oversight responsibilities.

a. Grantee Self-Certification. Recognizing that most FTA grantees have experience with the third party contracting requirements of the "common grant rules" (49 C.F.R. parts 18 and 19), FTA will rely primarily on grantees' "self-certifications" that their procurement system meets FTA requirements and that a grantee has the technical capacity to comply with Federal procurement requirements. All grantees must "self certify" as part of the Annual Certification/Assurance Process.[6]

   FTA will monitor compliance with this circular as part of its routine oversight responsibilities. If FTA becomes aware of circumstances that might invalidate a grantee's self-certification, FTA will investigate and recommend appropriate measures to correct whatever deficiency may exist.

b. FTA Review of Third Party Contracts. FTA relies on the validity of each grantee's self-certification rather than on a pre-award review of third party contracts. Accordingly, FTA will rely on periodic, post-grant reviews to ensure that grantees comply with Federal requirements and standards. Grantees are still free to request FTA's pre-award review of their procurements as part of FTA's technical assistance program. Conversely, if FTA requests to review the record of a particular procurement, grantees must make their procurement documents available for FTA's pre-award (or post-award) review.

c. Procurement System Reviews. FTA is required by 49 U.S.C. §5307 to perform reviews and evaluations of grant programs and to perform a full review and evaluation of the performance of grantees in carrying out grant programs with specific reference to their compliance with statutory and administrative requirements. Accordingly, FTA will perform procurement system reviews as part of its on-going oversight responsibility. FTA may recommend "best practices" in order to assist the grantee in improving its procurement practices. In such cases, FTA will identify such recommendations as "advisory."

d. FTA Procurement Technical Assistance. FTA provides procurement training and technical assistance at both regional and national levels by offering various instructional courses, by conducting regional technical assistance conferences, by providing assistance by a contractor on an as-needed basis, and by updating and revising the FTA "Best Practices Procurement Manual. " The manual contains

[6] To preclude unnecessary delay in grantee procurements, FTA does not, as a general rule, conduct pre-award reviews of third party contracts as envisioned in the Common Grant Rule. Instead, we have chosen to rely heavily on our grantees' self-certification of their procurement systems.

procurement guidance and "best practices" that grantees may choose to follow in performing their procurement functions.

e. Contract Clauses and Provisions. The Master Agreement, issued annually, lists many but not all FTA and other crosscutting Federal requirements applicable to FTA grantees. Many of these requirements are related to grantee procurements. Further guidance and suggested wording for contract clauses and provisions is provided in the "Best Practices Procurement Manual. "

f. Use of GSA Schedules is restricted to those transit properties with specific legislative authority to use them.[7]

6. DEFINITIONS. All definitions in 49 U.S.C. §5302 are applicable to this circular. The following definitions are provided:

a. "Grantee" means the public or private entity to which a grant or cooperative agreement is awarded by FTA. The grantee is the entire legal entity even if only a particular component of the entity is designated in the assistance award document.[8]

For the purposes of this circular, "grantee" also includes any subgrantee of the grantee. Furthermore, a grantee is responsible for assuring that its subgrantees comply with the requirements and standards of this circular, and that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

b. "State" means any of the several states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. "State" does not include any public and Indian housing agency under the United States Housing Act of 1937.

c. "FTA" refers to the Federal Transit Administration.

d. "Third party contract" refers to any purchase order or contract awarded by a grantee to a vendor or contractor using Federal financial assistance awarded by FTA.

e. "Piggybacking" is an assignment of existing contract rights to purchase supplies, equipment, or services.[9]

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[7] Within FTA's knowledge, the only grantee with full access to the GSA schedules is the Washington Metropolitan Area Transit Authority. GSA issued initial guidance implementing a program to allow state and local governments to use the GSA information technology schedule in May 2003. [*deleted October 2003* - ~~and FTA will update this section as more information becomes available.~~] [*added October 2003* – Directions for using the GSA information technology schedule are available at http://www.gsa.gov/Portal/gsa/ep/contentView.do?P=FCIM&contentId=8273&contentType=GSA_OVERVIEW]

[8] This definition was changed to comport with the Common Grant Rule.

f. "Tag-on" is defined as the addition of work (supplies, equipment or services) that is beyond the scope of the original contract that amounts to a cardinal change as generally interpreted in Federal practice by the various Boards of Contract Appeals. "In scope" changes are not tag-ons.[10]

g. "Best Value" is a selection process in which proposals contain both price and qualitative components, and award is based upon a combination of price and qualitative considerations. Qualitative considerations may include technical design, technical approach, quality of proposed personnel, and/or management plan. The award selection is based upon consideration of a combination of technical and price

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[9] FTA has introduced a limited definition of 'piggybacking' and, to differentiate vastly different practices, has separated this practice of assigning contractual rights among grantees from joint procurements or other intergovernmental agreements. Paragraph 7.e. further explains these different practices. Our intent was to eliminate some of the confusion that has grown around this term.

[10] We have similarly attempted to limit the definition of 'tag-on' and align it with the concept of a 'cardinal change' or 'out-of-scope change.' FTA believes that earlier attempts to categorize virtually any change in quantity, for example, as a forbidden 'tag-on' failed to account for the realities of the marketplace and unnecessarily limited grantees from exercising reasonable freedom to make those minor adjustments "fairly and reasonably within the contemplation of the parties when the contract was entered into." *Freund v. United States*, 260 U.S. 60 (1922).

In applying the concept of 'cardinal change' to third party contracts, FTA recognizes that this is a difficult concept, not easily reduced to a percentage, dollar value, number of changes, or other objective measure that would apply to all cases. We also recognize that the various Boards of Contract Appeals, Federal courts, and Comptroller General have wrestled with these issues over many years and built an extensive array of case law differentiating in-scope from out-of-scope or cardinal changes. We do not imply that the Boards of Contract Appeals cases are controlling, only that we will look to their collective wisdom in judging where changes in grantee contracts fall along the broad spectrum between clearly in-scope and clearly out-of-scope changes. It is our intent to monitor our grantees and oversight contractors to ensure this concept is well understood and uniformly applied, and to issue additional guidance as necessary to assist our grantees in exercising this authority.

Before attempting any change in quantity of major items (e.g., buses, rail cars), grantees should review their contract clauses to ensure they allow for such changes. For instance, in Federal practice, the 'changes' clause from the Federal Acquisition Regulation has been interpreted not to allow changes in quantity of major items. Federal contracting officers use additional clauses specific to this desired flexibility when they anticipate that there may be a need to add quantities of these major items. [*added February 2004* – As an example, where a contract, as originally competed and issued, allowed a transit agency to purchase X number of 40' buses and Y number of 45' buses, a contract change that substituted a provision that would instead allow the transit agency to buy X+Y buses in any combination of 40' and 45' models would be a cardinal change since it would allow a substitution of major end items not contemplated in the original competition and contract. If the 'any combination' language was part of the original competition, it would not be objectionable.]

factors to determine {or derive} the offer deemed most advantageous and of the greatest value to the procuring agency.[11]

h. "Design-Bid-Build" refers to the project delivery approach where the grantee commissions an architect or engineer to prepare drawings and specifications under a design services contract, and separately contracts for at-risk construction, by engaging the services of a contractor through sealed bidding or competitive negotiations.[12]

i. "Design-Build" refers to a system of contracting under which one entity performs both architectural/engineering and construction under one contract.[13]

7. GENERAL PROCUREMENT STANDARDS APPLICABLE TO THIRD-PARTY PROCUREMENTS.

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

b. Contract Administration System. Grantees shall maintain a contract administration system that ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

c. Written Standards of Conduct. Grantees shall maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer, agent, immediate family member, or Board member of the grantee shall participate in the selection, award, or administration of a contract supported by FTA funds if a conflict of interest, real or apparent, would be involved.

