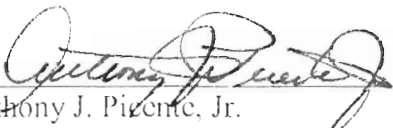


**Addendum To  
Oneida County Department of Purchasing  
Procurement Manual**

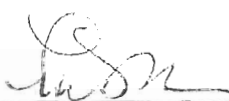
*Procurement Guidelines  
for Purchases and Construction Projects  
funded with Federal Transit Administration and NYS DOT Funds*

On May 23-24, 2007, the Federal Transit Administration (FTA) conducted its Triennial Review of the federally funded mass transportation program operating in Oneida County. The review report is the FTA's assessment of the County's compliance with Federal requirements and is determined by examining grant management practices and program implementation activities. These reviews are required in determining a grantee's continued eligibility for Federal funding.

As recommended per Oneida County's 2007 Triennial Review, the attached addendum will be added to the Oneida County Department of Purchasing Policy and Procedure Manual as it applies to Federal Transit Administration (FTA) procurements. This procurement addendum is for all of Oneida County's FTA purchases, and related activities including the code of conduct, protest procedures, and all FTA required third-party contract clauses and certifications. This addendum has been reviewed by the Oneida County Planning Department, the Oneida County Purchasing Department, the Oneida County Department of Public Works, and the Oneida County Law Department.

  
Anthony J. Pizente, Jr.  
Oneida County Executive

8/28/07  
Date

  
Linda Dillon  
Oneida County Attorney  
Approved to Form

8/27/07  
Date

**ONEIDA COUNTY**

**PROCUREMENT GUIDELINES  
FOR  
PURCHASES AND CONSTRUCTION  
PROJECTS**

**FUNDED  
WITH**

**FEDERAL TRANSIT ADMINISTRATION  
AND  
NEW YORK STATE  
DEPARTMENT OF TRANSPORTATION**

**FUNDS**

**August, 2007**

TABLE OF CONTENTS

ONEIDA COUNTY PROCUREMENT GUIDELINES

PROCUREMENT CODE OF CONDUCT ..... 1

**SECTION I: OVERVIEW, PURPOSE, APPLICABILITY, AND DEFINITIONS** ..... 1

OVERVIEW ..... 1

PURPOSE ..... 1

APPLICABILITY ..... 1

DEFINITIONS ..... 2

**SECTION II: GENERAL PROCUREMENT GUIDELINES** .....

1. CONTRACT ADMINISTRATION SYSTEM ..... 1

2. BOARD APPROVAL ..... 1

3. ENSURING MOST EFFICIENT AND ECONOMIC PURCHASE ..... 1

4. INTERGOVERNMENTAL PROCUREMENT AGREEMENTS ..... 1

5. USE OF NY SOGS and GSA CONTRACT PRICES and EXCESS OR SURPLUS  
FEDERAL PROPERTY ..... 1

6. AWARDS TO RESPONSIBLE CONTRACTORS ..... 2

7. WRITTEN RECORD OF PROCUREMENT HISTORY ..... 2

8. USE OF TIME AND MATERIALS TYPE CONTRACTS ..... 3

9. SETTLEMENT OF CONTRACT ISSUES/DISPUTES ..... 3

10. CONTRACT PERIOD OF PERFORMANCE ..... 3

11. INDEPENDENT COST ESTIMATES ..... 4

12. CONTRACT COST AND PRICE ANALYSIS ..... 4

13. PROCUREMENTS WITH STATE AND FEDERAL FUNDS ..... 5

14. FULL AND OPEN COMPETITION ..... 6

15. GEOGRAPHIC PREFERENCES ..... 6

16. PREQUALIFICATION CRITERIA ..... 6

17. WRITTEN PROCUREMENT SELECTION PROCEDURES ..... 7

18. FAILURE TO RESPOND TO BID SOLICITATION ..... 7

19. REQUESTS FOR DEVIATIONS FROM SPECIFICATIONS ..... 7

20. WRITTEN ADDENDA ..... 7

21. WRITTEN PROTEST PROCEDURES ..... 8

22. OPTIONS..... 8

23. DISADVANTAGED BUSINESS ENTERPRISES ..... 9

24. PAYMENTS ..... 9

25. EMERGENCY PROCUREMENTS ..... 9

26. PROFESSIONAL SERVICES CONTRACTS ..... 10

27. CONSTRUCTION CONTRACTS ..... 11

28. BONDING REQUIREMENTS ..... 11

29. INSURANCE..... 13

30. PROMPT PAYMENT PROCEDURES ..... 15

31. BUY AMERICA REQUIREMENTS ..... 16

32. LIQUIDATED DAMAGES ..... 17

**SECTION III: DETAILED PROCUREMENT GUIDELINES** ..... 1

1. INFORMAL PROCUREMENT PROCEDURES ..... 1

2. FORMAL BIDDING (ITEMS/SERVICES \$15,000 and OVER) ..... 4

**SECTION IV: PROTEST PROCEDURES**

**APPENDIX A: FTA CIRCULAR 4220.1E, THIRD PARTY CONTRACTING GUIDELINES**

**APPENDIX B: CONTRACT ADMINISTRATION PROCEDURES**

**APPENDIX C: REQUIRED THIRD PARTY CONTRACT CLAUSES**

**APPENDIX D: REQUIRED CERTIFICATIONS**

**APPENDIX E: APPLICABILITY OF THRID PARTY CONTRACT CLAUSES**

**APPENDIX F: IMPLEMENTATION OF EO 127**

**APPENDIX G: PURCHASES EXEMPT FROM THE PURCHASE ORDER PROCESS**

**PROCUREMENT CODE OF CONDUCT**

Oneida County (hereinafter: "County") employees shall adhere to the following code of conduct governing their performance in connection with County use, awarding, monitoring and reporting of procurement contracts, related to the Federal Transit Administration (hereinafter: FTA) funded projects:

1. Consider the interests of the County first;
2. Give all bidders equal consideration and assurance of unbiased judgment in determining whether their proposed product(s) or service(s) meet the desired specifications;
3. Accord a prompt and courteous reception to all who call on legitimate County business;
4. Never discriminate by dispensing special favors or privileges to anyone, whether or not for remuneration;
5. Never accept favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of County duties;
6. Make no private promises of any kind binding upon the duties of office, as an employee of the County may have no private work which is binding on public duties;
7. Engage in no business with County, either directly or indirectly, which is inconsistent with the conscientious performance of County duties or in conflict with County's written policies;
8. Never use any information obtained confidentially in the performance of County duties as a means for making private profit; and
9. While an employee, officer, agent, or servant of the County, or an immediate family member of any of the preceding, and for a period of one (1) year following such tenure, do not participate in or maintain any interest, direct or indirect, in County work, or in the selection, award, or administration of County contracts, or the proceeds thereof if a conflict of interest, real or apparent, would be involved.

