Procurement and NEPA Regulations: Overview and Topics for discussion

Wisconsin Tribal Transit Peer Exchange
April 2018
General Principles of Federally Funded Procurement

• All transactions must be conducted in a manner that:
  – Provides **full and open competition**
  – Prohibits **geographic preference**

• Extend Federal Requirements to all third party participants. Transit agencies must ensure that all third party contractors/subcontractors meet all applicable federal requirements.

• Award contracts only to **responsible contractors**
Testimony: Procurement 'corrupted'

Metro agrees to pay nearly $5 million for role in no-bid contract

Long Beach Transit Faces New Challenges with Electric Bus Procurement

Losing rail car bidder says CTA rigged contract process

New details emerge about Metro contract that raised ethical questions
Procurement Regulations

transit.dot.gov/funding/procurement

CIRCULAR

FTA C 4220.1F

November 1, 2008
Rev. 1, April 14, 2009
Rev. 2, July 1, 2010
Rev. 3, February 15, 2011
Rev. 4, March 18, 2013

Subject: THIRD PARTY CONTRACTING GUIDANCE

1. PURPOSE. This circular provides contracting guidance for recipients of Federal assistance awarded by the Federal Transit Administration (FTA) when using that Federal assistance to finance its procurements (third party contracts). This revision incorporates the new procurement provisions of the Moving Ahead for Progress in the 21st Century Act (MAP 21), Pub. L. 112-141, July 2012, and includes the most current available guidance for the Federal public transportation program as of the date of publication.

2. CANCELLATION. This circular cancels FTA Circular 4220.1E, Third Party Contracting Requirements, dated 06-19-03.

3. AUTHORITY. Federal Transit Act, Title 49, United States Code, Chapter 53

4. WAIVER. FTA reserves the right to waive any provision of this circular to the extent permitted by Federal law or regulation.

5. FEDERAL REGISTER NOTICE. In conjunction with publication of this circular, a Federal Register notice was published on September 30, 2008 (73 FR 60696), addressing comments received during the development of the circular.

6. AMENDMENTS TO THE CIRCULAR. FTA reserves the right to update this circular due to changes in other revised or new guidance and regulations that undergo notice and comment, without further notice and comment on this circular. FTA will post updates on its Web site: http://www.fta.dot.gov/. The Web site allows the public to register for notification when FTA issues Federal Register notice or new guidance, visit the Web site and click on 'Sign-up for e-mail updates.'

7. ACCESSIBLE FORMATS. This document is available in accessible formats upon request. To obtain paper copies of this circular as well as information regarding these accessible formats, telephone FTA's Administrative Services Help Desk, 202-366-4465. Individuals with hearing impairments may contact the Federal Relay Service, 1-800-877-8339, for assistance with the call.
FTA Circular 4220.1F

• Procurement regulations apply to every recipient using FTA funds on a third party purchasing contract.

• Every FTA recipient must have written procurement procedures that address:
  – Necessity, Lease vs. Purchase, Sources
  – Procurement Methods, Solicitations
  – Legal Restrictions, and Required Contract Provisions/Clauses
  – Resolution of Contract Issues
Written Policies and Procedures

• Staff/Employee Standards of Conduct addressing:
  – Personal Conflicts of Interest, real or apparent
  – Gifts
  – Violations

• Procedures for the following methods of procurement:
  – micro-purchase ($<3,000)
  – small purchase ($3,000 - $150,000)
  – IFB/sealed bid
  – RFP/competitive proposal
  – non-competitive proposal
Written Policies and Procedures

• **Recordkeeping:** Document all procurement actions carefully
  - *Price reasonableness and quotes*
  - Procurement method selection rationale
  - Contract type selection rationale
  - Contractor selection rationale

• Responsibility Determination
  - Cost or Price Justification
Self Test


• Do your policies and procedures require that records are maintained detailing the history of a procurement? At a minimum, these records include:
  – the rationale for the method of procurement,
  – selection of contract type,
  – reasons for contractor selection or rejection, and
  – the basis for the contract price.

• Do your policies and procedures require that the contract period of performance for rolling stock and replacement parts not exceed five (5) years inclusive of options without prior written FTA approval when FTA funds are involved?
Self Test


• Do your procurement policies and procedures include requirements for a contract administration system that ensures contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders?