Such a conflict would arise when any of the following has a financial or other interest in the firm selected for award:

(1) The employee, officer, agent, or Board member,

(2) Any member of his/her immediate family,

(3) His or her partner, or

(4) An organization that employs, or is about to employ, any of the above.

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[11] This new definition was intended to recognize the concept of best value. The language is intended neither to limit nor dictate qualitative measures grantees may employ.

[12] This definition was added only to acknowledge this method of construction contracting.

[13] This definition was added only to acknowledge this method of construction contracting.

The grantee's officers, employees, agents, or Board members will neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantees may set minimum rules when the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. 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 grantee's officers, employees, or agents, or by contractors or their agents.

d. Ensuring Most Efficient and Economic Purchase. Grantee procedures shall provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase.

Where appropriate, an analysis will be made of lease versus purchase alternatives and any other appropriate analysis to determine the most economical approach.

e. Intergovernmental Procurement Agreements.

(1) Grantees are encouraged to utilize available state and local intergovernmental agreements for procurement or use of common goods and services. When obtaining goods or services in this manner, grantees must ensure all federal requirements, required clauses, and certifications (including Buy America) are properly followed and included, whether in the master intergovernmental contract or in the grantee's purchase document.[14]

(2) Grantees are also encouraged to jointly procure goods and services with other grantees. When obtaining goods or services in this manner, grantees must ensure all federal requirements, required clauses, and certifications are properly followed and included in the resulting joint solicitation and contract documents.[15]

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[14] Sub-paragraph (1) looks primarily to State government contracts that allow subordinate government agencies to buy from established schedules akin to the GSA schedules in Federal practice. FTA believes grantees may buy through these contracts provided all parties agree to append the required Federal clauses in the purchase order or other document that effects the grantee's procurement. When buying from these schedule contracts, grantees should obtain Buy America certification before entering into the purchase order. Where the product to be purchased is Buy America compliant, there is no problem. Where the product is not Buy America compliant, the grantee will still have to obtain a waiver from FTA before proceeding.

[15] Sub-paragraph (2) reflects FTA's belief that grantees should consider combining efforts in their procurements to obtain better pricing through larger purchases. Joint procurements offer the additional advantage of being able to obtain goods and services that exactly match each cooperating grantee's requirements. We believe this is superior to the practice of 'piggybacking' since 'piggybacking' does not combine buying power at the pricing stage and may limit a grantee's choices to those products excess to another grantee's needs.

(3) Grantees may assign contractual rights to purchase goods and services to other grantees if the original contract contains appropriate assignability provisions. Grantees who obtain these contractual rights (commonly known as 'piggybacking') may exercise them after first determining the contract price remains fair and reasonable.[16]

f. Use of Excess Or Surplus Federal Property. Grantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property, whenever such use is feasible and reduces project costs.

g. Use of Value Engineering in Construction Contracts. Grantees are encouraged to use value engineering clauses in contracts for construction projects. FTA cannot approve a New Starts grant application for final design funding or a full funding grant agreement until value engineering is complete (see FTA Circular 5010.1C).[17]

h. Awards to Responsible Contractors. Grantees shall make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

i. Written Record of Procurement History. Grantees shall maintain records detailing the history of each procurement. At a minimum, these records shall include:

(1) the rationale for the method of procurement,

(2) selection of contract type,

(3) reasons for contractor selection or rejection, and

(4) the basis for the contract price.[18]

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[16] Sub-paragraph (3) reflects grantees' continuing ability to assign contractual rights to others – 'piggybacking.' FTA believes it is extremely important that grantees ensure they contract only for their reasonably anticipated needs and do not add quantities or options to contracts solely to allow them to assign these quantities or options at a later date.

[17] The first sentence in this paragraph was drawn from the Common Grant Rule and reflects FTA's encouragement of value engineering. It is important to note that some contractual arrangements (e.g., design-build contracts) may inherently include value engineering concepts and principles. Where this is the case, FTA does not require separate value engineering proposals, change orders, or other processes. From a procurement view, the concept of value engineering is more important than the form it takes.

[18] This paragraph is taken from the Common Grant Rule. FTA recognizes that these written records will vary greatly for different procurements. For a $100 credit card purchase from a lumberyard, all of the required information may be able to be inferred from the receipt and/or bill itself. More substantial procurements may include voluminous analysis. FTA believes the rule

j. Use of Time and Materials Type Contracts. Grantees will use time and material type contracts only:

(1) After a determination that no other type of contract is suitable; and

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

k. Responsibility for Settlement of Contract Issues/Disputes. Grantees alone will be responsible in accordance with good administrative practice and sound business judgment for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to, source evaluation, protests, disputes, and claims. These standards do not relieve the grantee of any contractual responsibility under its contracts.

FTA will not substitute its judgment for that of the grantee or subgrantee, unless the matter is primarily a Federal concern. Violations of the law will be referred to the local, State, or Federal authority having proper jurisdiction.

l. Written Protest Procedures. Grantees shall have written protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding protests to FTA.[19] All protest decisions must be in writing. A protester must exhaust all administrative remedies with the grantee before pursuing a protest with FTA.

Reviews of protests by FTA will be limited to:

(1) a grantee's failure to have or follow its protest procedures, or its failure to review a complaint or protest; or

(2) violations of Federal law or regulation.[20]

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of reason must be applied to this requirement and the documents comprising a procurement history should be commensurate with the size and complexity of the procurement itself.

[19] Prior versions of the circular contained the language in this paragraph related to "disclos[ing] information regarding protests to FTA." We noted that this provision allowed for widely differing interpretations but found ourselves bound by the Common Grant Rule. FTA believes this provision requires grantees to, at a minimum, informally notify their FTA regional offices when they receive a protest related to a contract required to comply with the circular and to similarly keep their regional offices apprised of the status of those protests. Regional offices may require grantees to forward copies of particular protests or all protests for information or review purposes at any time.

[20] This paragraph has been aligned with the Common Grant Rule and practice by adding "violations of Federal law or regulation" to the basis of FTA protest jurisdiction. FTA will continue to limit its review of grantee protest decisions and will read this Common Grant Rule provision in conjunction with the provisions that express our intent to avoid substituting FTA's judgment for those of its grantees. FTA will not consider each and every appeal of grantees' protest decisions simply because a federal law or regulation may be involved. Instead, FTA will

An appeal to FTA must be received by the cognizant FTA regional or Headquarters Office within five (5) working days of the date the protester learned or should have learned of an adverse decision by the grantee or other basis of appeal to FTA.[21]

m. Contract Term Limitation. Grantees shall not enter into any contract for rolling stock or replacement parts with a period of performance exceeding five (5) years inclusive of options. All other types of contracts (supply, service, leases of real property, revenue and construction, etcetera) should be based on sound business judgment. Grantees are expected to be judicious in establishing and extending contract terms no longer than minimally necessary to accomplish the purpose of the contract. Additional factors to be considered include competition, pricing, fairness and public perception. Once a contract has been awarded, an extension of the contract term length that amounts to an out of scope change will require a sole source justification[22]

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exercise discretionary jurisdiction over those cases deemed to involve issues important to the overall third party contracting program. [*added February 2004* – Any decision by FTA to decline jurisdiction over a protest does not imply approval of or agreement with the grantee's determination or that FTA has determined the contract is eligible for Federal participation but only that FTA does not believe the issues presented are important to the overall program.]