Such a conflict of interest is defined to be when any of the following has a financial or other interest in the firm selected for award:

- a. The employee, officer, agent, or Board Member;
  - b. Any member of his/her immediate family (wife/husband, children and their families, parents, brothers and sisters and their families)
  - c. His or her (business related) partner,
  - d. An organization that employs, or is about to employ, any of the above.
10. The County's officers, employees, agents, or Board Members will not solicit, accept, or receive gifts, gratuities, favors, or anything of any monetary value, from contractors, potential contractors, or parties to sub-agreements, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence or reward the recipient in the performance of his/her official duties or was intended as a reward for any official action on his/her part.
  11. **Violations:** In addition to any penalty contained in any other provision of law any such commissioner, officer, or employee who knowingly and intentionally violates any of the provisions of this section may be subject to disciplinary action, suspended, or removed from office or employment in the manner provided by contract, law, or established employment policies. Every County employee involved in the award or administration of contracts shall be given a copy of these Written Standards of Conduct, and will be required to sign a statement that they are familiar with, and will abide by, these standards.

## **SECTION I: OVERVIEW, PURPOSE, APPLICABILITY, AND DEFINITIONS**

### **OVERVIEW**

The County routinely expends funds to purchase goods and services including, but not limited to, bus parts, support equipment, professional services, etc. Any purchases using Federal transit funds must be in compliance with *Federal Transit Administration ("FTA") Circular 4220.1E, Third Party Contracting Guidelines* (Appendix A). The procurement procedures described in this document have been developed to assure compliance with these guidelines.

The basic procurement objective is to secure the best goods and/or services at the lowest available price, consistent with quality requirements and delivery needs. The practice of competitive bidding, whether formal or informal, not only tends to assure reasonable prices, but guards against improper practices.

Failure to appropriately procure goods and services funded by the Federal government could seriously jeopardize Federal funding to the County. All the County staff involved in procurement activities must familiarize themselves with the County procurement guidelines, FTA regulations, and other pertinent documentation, as promulgated.

### **PURPOSE**

These Procurement Guidelines set forth the requirements that the County and its subsidiary corporations (individually or collectively referred to as "the County") must adhere to in the solicitation, award, and administration of its third party contracts for goods and services. These requirements are in conformance with common Federal grant rules, Federal and New York State statutes, Federal Executive orders and their implementing regulations, New York State Department of Transportation policy and Federal Transit Administration policy.

These guidelines are meant to:

- a. formalize practices which insure that the County interests are protected,
- b. assure that all Federal and state procurement laws and regulations are followed, and
- c. communicate policies, give guidance to purchasing personnel, personnel assigned to the purchasing function, and others with delegated purchasing authority.

These Guidelines have been duly adopted by resolution of the County Board of Legislators (the "Board") and detail the County operative policy and instructions regarding the use, awarding, monitoring and reporting of procurement contracts.

### **APPLICABILITY**

The County Procurement Guidelines apply to all commodity, service, and professional service contracts procured by the County. These Guidelines adhere closely to the Federal Procurement Requirements outlined in *FTA Circular- 4220.1E*. the County has chosen to adopt the procurement practices outlined in the Circular and the Best Practices Procurement Manual as a way of ensuring compliance with FTA requirements in all the County procurement activities.

These Guidelines are intended for the guidance of officers and employees of the County only, and nothing contained herein is intended or shall be construed to confer upon any person, firm or corporation, any right, claim or benefit under, or by reason of, any requirement or provision hereof. Nothing contained in these Guidelines shall be deemed to alter, affect the validity of, modify the terms of or impair any contract or agreement made or entered into in violation of, or without compliance with, the provisions of these Guidelines.

Where applicable Federal, state or local laws, ordinances, codes, rules or regulations contain requirements that are in conflict with, or that impose greater obligations upon the County than these Guidelines, those requirements shall take precedence over those contained herein.

the County shall not be precluded from adopting additional requirements for particular contracts relating to the matters covered by these Guidelines.

### **DEFINITIONS**

When used in these guidelines:

**"Advertisement"** the publication of a Notice of Procurement Opportunity in any of the following forums, as are appropriate: newspapers of general circulation in Oneida County and/or any other member county within the County District; regional, state and national trade journals and magazines; newsletters; and New York State Economic Development Department and/or Disadvantaged Business Enterprise publications,

- a. the posting of a Notice of Procurement Opportunity on the County's property at a location accessible to the public,
- b. the dissemination of a Notice of Procurement Opportunity to three (3) or more potential bidders, proposers or suppliers either by written, telephonic or electronic transmission, and
- c. any or all methods of advertisement as are herein defined that are necessary or desirable to promote competition under these Guidelines.

**"Approved Equal"**: An item or service which has been approved by the procuring agency as equal to the brand name item originally specified.

**"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 factors to determine the offer deemed most advantageous and of the greatest value to the procuring agency.

**"Brand Name"**: A name of a product or service that is limited to the product or service produced or controlled by one private entity or by a closed group of private entities. Brand names may include trademarks, manufacturer names, or model names or numbers that are associated with only one manufacturer.

**"Commodities"**: Standard articles of commerce in the form of material goods, supplies, products or similar items. Commodities do not include technology.

**"Construction"**: the supervision, inspection and building of, and all expenses incidental to the acquisition, construction, repair, painting or reconstruction of, facilities and equipment for use by the County.

**"Contractor"**: any person, partnership, private corporation or association selling materials, equipment or supplies, or leasing property or equipment, to the County. Constructing, reconstructing, rehabilitating or repairing buildings or other improvements for or on behalf of the County. Rendering or providing services to the County pursuant to a Contract.