• Do your policies and procedures require that "Time and Materials Type Contracts" may only be used:
  – after a determination that no other type of contract is suitable, and
  – if the contract specifies a ceiling price that the contractor shall not exceed except at its own risk?
Self Test


• Do they define Organizational Conflicts of Interest and provide means for eliminating or mitigating such conflicts?
• Do they prohibit cost plus percentage of cost type contract?
• Do they prohibit advance payments utilizing FTA funds unless prior written concurrence is obtained from FTA?
• Do they include sole source documentation requirements?
• Do they contain requirements that independent cost or price estimates must be made before receiving bids or proposals?
Buying a Transit Vehicle with FTA Grant Funds
Eligibility

• FTA Circular 9040.1G: 5311 Program Regulations
  – Chapter X: Tribal Transit Program
    – Buses
    – Vans
    – Paratransit Vehicles
    – Wheelchair lifts / restraints, ADA compliance
    – Vehicle rehabilitation, remanufacture, overhaul
    – Preventive maintenance, associated capital maintenance equip, tires, materials
    – Extended warranties (not exceeding industry standards)
    – Vehicle procurement, testing, inspection, and acceptance costs
    – Lease of vehicles when more cost effective than purchase
    – New and innovative technology

• Used for providing public transit service to Tribal communities
Eligibility

• Expansion or Replacement
  – Is vehicle being replaced reached its **useful life**?
    • Large Heavy Duty (More then 35ft): At least 12 years or 500,000 miles
    • Medium duty: At least 7 years or 200,000 miles
    • Light duty vans / paratransit: At least 4 years or 100,000 miles

• What are you looking for in a new vehicle? What’s the need?
  Consider:
  – Budget (ask around for quotes, research online, other transit agencies)
  – Overall fleet replacement schedule
  – Route demand and Passenger Capacity, Road and weather conditions, ADA requirements, CDL req?
  – Used vs. New, Fuel and Maintenance Costs over the life of the vehicle, warranty
Vehicle Procurement Requirements

- Establish a Written Record of Procurement History to retain all records related to the procurement, including grant records, cost or pricing data, state purchasing schedule terms and conditions, method of procurement chosen (and why), quotes, and contract documents.

- Independent Cost Estimate (ICE): This is a very important first step to have documented before entering into any procurement or contracting activities. Document your estimated price range for the purchase.
  - Published prices (internet, catalogs, ads), gov. databases
  - Current and past contracts for similar products
  - Other agencies who have purchased the same or similar products
  - Vendor price quotes, not official bids
Cost/Price Analysis

- Price Reasonableness: IF determined that competition was adequate, and one or more prices were within ICE, a Price Analysis is done.

- The Price Analysis document should compare bids to each other, to the ICE, and document determination of adequate competition and fair and reasonableness of price.

- If the competition was not adequate, and/or prices were not within estimate, a Cost Analysis must be completed.

- Cost analysis document should compare the offerors’ price to the full breakdown price of component parts, time and materials, labor and overhead, and profit margin to determine if cost is fair and reasonable.
Vehicle Procurement Requirements

- If purchasing from a State Contract/State Purchasing Schedule, obtain written approval from the State DOT from which the vehicle contract or purchasing schedule price originates.

- Search of the Exclusion List at [www.sam.gov](http://www.sam.gov) to assure the contractor hasn’t been declared excluded from receiving federal funds. (Print out record)

Search Records

Search Tips to Get Started:
- Looking for entity registration records or entity exclusion records in SAM? Use QuickSearch if you know an entity’s Business Name, DUNS Number or CAGE Code. Use Advanced Search to structure your search using multiple categories and criteria.
- Are you a Federal government employee? Create a SAM user account with your government e-mail address and log into SAM before searching to see FOUO information and registrants who chose to opt out of the public search.
- Conducting small business-focused research? In addition to what is contained in SAM, small businesses can provide the Small Business Administration (SBA) supplemental information about themselves. Use the SBA’s Dynamic Small Business Search to conduct further market research.
- Trying to find a contractor participating in the Disaster Response Registry? Use the Disaster Response Registry Search to locate contractors willing to provide debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief services in the event of a national disaster.

Choose Quick Search or Advanced Search

**QUICK SEARCH:**
- Enter your specific search term
  (Example of search term includes the entity’s name, etc.)
- DUNS Number Search: Enter DUNS number ONLY
- CAGE Code Search: Enter CAGE code ONLY

**ADVANCED SEARCH:**
- Use specific criteria in multiple categories to structure your search.
  - ADVANCED SEARCH - ENTITY
  - ADVANCED SEARCH - EXCLUSION
  - DISASTER RESPONSE REGISTRY SEARCH
Eligible Transit Vehicle Manufacturers

DBE regulations require FTA recipients to report transit vehicle procurement awards (49 CFR 26.49). Since November 2014, FTA grantees have been required to submit, within 30 days of making an award, the name of the successful bidder and the total dollar value of the contract. Only eligible TVMs may bid on FTA-assisted transit vehicle procurements. Transit vehicle manufacturers that have submitted a goal methodology to FTA that has been approved, or has not been disapproved, at the time of solicitation are eligible to bid (49 CFR 26.49(a)(1)). The following is a list of eligible TVMs:

<table>
<thead>
<tr>
<th>Transit Vehicle Manufacturer</th>
<th>Address</th>
<th>DBE Goal %</th>
<th>DBE Liaison Officer/Email</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alexander Dennis</td>
<td>31556 Railroad Canyon Road Suite 342 Canyon Lake, CA</td>
<td>3.00%</td>
<td>Judy Lovitt</td>
</tr>
<tr>
<td>Alstom Transport</td>
<td>1 Transit Drive Homell, NY</td>
<td>7.55%</td>
<td>Michelle Studer</td>
</tr>
<tr>
<td>AMASA Transportation Corporation</td>
<td>1070 Commerce Drive Madison, GA</td>
<td>1.07%</td>
<td>Chris Neumann</td>
</tr>
<tr>
<td>American CRRC Tangshan Rolling Stock, LLC*</td>
<td>1869 Preston White Drive, Suite 202 Reston, VA 20191</td>
<td>7.03%</td>
<td>Zhao Liyan</td>
</tr>
</tbody>
</table>
Vehicle Procurement Requirements

- Ensure all required federal contract clauses are included in the contract. Do not allow any exceptions or exemptions. See Appendix A for full listing:

- Altoona Testing: Verify the vehicle that was submitted as part of the solicitation has an Altoona test
  http://altoonabustest.psu.edu/buses. Read the report to see if there were any deficiencies noted in the testing, verify that they have been corrected and retested.
Vehicle Procurement Requirements: Audits

- Purchaser’s Requirements Certifications: form filled out pre-contract award, and another form filled out post-vehicle delivery

- FMVSS Certifications: 1 filled out pre-contract award, and 1 filled out post-vehicle delivery

- Buy America Pre-Contract Award Certification: Recipients must ensure that the cost of the components and subcomponents produced in the United States meets the following threshold: for fiscal years 2018 and 2019, more than 65 percent of the cost of all components of the rolling stock. Additionally, final assembly of the rolling stock must occur in the United States.

- Buy America Post-Delivery Audit: must be completed before the vehicle title is transferred to the recipient or before the rolling stock is placed in revenue service, whichever comes first.

- See Buy America handbook at transit.dot.gov/buyamerica for templates
Resources

• Joint Procurement Clearinghouse
• GSA or State Purchasing Schedule (with permission)
  • https://ftawebprod.fta.dot.gov/ContactUsTool
  • https://transit.dot.gov/funding/procurement
  • https://transit.dot.gov/buyamerica
  • http://wisconsindot.gov/Pages/doing-bus/local-gov/astncs-pgm/transit/procure.aspx
NEPA: Environmental Review
Does NEPA Apply?

• Yes – all federally funded projects require some environmental review. If it is covered under a C-List Categorical Exclusion, documentation is not required.
  – Examples: Operating expenses, Planning and Admin, Vehicle/Equipment replacement, Preventative Maintenance, most Safety, Security and ADA activities, emergency activities

• Projects requiring further documentation and approval from FTA:
  – Any construction activities including renovation, rehab, demolition, expansion, excavation, and related acquisition (including land acquisition, installing Bus shelters, bus wash and fuel equip facilities)
  – Any other activity that may raise environmental or historic preservation concerns
NEPA Class of Action

- Project proposals must contain enough information for FTA to determine class of action:
  - Categorical Exclusion (C-List) (D-List)
  - Environmental Assessment
  - Environmental Impact Statement

- Under Federal Law, FTA must ensure NEPA mandates have been met before approving any applications for federal financial assistance.
Class of Action Determination

Class I – Environmental Impact Statement (EIS)
- New major capital projects
- Projects with substantial public controversy
- Projects with significant, unavoidable adverse impacts

Class II – Categorical Exclusion (CE)
- Projects with none to a few minor impacts
- Often entirely within existing transportation right-of-way or facility footprints
- Typically no public involvement required

Class III – Environmental Assessment (EA)
- Projects that do not qualify for CE
- Unclear whether impacts are significant
Class of Action Process

**CE**
- CE Approval Letter from FTA - Done
- OR Finding of Potential for Significant Impacts

**EA**
- Public Involvement to the extent practicable
- Finding of No Significant Impact (FONSI) from FTA - Done
- OR Finding of Potential for Significant Impacts

**EIS**
- Issue Notice of Intent in the Federal Register
- Conduct Public Scoping and enhanced public engagement
- Publish Draft EIS with comment period
- Publish Final EIS
- Record of Decision
Plan Early!

- Notify FTA of any construction project planning as soon as possible.
- Do not begin any land acquisition, A&E, or site development on an FTA funded project before the NEPA process is completed.