[21] Additionally, we have noted that requiring an appeal to be filed within five days of 'the violation' yet also requiring protestors to extinguish their local remedies before filing with FTA led to some confusion. We have attempted to clarify this standard by starting the protestor's clock when it receives actual or constructive notice of an adverse decision or that a grantee failed to have or follow its procedures or review a complaint.

[22] Although the 'five-year rule' has been eliminated for all but rolling stock and replacement part contracts (i.e., those for which the rule is statutorily required), FTA expects grantees to be judicious about the terms of their contracts. Sound business judgment should underlie any decision on contract term, whether or not it exceeds five years. This sound business judgment should be evident in the procurement files. In keeping with the general tone of the new circular, contract extensions will be viewed with an eye to whether they are in-scope and out-of-scope contract changes. Out-of-scope changes will, of course, be regarded as new procurements and the normal sole source rules will apply. [*inserted October 2003* Regarding rolling stock, this provision is intended only to reflect the statutory five-year rule and not in any way to limit grantees beyond the statute. FTA interprets this five-year period as the *requirements* from day one of the contract to those at the end of the fifth year. In determining what a requirement for today is, we look at the date a piece of equipment is needed, then back the date off to offset the necessary lead time for delivery. If it takes 18 months to deliver a product and it is *needed* 18 months from now, it is a *requirement* today. If (assuming the same 18 month lead time) the transit agency enters into a contract on January 1st, year 1 and needs a piece of equipment delivered in March of year 7, it is a requirement in September of year 5 (March of year 7 minus 18 months) and can be ordered then under the contract. If the transit needs a piece of equipment in January of year 8, it is a requirement of July of year 6 and the transit agency could not order it under this contract since it is a requirement beyond the five-year limitation. As this example shows, 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 five years of requirements.

n. Revenue Contracts. Revenue contracts are those third party contracts whose primary purpose is to either generate revenues in connection with a transit related activity, or to create business opportunities utilizing an FTA funded asset. FTA requires these contracts to be awarded utilizing competitive selection procedures and principles. The extent of and type of competition required is within the discretionary judgment of the grantee.[23]

o. Tag-ons. The use of tag-ons is prohibited and applies to the original buyer as well as to others as defined in paragraph 6f.

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

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[23] When addressing revenue contracts, FTA allows grantees broad latitude in determining what level of competition is appropriate for a particular contract. As an example, where a grantee wishes to enter into a contract to allow advertising on the sides of buses and there are several potential competitors for that limited space, a competitive process would be required to allow interested parties an equal chance at obtaining this limited opportunity. Where a grantee wishes to enter into a contract to allow a private utility to run cable through subway tunnels and is willing to grant similar contracts/licenses to others similarly situated (since there is room for a substantial number of such cables without interfering with transit operations), no competition would be required since the opportunity is open to all.

Another example where competition may be limited is in the area of leveraged leasing. Many grantees are taking advantage of the opportunities to obtain a portion of the tax benefits available to private sector investors who lease or buy grantee assets through innovative financing techniques that keep possession and continuing control of the assets in the grantee's hands while transferring ownership for tax purposes. As grantees seek arrangers to construct these transactions, they should use some competitive procedure (but note that since these contracts are not Federally funded and involve no Federally-funded assets, the contract with the arranger need not comply with the circular) process. When the grantee's arranger constructs the actual transaction (a contract that will involve Federally-funded assets so FTA must approve of the transaction), competition is limited by securities regulations.

An emerging area that combines aspects of Federally funded construction and revenue contracting is that of joint development. Certainly the circular has to apply to the Federally funded construction aspects of joint development but revenue contracting aspects make for difficult procurement practice decisions. FTA will work with grantees on a case-by-case basis to craft approaches that satisfy the statutory and regulatory requirements while preserving the benefits of this innovative contracting strategy to the maximum possible extent.

solicitation and contract. If two or more parties jointly solicit and award an IDIQ contract, then there must be a total minimum and maximum.[24]

q. E-Commerce. E-Commerce is an allowable means to conduct procurements. If a grantee chooses to utilize E-Commerce, written procedures need to be developed and in place prior to solicitation and all requirements for full and open competition must be met in accordance with this circular.[25]

8. COMPETITION.

a. Full and Open Competition. All procurement transactions will be conducted in a manner providing full and open competition. Some situations considered to be restrictive of competition include, but are not limited to:[26]

(1) Unreasonable requirements placed on firms in order for them to qualify to do business;

(2) Unnecessary experience and excessive bonding requirements;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive awards to any person or firm on retainer contracts;

(5) Organizational conflicts of interest. An organizational conflict of interest means that because of other activities, relationships, or contracts, a contractor is unable, or potentially unable, to render impartial assistance or advice to the grantee; a contractor's objectivity in performing the contract work is or might be otherwise impaired; or a contractor has an unfair competitive advantage;

(6) Specifying only a "brand name" product instead of allowing "an equal" product to be offered without listing its' salient characteristics.

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[24] As discussed above, 'piggybacking' is still allowable. Given the opportunities for joint procurements, inter-governmental procurements, and other innovative means of obtaining goods and services, grantees should pay renewed attention to their procurement practices to ensure they contract only for their reasonably anticipated requirements and do not build excess capacity into their contracts simply to assign rights to others at a later date.

[25] This paragraph was added to recognize that a well-structured e-commerce procurement system is acceptable.

[26] Grantees have expressed frustration when attempting to capture the salient characteristics of common parts and items that must be precisely engineered to be useful and for which simple notations (such as original equipment manufacturer's part numbers) describe, in a practical sense, the requirements. Sub-paragraph (6) was annotated to demonstrate two potential (although not required) means by which grantees can meet the Common Grant Rule's requirement to list salient characteristics when using a 'brand name or equal' specification without attempting to reverse-engineer a complicated part to discern precise measurements or specifications.

Grantees may define the salient characteristics in language similar to the following:

(a) 'Original Equipment Manufacturer (OEM) part #123 or approved equal that complies with the original equipment manufacturer's requirements or specifications and will not compromise any OEM warranties'; or

(b) 'Original Equipment Manufacturer part #123 or approved equal that is appropriate for use with and fits properly in [describe the bus, engine, or other component the part must be compatible with] and will not compromise any OEM warranties'[27]; and

(c) Any arbitrary action in the procurement process.[27.5]

b. Prohibition Against Geographic Preferences. Grantees shall conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. This does not preempt State licensing laws. However, geographic location may be a selection criterion in procurements for architectural and engineering (A&E) services provided its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

c. Written Procurement Selection Procedures. Grantees shall have written selection procedures for procurement transactions. All solicitations shall:

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

(2) Identify all requirements that offerors must fulfill and all other factors to be used in evaluating bids or proposals.

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[27] This is meant only as an example of how a grantee might define salient characteristics, not as an exclusive means of doing so. Other examples can be found in the Best Practices Procurement Manual.