**"Contracts" or "Procurement Contracts"**: as defined by the Federal Acquisition Regulation: a mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. Contracts would include bilateral instruments, awards and notices of awards; job orders or task assignment letters issued under basic ordering agreements; letter contracts, orders, such as purchase orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications.

The parties to a contract must possess the legal capacity to enter into the contract, and they must assent to the terms of the contract.

**"Contract Administrator"**: This individual will be the primary contact with the contractor and shall establish frequent and direct communications with the Contractor. This is the only individual who, with proper consents and documentation, can authorize changes to the contract. In most cases, this individual will be the staff member who led the procurement process for the project. If a cost reimbursement or progress payment form of contract is used, the Contract Administrator shall monitor contractor progress to ensure that the maximum allowable contract amount is not exceeded and that funds are not paid to the contractor in an amount greater than either the percentage of work completed or actual costs incurred.

**"Cost Reimbursement (CR) Type Contract"**: A general compensation arrangement which requires the County to pay the Consultant a fixed fee plus all allowable actual costs (as established by predetermined cost principles and rates) provided such costs and fee do not exceed the final negotiated contract price, as incurred by the Consultant in performing the "agreed to" Scope of Work. This type of contract is appropriate for qualifications-based procurements and negotiated procurements based on a Scope of Services rather than detailed specifications.

**"Design-Bid-Build"**: 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.

**"Design-Build"**: A system of contracting under which one entity performs both architectural/engineering and construction under one contract.

**"Design Specifications"**: Specifications based on the design of a product or service. Typical design specifications may include dimensions, materials used, commonly and competitively available components, and non-proprietary methods of manufacturing.

**"Procurement Manager"**: Individual who has responsibility for the overall conduct of a particular procurement. This individual is responsible for ensuring compliance with applicable the County Guidelines and governmental regulations in the procurements under his/her purview.

**"Direct Report #1"**: The Commissioner of Department of Public Works and the Director of Purchasing who report directly to the County Executive.

**"Direct Report #2"**: The Commissioner of Planning who report directly to the County Executive.



**"Disadvantaged Business Enterprise"** : a small business concern which is at least fifty-one percent (51 %) owned by one or more socially and economically disadvantaged individuals (individual with a personal net worth less than \$675,000) and has been certified as such by the State of New York.

**"Emergency Procurement"**: the procurement of goods or services under circumstances where a delay in procurement may result in danger to employees or the public, damage to the County facilities or equipment, or an impediment, delay or danger to the business operations of the County.

**"Federal Transit Administration"**: FTA is one of eleven modal administrations within the U.S. Department of Transportation. The Federal government, through the FTA, provides financial assistance to develop new transit systems and improve, maintain, and operate existing systems. FTA oversees thousands of grants to hundreds of state and local public transit providers. These grantees are responsible for managing their programs in accordance with Federal requirements, and FTA is responsible for ensuring that grantees follow Federal mandates along with statutory and administrative requirements.

**"Firm-Fixed-Price Type Contract" (FFP)**: A general compensation arrangement which places the risk of performance for a lump sum on the contractor, regardless of the actual costs incurred by the contractor. The only allowable adjustments to the lump sum contract price are those arising from authorized changes in scope of services or changes in specifications. This type of contract is appropriate for acquiring commercial items, or for supplies or services which can be clearly defined with either performance/functional specifications or design specifications where there are no substantial uncertainties relating to cost, performance, or schedule. This type of contract may only be used in sealed bidding procurements.

**"Formal Bidding"**: bidding involving public advertising and sealed bids, and is required for procurements of goods or services in an amount of \$10,000 or more, except as otherwise provided herein. All formal bidding must be approved by the County Executive and the Board of Acquisition and Contracts.

**"General Services"**: those services provided by an individual or business which are not considered professional or construction.

**"General Services Administration"**: GSA is one of three central management agencies in the federal government. GSA supports Federal employees wherever they work--in an office building, a warehouse, a national forest, or a government car. GSA provides workspace, security, furniture, equipment, supplies, tools, computers, and telephones. GSA also provides travel and transportation services, manages the federal motor vehicle fleet, oversees telecommuting centers and federal child care centers, preserves historic buildings, manages a fine arts program, and develops, advocates, and evaluates government-wide policy.

**"Grants Administrator"**: Individual who has responsibility for the overall grant approval and execution process. This individual is responsible for ensuring compliance with applicable County Guidelines and governmental regulations in the procurements under his/her purview. For the purposes of this document every reference to the "Procurement Manager" shall mean the "Grants Administrator" when the item being purchased is done so with Federal Capital Grant dollars.

**"Independent Cost Estimate"**: Such estimates may be obtained from published competitive prices, results of previous competitive procurements, including some type of price escalation percentage, or price quotes from manufacturers.

**"Informal Bidding"**: bidding without public advertising but within formal procedures, which may include, without limitation, written, telephonic or electronic bidding.

**"Invitation for Bids (IFB)"**: the County request for sealed bids setting forth the detailed specifications for the work to be performed.

**"Maintenance Bond"**: An instrument of security furnished by the contractor and his/her surety for the maintenance of the work after completion, in accordance with the contract documents.

**"Micro-Purchase"**: purchases under \$1,000. Purchases below this threshold may be made without obtaining competitive quotations if the County determines that the price is fair and reasonable. Such purchases are exempt from Buy America requirements. There should be equitable distribution among qualified suppliers (in the local area) and no splitting of procurements to avoid competition. For this type of purchase one of the following signatures is required:

- **Director of Purchasing**
- **Commissioner of DPW**

**"Minority Business Enterprise (MBE)"**: Any business enterprise which is at least fifty-one percent (51 %) owned by, or in the case of a publicly owned business, at least fifty-one percent (51 %) of the capital stock of which is owned by citizens or permanent resident aliens who are minority persons, and such ownership interest is real, substantial and continuing. The minority ownership must have and exercise the authority to independently control the business decisions of the entity. The enterprise must also be authorized to do business in New York State, be independently owned and operated, and not be dominant in its field. For the purposes of these guidelines "minority person" shall refer to persons as are defined in Section 2879(3) of the Public Authorities Law.

**"New York State Contract Reporter"**: a publication of procurement opportunities printed for the New York State Economic Development Bureau pursuant to the New York State Economic Development Law.