Key information:
- Projected schedule
- Scope of work
- Location and footprint (Maps, Photos, Visuals!)
- Anticipated approvals/exclusions
- Relevant planning studies
- Committed and potential funding sources
- Known environmental issues, known historic sites or parkland in area
- Potential controversy
NEPAssist
https://www.epa.gov/nepa/nepassist
Section 106

• Identify Area of Potential Effect (APE)

• Identify National Register of Historic Places: Properties Eligible or Listed in APE
  – Structures more than 50 years old* with potential historic significance or contribution to art and architecture
  – Properties and wider districts with significant events, people, architecture, archeological sites, or potential to yield important information in the future
  – Traditional or cultural heritage sites

• [http://www.nps.gov/nr/research/](http://www.nps.gov/nr/research/)
Area of Potential Effects

• For archeological resources, the APE is generally the direct construction footprint of a proposed project including right of way, facility construction, construction equipment and footprint, and any ground disturbance for utility relocations.

• For historic structures, the APE generally extends to the next one or two parcels surrounding the direct footprint of a project.

• For some projects, in consultation with consulting parties, FTA has identified a much larger APE considering potential project noise and visual effects.
Section 106

• FTA Consultation with, and review from Tribal Historic Preservation Office (THPO)

• Any other consulting parties:
  – Tribal Leaders
  – Tribal Governmental Agencies
  – Public
  – Other State or Federal Agencies?

• Determination of Effects on Historic Properties:
  – No Historic Properties in APE
  – No adverse effect
  – Adverse effect Determination (Programmatic Agreement + Letter to ACHP)
Section 4(f)

- Identify Section 4(f) properties in APE
  - Parklands and Recreational areas (publicly owned, open to the public)
  - Wildlife and Waterfowl Refuges
  - Historic sites and monuments

- Documented determination
  - No Section 4(f) properties in APE
  - De minimis impact (with public comment)
  - Full Alternatives Analysis and Consultation (Dept. of Interior Review)
NEPA Project Planning Checklist

- Project Description: Purpose, Need, Scope,
- Location, Land Use, Zoning (Maps!)
- Traffic Impacts
- Aesthetics
  - Will the Project have an adverse effect on a scenic vista?
    - Light pollution? Other effects to visual character?
- Air Quality
- Coastal Zone
- Environmental Justice
  - Disproportionate effects on minority or low-income pop.?
Project Planning Checklist

- Floodplains
- Hazardous Materials on site
- Navigable Waterways
- Noise and Vibration Impact
- Prime and Unique Farmland
- Natural, Cultural, Historic, Recreational Resources
- Threatened or Endangered Species Habitats
- Seismic Conditions
Project Planning Checklist

- Water Quality Impacts, including during construction
  - Increase in new impervious surface?
  - Sole Source Aquifer in vicinity?
  - Wetland impacts?
- Other Construction, Cumulative, or Indirect Impacts?
- Uniform Act (relocation of individuals or businesses?)
- Public Engagement?
- Permits, Compliance with Tribal, State, or Local Policies and Ordinances
Resources

• https://www.transit.dot.gov/regulations-and-guidance/environmental-programs
• https://www.environment.fhwa.dot.gov/
• https://www.whitehouse.gov/ceq/
Other News and Updates

• 2017 TTP Competitive Project Selections
  - Congrats to Forest County Potawatomi Community!

• FTA is in the process of making updates to the 9040.1G circular (5311 Program) to reflect changes made under the FAST Act:
  • clarification on FTA/state/tribal role for tribes that receive 5311 funding directly through FTA
  • clarification on Indirect Cost rate under the Tribal Transit Program
  • More details to come!
Other News and Updates

• Joint Procurement Clearinghouse
• State Procurement Schedules and Pilot Program for Non-profit Cooperative Procurements
• Transit Asset Management (TAM)
  – NTD reporting requirements phased in
    • Inventory: Service & Revenue Vehicles, Facilities, Equipment >$50K
    • Narrative: Change in Condition, Goals & Targets
    • Objective is to reach and maintain a state of good repair (SGR) – Condition in which a capital asset operates at a full level of performance.
• Buy America domestic content requirement now 65%
Other News and Updates

• Tribal Transit Asset Management (TAM) Webinar:
  Tuesday, April 24, 1:00 – 2:30pm
  – Register Here: https://cecatalog.rutgers.edu/courseDisplay.cfm?schID=68532

• Section 106 Webinar!
  Thursday, May 31, 1:00 – 3:00pm
  – More details to come

• FTA Region 5 Grantee Resource Center:
Technical Assistance and Training

NationalRTAP.org
888-589-6821

NC4MM.org
866-846-6400

NADTC.org
866-983-3222

NTIONline.com
848-932-1700
FTA Contact:

Evan Gross
Email: Evan.Gross@dot.gov
Phone: 312-886-1619

https://www.transit.dot.gov/about/regional-offices/region-5