[27.5] [*added February 2004* - This provision was intended as paragraph 8.a.(7) and is not intended to be a portion of paragraph 8.a.(6).]

d. Prequalification Criteria. Grantees shall ensure that all lists of prequalified persons, firms, or products that are used in acquiring goods and services are current and include enough qualified sources to ensure maximum full and open competition. Also, grantees shall not preclude potential bidders from qualifying during the solicitation period, which is from the issuance of the solicitation to its closing date.[28]

9. METHODS OF PROCUREMENT. The following methods of procurement may be used as appropriate:

a. Procurement by Micro-Purchases. Micro-purchases are those purchases under $2,500. Purchases below that threshold may be made without obtaining competitive quotations. Such purchases are exempt from Buy America requirements. There should be equitable distribution among qualified suppliers and no splitting of procurements to avoid competition. The Davis-Bacon Act applies to construction contracts between $2,000 and $2,500. Minimum documentation is required: A determination that the price is fair and reasonable and how this determination was derived. The other requirements of paragraph 7(i) do not apply to micro-purchases.[29]

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[28] Prequalification and the Common Grant Rule's requirement to allow potential bidders to qualify throughout solicitation periods has led to substantial confusion among some grantees. Prequalification lists are most common in recurring requirements for goods that take some period of time to evaluate to determine if they satisfy the grantee's standards. In those cases, grantees must accept submissions for evaluation, even during ongoing procurement actions. Evaluation need not be accelerated or truncated and FTA does not believe a particular solicitation must be held open to accommodate a potential bidder who submits a person, firm, or product for approval before or during that solicitation.

Additionally, some procurement methods may include preliminary steps that should not be confused with prequalification. For instance, in Federal practice, 41 USC 253m allows for a two-phase selection procedure for large design-build projects and FTA believes grantees may also use that procedure. Essentially, the two-phase selection procedure allows the contracting officer to solicit proposals for design-build projects in two steps, the first a review of technical qualifications and technical approach to the project and the second a complete proposal. This allows the contracting officer to narrow the competitive range in the first step without a requirement for extensive proposal review on the government's part or expensive proposal drafting on potential contractors' parts. This two-phase selection procedure is separate and distinct from prequalification and is but one method grantees may use in their procurements.

[29] Determination of fair and reasonable pricing for micro-purchases (usually credit card purchases) has been seen as a burden by some grantees. FTA believes that determination may be done quickly and efficiently in several ways. One possible method would be for the official tasked to review and authorize payment of a credit card bill to annotate (by stapling a preprinted sheet to the bill, stamping the bill with a rubber stamp, or even asking the credit card provider to print an appropriate statement on each bill) a finding such as 'I have examined the expenditures reflected on this bill and determined that each reflects a reasonable price based on market prices offered by the vendors to the general public.'

b. Procurement by Small Purchase Procedures**.** Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that cost more than $2,500 but do not cost more than the simplified acquisition threshold fixed at 41 U.S.C. § 403(11) (currently set at $100,000). If small purchase procedures are used, price or rate quotations shall be obtained from an adequate number of qualified sources.[30]

c. Procurement By Sealed Bids/Invitation For Bid (IFB). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the invitation for bids, is the lowest in price.

(1) In order for sealed bidding to be feasible, the following conditions should be present:

(a) A complete, adequate, and realistic specification or purchase description is available;

(b) Two or more responsible bidders are willing and able to compete effectively for the business;

(c) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price; and

(d) No discussion with bidders is needed.

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

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

(b) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services sought in order for the bidder to properly respond;

(c) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(d) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. When specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest;

[30] This is not intended to imply that any purchase under $2,500 must be treated as a micro-purchase or that any purchase under $100,000 must be treated as a small purchase. Grantees remain free to set lower thresholds as they deem fit for either or both of these procurement methods.

Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

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

(3) The sealed bid method is the preferred method for procuring construction if the conditions in paragraph 9c(1) above apply.

d. Procurement By Competitive Proposal/Request for Proposals (RFP). The competitive proposal method of procurement is normally conducted with more than one source submitting an offer, i.e., proposal. Either a fixed price or cost reimbursement type contract is awarded. This method of procurement is generally used when conditions are not appropriate for the use of sealed bids. If this procurement method is used the following requirements apply:

(1) Requests for proposals will be publicized. All evaluation factors will be identified along with their relative importance;

(2) Proposals will be solicited from an adequate number of qualified sources;

(3) Grantees will have a method in place for conducting technical evaluations of the proposals received and for selecting awardees;

(4) Awards will be made to the responsible firm whose proposal is most advantageous to the grantee's program with price and other factors considered; and

(5) In determining which proposals is most advantageous, grantees may award (if consistent with State law) to the proposer whose proposals offer the greatest business value to the Agency based upon an analysis of a tradeoff of qualitative technical factors and price/cost to derive which proposal represents the "best value" to the Procuring Agency as defined in Section 6, Definitions. If the grantee elects to use the best value selection method as the basis for award, however, the solicitation must contain language which establishes that an award will be made on a "best value" basis.[31]

e. Procurement Of Architectural and Engineering Services (A&E). Grantees shall use qualifications-based competitive proposal procedures (i.e., Brooks Act procedures) when contracting for A&E services as defined in 40 U.S.C. §541and 49 U.S.C. §5325(d). [31.5] Services subject to this requirement are program management,

[31] Sub-paragraph (5), like paragraph 6.g., recognizes the concept of best value. Once again, FTA does not wish to dictate any particular factors or analytic process. Solicitations must, of course, tell potential competitors for the contract what the basis for award will be.

[31.5] [*added February 2004* - The Brooks Act has been re-codified and is now found at 40 U.S.C. §1102. The provision in 49 U.S.C. §5325 has been redesignated as subsection 5325(b).]

construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services.[32]

Qualifications-based competitive proposal procedures require that:

(1) An offeror's qualifications be evaluated;

(2) Price be excluded as an evaluation factor;

(3) Negotiations be conducted with only the most qualified offeror; and

(4) Failing agreement on price, negotiations with the next most qualified offeror be conducted until a contract award can be made to the most qualified offeror whose price is fair and reasonable to the grantee.

These qualifications-based competitive proposal procedures can only be used for the procurement of the services listed above. This method of procurement cannot be used to obtain other types of services even though a firm that provides A&E services is also a potential source to perform other types of services.

These requirements apply except to the extent the grantee's State adopts or has adopted by statute a formal procedure for the procurement of these services.

f. Procurement of Design-Bid-Build. Grantees may procure design-bid-build services through means of sealed bidding or competitive negotiations. These services must be procured in a manner that conforms to applicable state and local law, the requirements of this Circular relative to the method of procurement used and all other applicable federal requirements.

g. Procurement of Design-Build. Grantees must procure design-build services through means of qualifications-based competitive proposal procedures based on the Brooks Act as set forth in Section 9e when the preponderance of the work to be performed is considered to be for architectural and engineering (A&E) services as defined in Section 9e, Qualifications-based competitive proposal procedures should not be used to procure design-build services when the preponderance of the work to be performed is not of an A&E nature as defined in Section 9e, unless required by State law.[33]

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[32] FTA has expanded this section to better explain the breadth of this statutorily prescribed procurement method. FTA recognizes that most of the services listed (e.g., surveying) are not performed by architectural or engineering services companies. Qualifications-based competitive proposals (i.e., Brooks Act procedures) still must be applied to these procurements because of the statutory directive in 49 U.S.C. 5325(d).