**"Offer"**: A promise to provide goods or services according to specified terms and conditions in exchange for material compensation,

**"OGS Bid Contracts"**: purchase prices established for various items which have been competitively bid by the New York State Office of General Services (the "OGS") and which may be used by the County and its subsidiaries to make procurements for goods/services provided FTA requirements are included in the contract.

**"Organizational Conflict of Interest"**: because of other activities, relationships, or contracts, a contractor is unable, or potentially unable, to render impartial assistance or advice to the County; a contractor's objectivity in performing the contract work is or might be otherwise impaired; or a contractor has an unfair competitive advantage.

**"Performance Bond"**: An instrument of security furnished by the contractor and his surety for the performance of the work in accordance with the contract documents.

**"Performance Specifications"**: Specifications based on the function and performance of a product or service under specified conditions, preferably conditions that can be reproduced for testing purposes. Performance specifications may include useful life, reliability in terms of average intervals between failure, and capacity.

**"Piggybacking"** is an assignment of existing contract rights to purchase supplies, equipment, or services.

**"Procurement"**: The acquisition by the Authority of products, services, or public works by purchase process and policy as outlined in this manual, excepting:

- The purchase of periodicals, reference materials, treatises, or professional research tools;
- The payment of fees or tuition associated with continuing education courses, training courses, conferences, seminars, and symposiums,
- Expenditures governed by the County "Travel Policy and Guidelines"; and
- The purchase of advertising space or advertising time in any medium.
- Expenditures associated with internal or public meetings

**"Professional Services"**: services of a professional nature, including without limitation, accounting, legal, medical, occupational, architectural, engineering, consulting, advertising, marketing and planning.

**"Professional Services Contract"**: any written agreement to provide a service, including but not limited to legal, accounting, management consulting, investment banking, planning, training, statistical, research, public relations, marketing, advertising, architectural, engineering, surveying or other personal services of a consulting, professional or technical nature, for a fee, commission or other compensation, by a person or persons who are not providing such services as officers or employees of a state agency or public corporation.

**"Professional Services Contractor"**: any person, firm or corporation performing a Professional Services Contract for the County.

**"Prompt Payment"**: payment of a debt due and owing by the County before interest accrues thereon pursuant to a statement adopted in accordance with these Guidelines.

**"Proper Invoice"**: a written request for a Contract payment that is submitted by a Contractor setting forth the description, price and quantity of goods or services delivered or rendered in such form and supported by such other substantiating documentation as the County may reasonably require.

**"Public Work"**: the construction, demolition, repair, rehabilitation, removal, restoration or maintenance of any building, roadway, structure, fixture, facility, improvement or property owned by or leased to the County.

**"Receipt of an Invoice"**:

1. The date on which a proper invoice is actually received in the designated payment office; or
2. The date on which the County receives the purchased goods or services covered by the proper invoice, whichever is later.

**"Responsible"** : a potential contractor is considered responsible if it can demonstrate that it has the ability to perform successfully under the terms of the proposed Contract, taking into account the offeror's technical and financial capability. Responsibility refers to the ability of the contractor to deliver the requested items/services.

**"Responsive"**: a bid which complies, in all material respects, with the terms of the solicitation and is completed, executed, and submitted in accordance with the instructions set forth in the solicitation. Responsiveness refers to the integrity of the submitted bids and the bid process.

**"Sealed Bidding"**: a competitive procurement method under which a contract is awarded to the lowest price, responsive bid, offered by a responsible bidder.

**"Buyer"**: the individual(s) at the County responsible for purchasing general operating goods and services as well as preparing Invitations for Bids or Requests for Proposals for the County procurement contracts.

**"Services"**: A professional, consulting, technical, or other service, including but not limited to, legal, testing, accounting, bookkeeping, secretarial, management consulting, audit, investment banking, planning, training, statistical research, insurance, advertising, public relations, architectural, engineering, appraisal, janitorial, surveying, housekeeping, and waste disposal, performed for a fee, commission or other compensation.

**"Single bid"**: Two or more competitive bids are solicited and only one bid is received. A single bid is a subcategory of "Sole Source."

**"Small Procurement"**: The acquisition of goods or services under a written agreement or purchase order resulting in a cost to the County of more than \$1,000 but less than \$15,000 per year. There are 2 categories (non-bus parts and bus parts) and two levels of small purchases.

**Non Bus Parts:**

Non bus part purchases between \$1,000 and \$2,500 require a minimum of three verbal quotes and an authorized signature from one of the following:

- **Director of Purchasing**

Purchases between \$2,501 and \$10,000 require a minimum of three written quote and an authorized signature from one of the above and:

- **Director of Purchasing**
- **Commissioner of DPW**

**"Small Procurement Informal Bidding"**: A small procurement method of procuring goods or services under \$10,000, based upon competitive selection; quotes are requested and received via fax or regular/electronic mail.

**"Sole Source"**: the goods or services to be procured are available from only one responsible source; or no other goods or services will satisfy the County requirements; or prior state, federal or Board approval has been granted.

**"Solicitation"**: A purchasing entity's request for offers, including a telephone request for price quotations, an invitation for bids, or a request for proposals.

**"Surety bond"**: Refers to an agreement between a transit industry contractor or supplier and a surety bond writer that guarantees a contract obligation with a transit property. Typically, transit agencies require bonds that cover 100% of the value of a contract. If a contractor defaults on a contract or faces financial difficulties, the surety bond underwriter will owe the transit agency the full amount of the contract.

**"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.

**"Time and Material (T&M) Type Contract"**: A general compensation arrangement which provides for a fixed rate including Overhead and Profit, and material paid for at cost, plus handling charges. This type of contract is permitted only:

1. After a determination that no other compensation arrangement is suitable;
2. The contract or purchase order contains a price ceiling that the contractor exceeds at its own risk, and
3. All labor and equipment rates (including overhead and profit), are predetermined and set forth in the contract and materials are to be paid for at cost.

**"Women-owned Business Enterprise (WBE)"**: Any business enterprise which is at least fifty-one percent (51%) owned by, or in the case of a publicly-owned business, at least fifty-one percent (51 %) of the capital stock of which is owned by citizens or permanent resident aliens who are women, regardless of race or ethnicity, and such ownership interest is real, substantial and continuing. Women business owners must have and exercise the authority to independently control the business decisions of the entity. The enterprise must also be authorized to do business in New York State, be independently owned and operated, and not be dominant in its field.

## **SECTION II: GENERAL PROCUREMENT GUIDELINES**

### **1. CONTRACT ADMINISTRATION SYSTEM**

The County maintains a Contract Administration System (Appendix B) to ensure that contractors perform in accordance with the terms, conditions, and specifications of their contracts, including purchase order contracts.

### **2. BOARD APPROVAL**

The approval of the Board of Acquisition and Contracts is required for all Procurement Contracts which are for the acquisition of goods or services in the **actual or estimated amount of \$10,000 or more.**

### **3. ENSURING MOST EFFICIENT AND ECONOMIC PURCHASE**

All purchase requisitions shall be reviewed by the Director of Purchasing or the Buyer to avoid purchase of unnecessary or duplicative items. Consideration shall 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, as well as Federal funding constraints.

### **4. INTERGOVERNMENTAL PROCUREMENT AGREEMENTS**

To foster greater economy and efficiency, the County may enter into State and local intergovernmental agreements for the procurement or use of common goods and services. The requirements and standards of this document apply equally to procurements entered into under such agreements.

### **5. USE OF NY SOGS and GSA CONTRACT PRICES and EXCESS OR SURPLUS FEDERAL PROPERTY**

If allowed, the County may utilize either NYS Office of General Services (OGS) or the Federal General Services Administration (GSA) schedules for the procurement of particular goods and services. The NYS OGS, the Federal General Services Administration contract prices, and County contract prices are deemed competitive prices.

If allowed, contracts may be awarded based on the state, federal, or county contract price without additional competitive procedures. If the contract price available through the state, federal, or county price lists is lower than the lowest bid price after sealed bidding, formal bidding, or informal bidding, the bids shall be rejected and a contract awarded based upon the state, federal, or county contract price. If these sources are used, proper documentation shall be attached to the purchase order to ensure that an adequate and detailed procurement record exists.

If the Director of Purchasing or Buyer determines that the OGS Bid Contract price is not the lowest available, or if purchase under an OGS Bid Contract would result in an inordinate delay in delivery, then the regular bidding process provided in these Guidelines shall be used, and a contract awarded to the lowest responsive and responsible bidder.

If allowed the County may use Federal excess and surplus property in lieu of purchasing new equipment and property, whenever such use is considered preferable and reduces project costs.

## **6. AWARDS TO RESPONSIBLE CONTRACTORS**

The County shall make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. In making a responsible contractor determination, consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. **Responsibility** differs from responsiveness in that responsibility generally applies to the offeror. Responsive applies to the bid submission and its conformance with the specifications or requirements of the solicitation document.

## **7. WRITTEN RECORD OF PROCUREMENT HISTORY**

A properly documented Procurement file should be a complete record of procurement actions and should fully support the successful contractor's bid price. It provides a complete background as a basis for informed decisions at each step in the acquisition process. A well-documented file also supports actions taken, provides information for reviews and investigations, and furnishes essential facts in the event of litigation or legislative inquiries. If the procurement action is the result of a contract amendment or exercise of an option, sufficient data should be included to fully support the basis for the price and procurement action.

The County shall maintain records detailing the history of all procurements. At a minimum, these records shall include the following:

### **Documentation Checklist for Procurement File:**

#### Purchase Requisition

A memorandum explaining the rationale for the method of procurement

Independent cost estimates

Evidence of availability of funds

Selection of contract type

Copy of the solicitation package, all addenda, and all amendments

Copies of published notices of proposed contract action;

Names, addresses, phone numbers, and electronic mail (E-mail) addresses of contractors or vendors solicited;

Names, addresses, phone numbers and electronic mail (E-mail) addresses of contractors or vendors requesting a copy of the Invitation for Bids

Bid Tabulation Sheet

Bidders' / Proposers' packages;

The evaluations of proposals and selections of firms for negotiations and awards

The evaluations of submitted bids

A summary record of negotiations, if appropriate

Determination of responsiveness or non-responsiveness of each bid, offer, or quotation

Reasons for contractor selection or rejection

The costs negotiated by the parties and the determination that the price is fair and reasonable

A cost or price analysis, as appropriate, justifying the determination that the price is fair and reasonable

Determination of whether the goods or service may be procured under the OGS NYS Commodity Index, and if so, the price

The basis for the contract price

DBE Considerations-DBE Contract Goal, if applicable

Certified Bid Tabulation

Copies of notices to unsuccessful bidders

Notice of Award to successful bidder

A copy of the Notice to Proceed  
An original, executed contract, with Required Forms attached  
Records of any protest  
Bid, Performance, Payment or other bond documents, and notices to sureties  
Required insurance or bond documents, if any  
Adopted Board Resolution authorizing the award/contract  
All correspondence and data in support of relevant contractual actions  
Contract close-out documentation

The Procurement File for micro and small purchases shall include the following documentation:

Purchase Requisition  
Copies of any quotes received via fax, mail, or telephone  
Statement that successful bidder's price is fair and reasonable  
Copy of purchase order  
Description of method used in determining that the successful bidder's price is fair and reasonable  
Sole source justification, if applicable

#### **8. USE OF TIME AND MATERIALS TYPE CONTRACTS**

As required in FTA Circular 4220.1 E, the County shall use time and material type contracts only:

- a. after a determination that **no other type of contract is suitable**, and
- b. if the contract specifies a ceiling price that the contractor shall not exceed except at its own risk.

#### **9. SETTLEMENT OF CONTRACT ISSUES/DISPUTES**

In accordance with good administrative practice and sound business judgment, the County will be responsible 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 County of any contractual responsibility under its contracts.

Violations of the law will be referred to the local, State, or Federal authority having proper jurisdiction.

#### **10. CONTRACT PERIOD OF PERFORMANCE**

The County 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. The County will 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



## **11. INDEPENDENT COST ESTIMATES**

The County shall perform an independent cost estimate for every procurement including contract modifications, *before* receiving bids or proposals. An independent cost estimate is an estimate of the proper price level or the value of the supplies or services to be purchased. This estimate can be used in determining the reasonableness of the actual price offered. For procurements using Federal funds, this cost estimate shall be the estimated cost contained in the most recent version of the local Transportation Improvement Program (TIP).