[33] This paragraph was added to explain the requirements that apply to design-build procurements because they involve significant architectural, engineering, or other services that normally require qualifications-based competitive proposals but also include significant work that does not require this extraordinary procurement method. Grantees should determine which portion of the work is predominant and follow the method for that type of procurement. We would normally expect the construction portion of a design-build procurement to be predominant and, in that case, normal

h. Procurement By Noncompetitive Proposals (Sole Source). Sole Source procurements are accomplished through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate. A contract change that is not within the scope of the original contract is considered a sole source procurement that must comply with this subparagraph.[34]

(1) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and at least one of the following circumstances applies:

(a) The item is available only from a single source;

(b) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation;

(c) FTA authorizes noncompetitive negotiations—e.g., if FTA provides a joint procurement grant or a research project grant with a particular firm or combination of firms, the grant agreement is the sole source approval;[34.5]

(d) After solicitation of a number of sources, competition is determined inadequate; or

(e) The item is an associated capital maintenance item as defined in 49 U.S.C. §5307(a)(1) that is procured directly from the original manufacturer or supplier of the item to be replaced. The grantee must first certify in writing to FTA:

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procurement methods can be used in lieu of qualification-based competitive proposals (the Brooks Act method).

[34] This paragraph was changed from prior versions of the circular to eliminate the phrase "or acceptance" of a single proposal when discussing what constitutes a sole source procurement. FTA believes that, upon receiving a single bid (or proposal) in response to a solicitation, the grantee should determine if competition was adequate. This determination may include a review of the specifications to determine if they were unduly restrictive or contacting sources that chose not to submit a bid or solicitation. It is only if the grantee determines that competition was inadequate that the procurement should proceed as a sole source procurement. The mere fact that only one bid or proposal was received does not automatically mean competition was inadequate since many unrelated factors could cause potential sources not to submit a bid or proposal.

[34.5] [*Added October 2003* - This list of justifications is copied from the Common Grant Rule, 49 CFR 18.36(d)(4) which includes authority to use a sole source procurement when the "awarding agency [FTA] authorizes noncompetitive proposals." To ensure grantees have flexibility equal to that of Federal contracting officers, FTA authorizes procurement by noncompetitive proposals in all of the circumstances described in Part 6.3 of the Federal Acquisition Regulations, even if it is not specifically mentioned in this list of justifications.]

1 that such manufacturer or supplier is the only source for such item; and

2 that the price of such item is no higher than the price paid for such item by like customers.

(2) A cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit, is required.

i. Options. Grantees may include options in contracts. An option is a unilateral right in a contract by which, for a specified time, a grantee may elect to purchase additional equipment, supplies, or services called for by the contract, or may elect to extend the term of the contract. If a grantee chooses to use options, the requirements below apply:

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

(2) Exercise of Options.

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

(b) An option may not be exercised unless the grantee has determined that the option price is better than prices available in the market or that the option is the more advantageous offer at the time the option is exercised.

10. CONTRACT COST AND PRICE ANALYSIS FOR EVERY PROCUREMENT ACTION. Grantees must perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals.[35]

[35] Cost and Price Analysis. Cost or price analysis has proven difficult for grantees in some cases. FTA believes price analysis for micro-purchases may be conducted on a limited basis as discussed above (paragraph 9a). Similarly, an abbreviated price analysis may be used for small purchases in most cases. One method to record this analysis is through use of a preprinted form on which a contracting officer (or other responsible person) can annotate a finding of fair and reasonable pricing and check off the most common reasons why this would be so such as catalog or market prices offered in substantial quantities to the general public, regulated prices (e.g., for many utilities purchases), or comparison with recent prices for similar goods and services

Where cost analysis is required, some grantees have found difficulty obtaining the information necessary to conduct a proper cost analysis. The requirements for cost analysis are based in the Common Grant Rule and require action beyond FTA or DOT's authority to change. FTA continues to seek an equitable, practical solution to this problem consistent with the flexibility Federal contracting officers enjoy under the Federal Acquisition Regulation.

a. Cost Analysis. A cost analysis must be performed when the offeror is required to submit the elements (i.e., labor hours, overhead, materials, etc.) of the estimated cost, (e.g., under professional consulting and architectural and engineering services contracts, etc.).

A cost analysis will be necessary when adequate price competition is lacking and for sole source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or on the basis of prices set by law or regulation.

b. Price Analysis. A price analysis may be used in all other instances to determine the reasonableness of the proposed contract price.

c. Profit. Grantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

d. Federal Cost Principles. Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles. Grantees may reference their own cost principles that comply with applicable Federal cost principles.

e. Cost Plus Percentage of Cost Prohibited. The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

11. BONDING REQUIREMENTS. For those construction or facility improvement contracts or subcontracts exceeding $100,000, FTA may accept the bonding policy and requirements of the grantee, provided FTA determined that the policy and requirements adequately protect the Federal interest. FTA has determined that grantee policies and requirements that meet the following minimum criteria adequately protect the Federal interest:[36]

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[36] The language in this section has been amended from prior versions of the circular to better explain that FTA will accept a local bonding policy that meets the minimums of paragraphs a, b, and c but that a policy that does not meet these minimums still may be accepted where the local policy adequately protects the Federal interest. Grantees who wish to adopt less stringent bonding requirements generally, for a specific class of projects, or for a particular project may submit the policy and rationale to their regional office for approval. [*added October 2003* – There is no FTA approval required for more stringent bonding requirements. Additionally, FTA does *not* require bonds for rolling stock, services, maintenance, operations, or any other contracts – only for construction.]

a. A bid guarantee from each bidder equivalent to five (5) percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified;

b. 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; and

c. A payment bond on the part of the contractor. A payment bond is one executed in connection with a contract to assure payment, as required by law, of all persons supplying labor and material in the execution of the work provided for in the contract. Payment bond amounts determined to adequately protect the federal interest are as follows:

(1) Fifty percent of the contract price if the contract price is not more than $1 million;

(2) Forty percent of the contract price if the contract price is more than $1 million but not more than $5 million; or

(3) Two and a half million dollars if the contract price is more than $5 million.

d. A Grantee may seek FTA approval of its bonding policy and requirements if they do not comply with these criteria.

12. PAYMENT PROVISIONS IN THIRD PARTY CONTRACTS.

a. Advance Payments. FTA does not authorize and will not participate in funding payments to a contractor prior to the incurrence of costs by the contractor unless prior written concurrence is obtained from FTA. There is no prohibition on a grant recipient's use of local match funds for advance payments. However, advance payments made with local funds before a grant has been awarded, or before the issuance of a letter of no prejudice or other pre-award authority, are ineligible for reimbursement.[37]

[37] The language in this section has been amended from previous versions of the circular to explain that grantees may make advance payments from local share funds. Where grantees wish to make advance payments with FTA funds, they should contact their regional office to obtain FTA concurrence. FTA believes there are various sound business reasons for providing advance payments under a number of circumstances and, where we find adequate security for the advance payment combined with a sound business reason to grant the advance payment, will normally grant the required concurrence. These advance payments may be in the nature of mobilization payments, start-up costs, or other advances backed by sound business judgment and adequate security. [*added October 2003* – Additionally, grantees may make advance payments with either local match or FTA funds for those purchases where advance payment is customary in the commercial marketplace such as utility services and subscriptions. FTA concurrence in these circumstances is only required where the advance payment or payments exceed $100,000.]

b. Progress Payments. Grantees may use progress payments provided the following requirements are followed:[38]

(1) Progress payments are only made to the contractor for costs incurred in the performance of the contract.[38.2]

(2) The grantee must obtain adequate security for progress payments. Adequate security may include taking title, letter of credit or equivalent means to protect the grantee's interest in the progress payment.[38.5]

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

The assessment for damages shall be at a specific rate per day for each day of overrun in contract time; and the rate must be specified in the third party contract. Any liquidated damages recovered shall be credited to the project account involved unless the FTA permits otherwise.[39]

14. CONTRACT AWARD ANNOUNCEMENT. If a grantee announces contract awards with respect to any procurement for goods and services (including construction services) having an aggregate value of $500,000 or more, the grantee shall:

a. Specify the amount of Federal funds that will be used to finance the acquisition in any announcement of the contract award for such goods or services; and

b. Express the said amount as a percentage of the total costs of the planned acquisition.