In some cases, obtaining cost estimates may be difficult or may lie outside the competence of agency personnel. In the case of construction projects, a design firm may already be under contract and may perform this service.

Equipment estimates can often be prepared from published price lists or from past competitive procurements updated with inflation factors. In the case of specialized equipment, care must be taken that the source of the estimates is not disproportionately obtained from one supplier.

Professional services often range widely in both price and quality. It may be worth obtaining a professional cost estimate by a firm not interested in the final procurement. In the case of facility design services, industry standards to estimate design as a percent of construction are available. Other transit authorities are also a valuable source of cost estimating information if they have undertaken similar projects.

## **12. CONTRACT COST AND PRICE ANALYSIS**

A cost or price analysis is a determination that the cost or price offered by a contractor is reasonable, given current market conditions. The purpose of cost or price analysis is to ensure that the County does not pay unreasonably high prices. A cost or price analysis must be performed in connection with every procurement, including contract modifications. The method and degree of analysis is dependent on facts surrounding the particular procurement situation. Prices that are unreasonably low can also be detrimental to good procurement if they prove to be an indication that the offeror has made a mistake or misunderstood the work to be performed. All procurement files shall contain minimum documentation that the offered price is fair and reasonable.

### **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 of the services offered (e.g., under professional consulting and architectural and engineering services contracts). The cost analysis must verify the proposed cost data, the projections of the data, and must evaluate each specific element of costs and profit. The cost analysis shall include an evaluation of labor and other direct costs, overhead rates, G&A rates, and the profit factor.

A cost analysis will be necessary when *adequate price competition is lacking* and for *sole source* procurements, including contract modifications to 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.

### **Price Analysis**

A price analysis may be used in all other instances to determine the reasonableness of the proposed contract price. The County will determine which of the following price analysis techniques is appropriate for each procurement:

- a. Comparison of proposed prices received in response to the solicitation,
- b. Comparison of all prices received for recent (within last 12 months) prior procurement actions for the same or similar items. Prior price comparison may be affected by:
  - Changes in economic conditions between the times of the two procurements,
  - Differences in quantities, and
  - Inclusion of non-recurring cost in the prices. To make a fair comparison, non-recurring costs can be removed from both prices;
- c. Comparison with competitive published price lists, published market price of commodities, similar indexes, and discount or rebate arrangements, and
- d. Comparison of proposed prices with the cost estimates performed prior to the solicitation, although this alone is seldom adequate to warrant a determination that the price is reasonable.

Cost analysis differs from price analysis in that it focuses on the reasonableness of the *estimated costs of performance, not on the reasonableness of the price*. Cost analysis entails reviewing each element of cost (e.g., labor, overhead rates, and a profit factor) to determine whether the offeror's estimate contains an accurate and reasonable prediction of the cost incurred during performance. The contract price is figured by adding a rate of profit that is determined to be fair. All reasonable costs of performance can be considered. Price analysis involves examining and evaluating a proposed price without evaluating its separate cost and profit elements. Price analysis is based essentially on data from the offeror that can be independently verified.

#### **Profit Analysis**

Profit is negotiated 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, the 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.

#### **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. The County shall use Federal Cost Principles to determine allowable costs for all Federally-funded cost-reimbursement type contracts.

#### **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 by the County.

### **13. PROCUREMENTS WITH STATE AND FEDERAL FUNDS**

In all cases where procurements are made by the County with state and/or Federal funds and are conditioned upon, or subject to, laws or regulations for purchasing, the County shall observe such laws and/or regulations. This shall apply to all matters, including bidding, advertising for bids, reviewing bids, awarding Contracts, monitoring awarded Contracts and reporting awarded Contracts.

Federal regulations permit grant applicants, such as the County, to incur project costs before receiving formal approval or grant awards. It is the practice of the County not to incur costs or entertain the award of contracts for capital projects to be funded in whole or in part with Federal aid unless Federal aid supporting the projects is dedicated in an adopted Federal budget as a formula appropriation to the County or as an earmarked appropriation to the County.

#### **14. FULL AND OPEN COMPETITION**

All procurement transactions, without regard to dollar value, will be conducted in a manner that provides maximum open and free competition. The following are considered to be restrictive of competition:

- a. Placing unreasonable requirements on firms for them to qualify to do business;
- b. The specification of only a "brand name" product without listing its salient characteristics and not allowing "an equal" product to be offered. Brand names are among the most restrictive types of specification
- c. Non-competitive practices between firms or affiliated companies;
- d. Noncompetitive awards to any person or firm on retainer contracts;
- e. 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; a contractor's objectivity in performing the contract work is or might be otherwise impaired; or a contractor has an unfair competitive advantage;
- f. Any arbitrary action in the procurement process;
- g. Unnecessary experience and bonding requirements
- h. Sole Source negotiation without proper justification.

#### **15. GEOGRAPHIC PREFERENCES**

The County shall not use 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 requirement does not preempt State-licensing laws.

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.

#### **16. PREQUALIFICATION CRITERIA**

The County does not currently pre-qualify products or persons prior to solicitation. However, in the event that pre-qualification becomes necessary in the future, the County will ensure that all lists of pre-qualified persons, firms, or products that are used in acquiring goods and services are current and include no less than three (3) sources to ensure maximum full and open competition. As such, pre-qualification lists must contain a date as to when the list was last updated and a signature of the person who updated it. The County will not use pre-qualification lists that are over one (1) year in age and do not contain at least three persons, firms, or products. Also, the County will not preclude

potential bidders from qualifying during the solicitation period. This period is defined as the period from issuance of the solicitation to its closing date.

**17. WRITTEN PROCUREMENT SELECTION PROCEDURES**

The County shall use written selection procedures for procurement transactions as follows:

Solicitations shall include a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not 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.

**18. FAILURE TO RESPOND TO BID SOLICITATION**

A potential bidder may be removed from a list of prospective bidders by the Director of Purchasing if the potential bidder fails to respond to a bid solicitation for similar goods or services on three (3) consecutive occasions; provided, however, that with respect to DBEs, prior notification will be sent to the DBE Office.

**19. REQUESTS FOR DEVIATIONS FROM SPECIFICATIONS**

Specifications for goods and/or services shall be written clearly and concisely to minimize ambiguity and to ensure that the County receives the goods and/or services that are ideally suited for its needs. Where appropriate, provisions should be made in the specifications to allow bidders to seek deviations from the specifications. The purchaser and user should consider all such requests and approve those requests that enhance flexibility in bidding without sacrificing the quality or integrity of the goods and/or services being procured.

All requests for deviations that are submitted, accompanied by the County responses, shall be shared with all potential bidders. Such documentation shall be provided to all bidders prior to bid opening.

The following clause is recommended for use in all specifications for goods:

"The specifications released herewith represent the \_\_\_\_\_ which the County feels are ideally suited for its operations; however, the County will consider requests for deviations and requests for "approved equals" to the specifications. The County will accept such requests in writing up until \_\_\_\_\_

All requested deviations from these specifications will be responded to, in writing, in one of the following manners:

- (a) Approved as an equal
- (b) Rejected

The County will respond in writing to all requests no later than five (5) calendar days prior to bid opening. All requests, and the County responses thereto, will be furnished to all prospective bidders and become addenda to these specifications.

**20. WRITTEN ADDENDA**

The County reserves the right to issue clarifying information regarding the content of a procurement document should the Authority, in its sole judgment, determine it is necessary to do so.

If a request for interpretations, approved equals or clarification of specifications are submitted to the Director of Purchasing in writing regarding an IFB or RFP Document, the Director of Purchasing shall proceed in accordance with one or more of the following actions:

- a. Requests for interpretations of approved equals, and/or clarification of Specifications shall be made only in writing. Such requests must be received by the County no later than Fifteen (15) days prior to the date scheduled for Bid opening. No such request received by the County less than Fifteen (15) days prior to the date scheduled for Bid opening will be considered without the prior written authorization of the County Executive or his authorized representative.
- b. Any request for an approved equal or protest of the Specifications must be submitted on a copy of the form, if provided, fully supported with, if applicable, technical data, test results, or other pertinent information as evidence that the substitute offered is equal to or better than the Specifications requirement.
- c. The County's reply to such request(s) will be in the form of an Addenda and, where possible, postmarked TEN (10) DAYS prior to the scheduled Bid opening. Such addenda, if issued, will be mailed to each prospective Proposing Contractor and shall become part of the contract. All Proposing Contractors shall be bound by such Addenda whether or not received by them. Addenda will be on file in the offices of the the County Director of Purchasing.

## **21. WRITTEN PROTEST PROCEDURES**

The County shall include written protest procedures in its solicitations to handle and resolve disputes relating to their procurements. The Director of Purchasing shall disclose information regarding all protests to FTA. All protest decisions must be in writing. It is understood that reviews of protests by FTA will be limited to the County's failure to review a complaint or protest (Per 4220.1E), failure to comply with the Protest Procedures set forth in these Procurement Guidelines or violations of the Federal law or regulation.

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.

## **22. OPTIONS**

An option is a unilateral right in a contract by which, for a specified time, the County may elect to purchase additional equipment, supplies, or services called for by the original contract, or may elect to extend the term of the original contract. If the County elects to use options, the following requirements apply:

**Evaluation of Options** The option quantities or periods contained in the contractor's bid or offer must be evaluated 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. (To be eligible for Federal funding, options must be evaluated as part of the price evaluation of offers, or must be treated as sole source awards)

**Exercise of Options** The exercise of an option must be in accordance with the terms and conditions of the option stated in the initial contract awarded. An option may not be exercised unless it is determined that the option price is better than prices available in the market or that the option is the more advantageous offer at the time the option is exercised. The option price must be determined to be fair and reasonable, and a written justification of this determination must be included in the procurement file.

### **23. DISADVANTAGED BUSINESS ENTERPRISES**

It is the desire of the County to promote and assist participation by DBEs, M/WBEs and to facilitate a fair share of the awarding of contracts thereto.

The County DBE Liaison Officer shall maintain a list of all M/WBE and DBE entities certified to perform public work, supply items for purchase contracts, or perform personal or professional services of a kind and nature that may be needed by the Authority. The User Department shall be responsible for referencing such lists prior to the publication of a notice of procurement opportunity or informal solicitation to determine the availability of certified DBE and W/MBE entities.

The Authority will, on a routine basis, notify all vendors, contractors, consultants, or other firms with which it does business, that it will affirmatively insure that DBEs and MJWBEs will be afforded full opportunity to submit bids, quotes, or proposals in response to the County solicitations. The County will comply with all applicable equal opportunity laws and regulations.

### **24. PAYMENTS**

#### **Advance Payments**

The County shall not participate in advance payments to a contractor prior to the incurrence of costs by the contractor unless prior written concurrence is obtained from FTA. The County contracts shall not contain advance payment provisions, unless prior written concurrence is obtained from FTA.

#### **Progress Payments**

Progress payments may be used, provided the following requirements are followed:

- a. Progress payments are made only to the contractor for costs incurred (as opposed to percent of completion) in the performance of the contract, and
- b. When progress payments are used, the County must obtain adequate security (materials, work in progress, and finished goods) for which progress payments are made. Adequate security for progress payments may include taking title, irrevocable letter of credit or equivalent means to protect the County's interests in the progress payments.
- c. Percent of Completion payments are used by the County in its professional services and large construction contracts.

#### **Final Payment**

Final payment is made to the contractor when it has satisfied all the deliverable requirements called for by all provisions of the contract, including submission of all required documentation. Final payment signifies that the performance obligations of both parties to the contract have been satisfied. Before making a final payment, the Contract Administrator or Director of Purchasing shall obtain a signed release from the contractor releasing the Authority from any further claims by the contractor. The Contract Administrator/Director of Purchasing shall also obtain a signed receiving and inspection report from the lead dept. head certifying that all deliverable items have been received, inspected, and accepted as being in conformance with the contract specifications.

## **25. EMERGENCY PROCUREMENTS**

From time to time, emergency situations may arise which require that a procurement be made without following normal purchasing procedures. Emergency situations should be restricted to those times when delay in completing the procurement could result in jeopardy to persons or property. In addition, the situation leading to the emergency should be one that could not be normally anticipated. If an emergency situation occurs, it must be documented and this documentation must be attached to the purchase order or placed in the procurement file. The procurement must be approved by the County Executive.