15. CONTRACT PROVISIONS. All contracts shall include provisions to define a sound and complete agreement. In addition, contracts and subcontracts shall contain contractual provisions or conditions that allow for:

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[38] We have re-drafted the paragraph related to progress payments to account for the practical reality that taking title to work in progress may not be desirable in some cases.

[38.2] [*added February 2004* – Progress payments in construction contracts may be made on a percentage of completion method in accordance with 49 CFR 18.21(d). This payment method may not be used in non-construction contracts.]

[38.5] [*added October 2003* – "Adequate security" should reflect the practical realities of different procurement scenarios and factual circumstances. For example, adequate security may consist of taking title to work in progress in a rolling stock procurement, receiving a draft document in a consulting contract, or receiving some portion of recurring services under a services contract. Grantees should always consider the costs associated with this security (e.g., bonds or letters of credit must be purchased in the commercial marketplace) and the impact those costs have on the contract price, as well as the consequences of incomplete performance as they consider what constitutes adequate security for a given procurement.]

[39] The measurement period for liquidated damages may be something other than a day, where some other measuring period is appropriate.

a. Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, including sanctions and penalties as may be appropriate. (All contracts in excess of the small purchase threshold.)

b. Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of $10,000.)

16. STATUTORY AND REGULATORY REQUIREMENTS. A current but not all inclusive and comprehensive list of statutory and regulatory requirements applicable to grantee procurements (such as Davis-Bacon Act, Disadvantaged Business Enterprise, Clean Air, and Buy America) is contained in the FTA Master Agreement. Grantees are responsible for evaluating these requirements for relevance and applicability toeach procurement. For example, procurements involving the purchase of iron, steel and manufactured goods will be subject to the "Buy America" requirements in 49 C.F.R. Part 661. Further guidance concerning these requirements and suggested wording for contract clauses may be found in FTA's Best Practices Procurement Manual.

For specific guidance concerning the crosscutting requirements of other Federal agencies, grantees are advised to contact those agencies.

Jennifer L. Dorn
Administrator

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1 - FTA's purpose in re-issuing Circular 4220.1 is to incorporate policy updates contained in several Dear Colleague letters issued since 1996. At the same time, we have attempted to ease unnecessary requirements applied in our grantees' procurement processes while remaining consistent with applicable law and regulations, particularly the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments at 49 CFR Part 18 (the Common Grant Rule). We believe many of these 'requirements' have evolved from earlier versions of the circular through varying interpretations or as unintended consequences of the language as it was drafted. To help avoid this, we have compiled these interpretive comments to better explain what FTA believes the law and regulations conveyed through the circular actually require of our grantees. As applicable laws, regulations, and contracting practices evolve, we will use these interpretive comments to continue conveying our views to our grantees and the transit industry as a whole.

2 - As a general rule, the circular, along with the underlying requirements in the Federal transit laws and regulations, applies whenever Federal funds are involved.

Those grantees authorized to use formula funds for operating assistance must apply the circular to all operating contracts – even if they are able to administratively segregate the federal funds to non-contract operating expenses. The ability to use formula funds for operating assistance hinges upon a grantee's total operating expenses and the portion of those expenses not offset by operating income. Since the entire range of operating expenses is considered in this calculation, each segment of those operating expenses must be subject to Federal standards.

Grantees that are not authorized to use formula funds for operating assistance are not required to apply the circular to their operating contracts.

FTA also applies the requirements of this Circular to recipients of cooperative agreements through provisions of those agreements.

3 - Congestion Mitigation and Air Quality (CMAQ) and Job Access/Reverse Commute (JARC) funds may be used for operations by all grantees. The circular must be applied to all contracts that are funded, in part, by CMAQ or JARC funds. Using CMAQ or JARC funds for a specific operating contract or contracts does not trigger the requirement to apply the circular to other operating contracts. This is because the calculation required to use formula funds for operations contracts is not required as a prerequisite to using CMAQ or JARC funds for operating contracts.

4 - Grantees who use formula capital funds for preventative maintenance contracts must apply the circular to those contracts. If, through their accounting procedures, these grantees are able to allocate the Federal funds to discrete maintenance contracts, only those discrete contracts must adhere to the circular. If unable to allocate federal funds to discrete maintenance contracts, the circular applies to all maintenance contracts.

Capital projects that don't include Federal funding are not required to conform to the circular.

Procurements of real property and art are beyond the scope of Circular 4220.1E and covered in separate guidance. [*added October 2003* – Real property acquisition is covered in 49 CFR, Part 24. FTA Circular 9400.1A discusses art in transit projects. The Best Practices Procurement Manual includes extensive non-binding guidelines for applying C.9400.1A and related requirements.]

5 - The language of this paragraph was adjusted to comport with the Common Grant Rule. FTA believes that only States – not their sub-grantees, regional transit authorities, local agencies, or any other grantees or sub-grantees – are free to apply only limited portions of the circular to their procurements.

All other grantees and sub-grantees are obligated to apply the circular to their procurements as described above.

6 - To preclude unnecessary delay in grantee procurements, FTA does not, as a general rule, conduct pre-award reviews of third party contracts as envisioned in the Common Grant Rule. Instead, we have chosen to rely heavily on our grantees' self-certification of their procurement systems.

7 - Within FTA's knowledge, the only grantee with full access to the GSA schedules is the Washington Metropolitan Area Transit Authority. GSA issued initial guidance implementing a program to allow state and local governments to use the GSA information technology schedule in May 2003. [*deleted October 2003* - ~~and FTA will update this section as more information becomes available.~~] [*added October 2003* – Directions for using the GSA information technology schedule are available at http://www.gsa.gov/Portal/gsa/ep/channelView.do?pageTypeId=8199&channelPage=%2Fep%2Fchannel%FgsaOverview.jsp&channelId=-13463

8 - This definition was changed to comport with the Common Grant Rule.

9 - FTA has introduced a limited definition of 'piggybacking' and, to differentiate vastly different practices, has separated this practice of assigning contractual rights among grantees from joint procurements or other intergovernmental agreements. Paragraph 7.e. further explains these different practices. Our intent was to eliminate some of the confusion that has grown around this term.

10 - We have similarly attempted to limit the definition of 'tag-on' and align it with the concept of a 'cardinal change' or 'out-of-scope change.' FTA believes that earlier attempts to categorize virtually any change in quantity, for example, as a forbidden 'tag-on' failed to account for the realities of the marketplace and unnecessarily limited grantees from exercising reasonable freedom to make those minor adjustments "fairly and reasonably within the contemplation of the parties when the contract was entered into." *Freund v. United States,* 260 U.S. 60 (1922).

In applying the concept of 'cardinal change' to third party contracts, FTA recognizes that this is a difficult concept, not easily reduced to a percentage, dollar value, number of changes, or other objective measure that would apply to all cases. We also recognize that the various Boards of Contract Appeals, Federal courts, and Comptroller General have wrestled with these issues over many years and built an extensive array of case law differentiating in-scope from out-of-scope or cardinal changes. We do not imply that the Boards of Contract Appeals cases are controlling, only that we will look to their collective wisdom in judging where changes in grantee contracts fall along the broad spectrum between clearly in-scope and clearly out-of-scope changes. It is our intent to monitor our grantees and oversight contractors to ensure this concept is well understood and uniformly applied, and to issue additional guidance as necessary to assist our grantees in exercising this authority.

Before attempting any change in quantity of major items (e.g., buses, rail cars), grantees should review their contract clauses to ensure they allow for such changes. For instance, in Federal practice, the 'changes' clause from the Federal Acquisition Regulation has been interpreted not to allow changes in quantity of major items. Federal contracting officers use additional clauses specific to this desired flexibility when they anticipate that there may be a need to add quantities of these major items.

11 - This new definition was intended to recognize the concept of best value. The language is intended neither to limit nor dictate qualitative measures grantees may employ.

12 - This definition was added only to acknowledge this method of construction contracting.

13 - This definition was added only to acknowledge this method of construction contracting.

14 - Sub-paragraph (1) looks primarily to State government contracts that allow subordinate government agencies to buy from established schedules akin to the GSA schedules in Federal practice. FTA believes grantees may buy through these contracts provided all parties agree to append the required Federal clauses in the purchase order or other document that effects the grantee's procurement. When buying from these schedule contracts, grantees should obtain Buy America certification before entering into the purchase order. Where the product to be purchased is Buy America compliant, there is no problem. Where the product is not Buy America compliant, the grantee will still have to obtain a waiver from FTA before proceeding.

Sub-paragraph (2) reflects FTA's belief that grantees should consider combining efforts in their procurements to obtain better pricing through larger purchases. Joint procurements offer the additional advantage of being able to obtain goods and services that exactly match each cooperating grantee's requirements. We believe this is superior to the practice of 'piggybacking' since 'piggybacking' does not combine buying power at the pricing stage and may limit a grantee's choices to those products excess to another grantee's needs.

16 - Sub-paragraph (3) reflects grantees' continuing ability to assign contractual rights to others – 'piggybacking.' FTA believes it is extremely important that grantees ensure they contract only for their

reasonably anticipated needs and do not add quantities or options to contracts solely to allow them to assign these quantities or options at a later date.

17 - The first sentence in this paragraph was drawn from the Common Grant Rule and reflects FTA's encouragement of value engineering. It is important to note that some contractual arrangements (e.g., design-build contracts) may inherently include value engineering concepts and principles. Where this is the case, FTA does not require separate value engineering proposals, change orders, or other processes. From a procurement view, the concept of value engineering is more important than the form it takes.

18 - This paragraph is taken from the Common Grant Rule. FTA recognizes that these written records will vary greatly for different procurements. For a $100 credit card purchase from a lumberyard, all of the required information may be able to be inferred from the receipt and/or bill itself. More substantial procurements may include voluminous analysis. FTA believes the rule of reason must be applied to this requirement and the documents comprising a procurement history should be commensurate with the size and complexity of the procurement itself.

19 - Prior versions of the circular contained the language in this paragraph related to "disclos[ing] information regarding protests to FTA." We noted that this provision allowed for widely differing interpretations but found ourselves bound by the Common Grant Rule. FTA believes this provision requires grantees to, at a minimum, informally notify their FTA regional offices when they receive a protest related to a contract required to comply with the circular and to similarly keep their regional offices apprised of the status of those protests. Regional offices may require grantees to forward copies of particular protests or all protests for information or review purposes at any time.

20 - This paragraph has been aligned with the Common Grant Rule and practice by adding "violations of Federal law or regulation" to the basis of FTA protest jurisdiction. FTA will continue to limit its review of grantee protest decisions and will read this Common Grant Rule provision in conjunction with the provisions that express our intent to avoid substituting FTA's judgment for those of its grantees. FTA will not consider each and every appeal of grantees' protest decisions simply because a federal law or regulation may be involved. Instead, FTA will exercise discretionary jurisdiction over those cases deemed to involve issues important to the overall third party contracting program.

21 - Additionally, we have noted that requiring an appeal to be filed within five days of 'the violation' yet also requiring protestors to extinguish their local remedies before filing with FTA led to some confusion. We have attempted to clarify this standard by starting the protestor's clock when it receives actual or constructive notice of an adverse decision or that a grantee failed to have or follow its procedures or review a complaint.

22 - Although the 'five-year rule' has been eliminated for all but rolling stock and replacement part contracts (i.e., those for which the rule is statutorily required), FTA expects grantees to be judicious about the terms of their contracts. Sound business judgment should underlie any decision on contract term, whether or not it exceeds five years. This sound business judgment should be evident in the procurement files. In keeping with the general tone of the new circular, contract extensions will be viewed with an eye to whether they are in-scope and out-of-scope contract changes. Out-of-scope changes will, of course, be regarded as new procurements and the normal sole source rules will apply. [*inserted October 2003* Regarding rolling stock, this provision is intended only to reflect the statutory five-year rule and not in any way to limit grantees beyond the statute. FTA interprets this five-year period as the *requirements* from day one of the contract to those at the end of the fifth year. In determining what a requirement for today is, we look at the date a piece of equipment is needed, then back the date off to offset the necessary lead time for delivery. If it takes 18 months to deliver a product and it is *needed* 18 months from now, it is a *requirement*

today. If (assuming the same 18 month lead time) the transit agency enters into a contract on January 1st, year 1 and needs a piece of equipment delivered in March of year 7, it is a requirement in September of year 5 (March of year 7 minus 18 months) and can be ordered then under the contract. If the transit needs a piece of equipment in January of year 8, it is a requirement of July of year 6 and the transit agency could not order it under this contract since it is a requirement beyond the five-year limitation. As this example shows, 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 five years of requirements.

23 - When addressing revenue contracts, FTA allows grantees broad latitude in determining what level of competition is appropriate for a particular contract. As an example, where a grantee wishes to enter into a contract to allow advertising on the sides of buses and there are several potential competitors for that limited space, a competitive process would be required to allow interested parties an equal chance at obtaining this limited opportunity. Where a grantee wishes to enter into a contract to allow a private utility to run cable through subway tunnels and is willing to grant similar contracts/licenses to others similarly situated (since there is room for a substantial number of such cables without interfering with transit operations), no competition would be required since the opportunity is open to all.

Another example where competition may be limited is in the area of leveraged leasing. Many grantees are taking advantage of the opportunities to obtain a portion of the tax benefits available to private sector investors who lease or buy grantee assets through innovative financing techniques that keep possession and continuing control of the assets in the grantee's hands while transferring ownership for tax purposes. As grantees seek arrangers to construct these transactions, they should use some competitive procedure (but note that since these contracts are not Federally funded and involve no Federally-funded assets, the contract with the arranger need not comply with the circular) process. When the grantee's arranger constructs the actual transaction (a contract that will involve Federally-funded assets so FTA must approve of the transaction), competition is limited by securities regulations.

An emerging area that combines aspects of Federally funded construction and revenue contracting is that of joint development. Certainly the circular has to apply to the Federally funded construction aspects of joint development but revenue contracting aspects make for difficult procurement practice decisions. FTA will work with grantees on a case-by-case basis to craft approaches that satisfy the statutory and regulatory requirements while preserving the benefits of this innovative contracting strategy to the maximum possible extent.

24 - As discussed above, 'piggybacking' is still allowable. Given the opportunities for joint procurements, inter-governmental procurements, and other innovative means of obtaining goods and services, grantees should pay renewed attention to their procurement practices to ensure they contract only for their reasonably anticipated requirements and do not build excess capacity into their contracts simply to assign rights to others at a later date.

25 - This paragraph was added to recognize that a well-structured e-commerce procurement system is acceptable.

26 - Grantees have expressed frustration when attempting to capture the salient characteristics of common parts and items that must be precisely engineered to be useful and for which simple notations (such as original equipment manufacturer's part numbers) describe, in a practical sense, the requirements. Sub-paragraph (6) was annotated to demonstrate two potential (although not required) means by which grantees can meet the Common Grant Rule's requirement to list salient characteristics

when using a 'brand name or equal' specification without attempting to reverse-engineer a complicated part to discern precise measurements or specifications.

27 - This is meant only as an example of how a grantee might define salient characteristics, not as an exclusive means of doing so. Other examples can be found in the Best Practices Procurement Manual.

28 - Prequalification and the Common Grant Rule's requirement to allow potential bidders to qualify throughout solicitation periods has led to substantial confusion among some grantees. Prequalification lists are most common in recurring requirements for goods that take some period of time to evaluate to determine if they satisfy the grantee's standards. In those cases, grantees must accept submissions for evaluation, even during ongoing procurement actions. Evaluation need not be accelerated or truncated and FTA does not believe a particular solicitation must be held open to accommodate a potential bidder who submits a person, firm, or product for approval before or during that solicitation.

Additionally, some procurement methods may include preliminary steps that should not be confused with prequalification. For instance, in Federal practice, 41 USC 253m allows for a two-phase selection procedure for large design-build projects and FTA believes grantees may also use that procedure. Essentially, the two-phase selection procedure allows the contracting officer to solicit proposals for design-build projects in two steps, the first a review of technical qualifications and technical approach to the project and the second a complete proposal. This allows the contracting officer to narrow the competitive range in the first step without a requirement for extensive proposal review on the government's part or expensive proposal drafting on potential contractors' parts. This two-phase selection procedure is separate and distinct from prequalification and is but one method grantees may use in their procurements.

29 - Determination of fair and reasonable pricing for micro-purchases (usually credit card purchases) has been seen as a burden by some grantees. FTA believes that determination may be done quickly and efficiently in several ways. One possible method would be for the official tasked to review and authorize payment of a credit card bill to annotate (by stapling a preprinted sheet to the bill, stamping the bill with a rubber stamp, or even asking the credit card provider to print an appropriate statement on each bill) a finding such as ' I have examined the expenditures reflected on this bill and determined that each reflects a reasonable price based on market prices offered by the vendors to the general public.'

30 - This is not intended to imply that any purchase under $2,500 must be treated as a micro-purchase or that any purchase under $100,000 must be treated as a small purchase. Grantees remain free to set lower thresholds as they deem fit for either or both of these procurement methods.

31 - Sub-paragraph (5), like paragraph 6.g., recognizes the concept of best value. Once again, FTA does not wish to dictate any particular factors or analytic process. Solicitations must, of course, tell potential competitors for the contract what the basis for award will be.

32 - FTA has expanded this section to better explain the breadth of this statutorily prescribed procurement method. FTA recognizes that most of the services listed (e.g., surveying) are not performed by architectural or engineering services companies. Qualifications-based competitive proposals (i.e., Brooks Act procedures) still must be applied to these procurements because of the statutory directive in 49 U.S.C. 5325(d).

33 - This paragraph was added to explain the requirements that apply to design-build procurements because they involve significant architectural, engineering, or other services that normally require qualifications-based competitive proposals but also include significant work that does not require this extraordinary procurement method. Grantees should determine which portion of the work is predominant and follow the method for that type of procurement. We would normally expect the construction portion

of a design-build procurement to be predominant and, in that case, normal procurement methods can be used in lieu of qualification-based competitive proposals (the Brooks Act method).

34 - This paragraph was changed from prior versions of the circular to eliminate the phrase "or acceptance" of a single proposal when discussing what constitutes a sole source procurement. FTA believes that, upon receiving a single bid (or proposal) in response to a solicitation, the grantee should determine if competition was adequate. This determination may include a review of the specifications to determine if they were unduly restrictive or contacting sources that chose not to submit a bid or solicitation. It is only if the grantee determines that competition was inadequate that the procurement should proceed as a sole source procurement. The mere fact that only one bid or proposal was received does not automatically mean competition was inadequate since many unrelated factors could cause potential sources not to submit a bid or proposal.
34.5 - *Added October 2003* - This list of justifications is copied from the Common Grant Rule, 49 CFR 18.36(d)(4) which includes authority to use a sole source procurement when the "awarding agency [FTA] authorizes noncompetitive proposals." To ensure grantees have flexibility equal to that of Federal contracting officers, FTA authorizes procurement by noncompetitive proposals in all of the circumstances described in Part 6.3 of the Federal Acquisition Regulations, even if it is not specifically mentioned in this list of justifications.

35 - Cost and Price Analysis. Cost or price analysis has proven difficult for grantees in some cases. FTA believes price analysis for micro-purchases may be conducted on a limited basis as discussed above (paragraph 9a). Similarly, an abbreviated price analysis may be used for small purchases in most cases. One method to record this analysis is through use of a preprinted form on which a contracting officer (or other responsible person) can annotate a finding of fair and reasonable pricing and check off the most common reasons why this would be so such as catalog or market prices offered in substantial quantities to the general public, regulated prices (e.g., for many utilities purchases), or comparison with recent prices for similar goods and services.

Where cost analysis is required, some grantees have found difficulty obtaining the information necessary to conduct a proper cost analysis. The requirements for cost analysis are based in the Common Grant Rule and require action beyond FTA or DOT's authority to change. FTA continues to seek an equitable, practical solution to this problem consistent with the flexibility Federal contracting officers enjoy under the federal Acquisition Regulation.

36 - The language in this section has been amended from prior versions of the circular to better explain that FTA will accept a local bonding policy that meets the minimums of paragraphs a, b, and c but that a policy that does not meet these minimums still may be accepted where the local policy adequately protects the Federal interest. Grantees who wish to adopt less stringent bonding requirements generally, for a specific class of projects, or for a particular project may submit the policy and rationale to their regional office for approval. [*added October 2003* – There is no FTA approval required for more stringent bonding requirements. Additionally, FTA does *not* require bonds for rolling stock, services, maintenance, operations, or any other contracts – only for construction.]

37 - The language in this section has been amended from previous versions of the circular to explain that grantees may make advance payments from local share funds. Where grantees wish to make advance payments with FTA funds, they should contact their regional office to obtain FTA concurrence. FTA believes there are various sound business reasons for providing advance payments under a number of circumstances and, where we find adequate security for the advance payment combined with a sound business reason to grant the advance payment, will normally grant the required concurrence. These

advance payments may be in the nature of mobilization payments, start-up costs, or other advances backed by sound business judgment and adequate security. [*added October 2003* – Additionally, grantees may make advance payments with either local match or FTA funds for those purchases where advance payment is customary in the commercial marketplace such as utility services and subscriptions. FTA concurrence in these circumstances is only required where the advance payment or payments exceed $100,000.]

38 - We have re-drafted the paragraph related to progress payments to account for the practical reality that taking title to work in progress may not be desirable in some cases.
38.5 - [*added October 2003* – "Adequate security" should reflect the practical realities of different procurement scenarios and factual circumstances. For example, adequate security may consist of taking title to work in progress in a rolling stock procurement, receiving a draft document in a consulting contract, or receiving some portion of recurring services under a services contract. Grantees should always consider the costs associated with this security (e.g., bonds or letters of credit must be purchased in the commercial marketplace) and the impact those costs have on the contract price, as well as the consequences of incomplete performance as they consider what constitutes adequate security for a given procurement.]

39 - The measurement period for liquidated damages may be something other than a day, where some other measuring period is appropriate.