Emergency procurements shall, to the extent that time permits, follow regular procurement guidelines concerning the solicitation of quotes and the approval of the procurements. Emergency procurements of goods and/or services costing \$10,000 or more must be authorized by the County Executive. A written memorandum justifying the emergency nature of the procurement shall be maintained in the procurement file.

## **26. PROFESSIONAL SERVICES CONTRACTS**

The following guidelines apply to the procurement of consulting or professional services such as legal, audit, planning, testing, accounting, architectural, engineering or surveying services and construction management, except to the extent that the procurement of such services are governed by State or Federal regulations.

### **Responsibility**

The County Executive and/or his designee has the responsibility for overseeing the awarding and monitoring of Professional Services Contracts. Depending on the kind of project, the County Executive by executive order authorizes formation of a Survey Committee to prepare a request for proposal, receive proposals and conduct all necessary steps to select and recommend selection for Board to approve the Professional Services Contractor. Professional Services Contracts shall be utilized by the County for those areas in which County determines such services may not be reasonably provided by the staff of the County or its subsidiary corporations or by the officers or employees of another state agency or public corporation.

### **Requirements Regarding the Selection of Professional Services Contractors**

To the maximum extent feasible, the selection of Professional Services Contractors shall be on a competitive basis, except that the Board may waive competition by resolution if it is in the best interest of the County for the Board to do so. The determination to waive competition in a particular case may be based upon any of the following criteria, but is in no way limited thereto:

- a. Specialized or unique skills, expertise, knowledge, qualification or experience are available from one source only;
- b. Specialized facilities or equipment are available from only one source;
- c. A contractor has geographical proximity to the County and such proximity is a material consideration in the award of a contract;
- d. There is a lack of responsible competition, in the sole opinion of the County, among contractors capable of performing the desired services;

- e. Selecting a contractor on a competitive basis would discourage innovative methods or technologies because, by way of example and not of limitation, a contractor has proprietary data, trade secret information or the like; or
- f. Selection without competition is otherwise necessary to the operations of the County or any of its subsidiary corporations.

Any Professional Services Contract which contains a total award up to \$50,000 must be approved by the Board of Acquisition and Contract. Recommendation for award is prepared by the Survey Committee, named by the County Executive.

Any Professional Services Contract which contains an award over \$50,000 must be approved by the Board of Legislators after review and approval of the Board of Acquisition and Contracts.

The County Executive signs the Professional Service Contract based on the approval of the appropriate Board or Boards.

The procedures for competitive negotiation outlined in these Guidelines shall be followed in the selection of Professional Service Contractors.

## **27. CONSTRUCTION CONTRACTS**

Every construction contract should include a "Changes" clause giving the grantee the unilateral right to order changes in the contract work during the course of performance, and the Contractor the duty to proceed with the work as changed upon receipt of the change order, assuming that the change is within the scope of the contract. The "Changes" clause must contain language deferring the pricing of the changed work until some later time, while obligating the Contractor to proceed with the work and resolve the issue of compensation later. Failure to reach an agreement on compensation would be a dispute to be processed according to the procedures of the *Disputes* clause of the contract.

## **28. BONDING REQUIREMENTS**

### **Bid and Performance Bonds**

To insure the adequate and expeditious provision of goods, equipment and/or services procured by the County, bid or performance bonds may be required where appropriate, or as stipulated by state or Federal law. Final payment, however, will be withheld from a vendor until the department head requesting the procurement certifies as to the successful and total completion of the goods, equipment and/or services procured.

#### **I. Bid Guarantee.**

All construction (Public Work) contracts **equal to or in excess of \$100,000** shall require bid security equal to five percent (5 %) of the bid price. The Bid Guarantee shall consist of a firm commitment that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time period specified. Bid guarantee may be in the form of a bid bond, certified check or other guaranteed negotiable instrument, or letter of credit in a form acceptable to the County.

The bid security of the successful bidder will be retained until execution of the Contract. Bid security of the unsuccessful bidders will be returned upon execution of the Contract with the successful bidder, but in no event in excess of 60 calendar days after the bid date.



In the event of neglect or refusal on the part of the successful bidder to execute the Contract and furnish the performance security and evidence of insurances within ten (10) days after written notification of the award of the Contract, the entire bid security shall be forfeited to and retained by the County as liquidated damages for such neglect or refusal.

## **II. Performance Bond.**

All construction (Public Work) contracts in **excess of \$100,000** shall require a performance bond or certified check or other guaranteed negotiable instrument or letter of credit for 100 percent (100 %) of the contract price in a form acceptable to the County guaranteeing the contractor's faithful performance of all terms under such contract.

Performance security is not mandated for product contracts.

In instances where a performance bond is offered, the bond shall be in the amount of the Contract and issued by a duly incorporated entity authorized to guarantee the faithful performance of Contracts and to do business in the State of New York as a surety.

## **III. Letter of Credit.**

A letter of credit used as bid or performance security must:

- a. be an irrevocable letter of credit issued by a bank or financial institution of B-rating or better,
- b. be signed by an authorized representative of the issuing institution,
- c. name the County as beneficiary, and

be in a form otherwise acceptable to the County. The letter of credit must state that an amount representing at least ten percent (10%) of the bid price is available to be drawn on, unconditionally, by the County under the expressed terms and conditions. These terms and conditions, including the location at which the County can draw the funds, an effective date and an expiration date, should be clearly stated in the letter of credit.

## **IV. Labor and Material Payment Bonds.**

All construction (Public Work) contracts, regardless of amount, shall require labor and material payment bonds. Payment bonds are executed in connection with contracts 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. Minimum payment bond amounts required from contractors are as follows:

- a. 50% of contract price, for contracts of \$1 million or less;
- b. 40 % of the contract price if the contract price is more than \$1 million, but less than \$5 million,
- c. \$2.5 million if the contract price is more than \$5 million.

## **V. Maintenance Bonds.**

All construction (Public Work) contracts, in excess of \$25,000 shall require, at a minimum, a one (1) year maintenance bond, which period shall commence as of the date of final acceptance. The maintenance bond shall be in the full amount of the Contract.

**VI. Waiver.**

Bid and maintenance bond requirements may be waived prior to the bid date by the County Executive or his designee for cause. In instances where such bonds are not required, payment shall be withheld until full and complete performance has been accomplished under the terms of the contract.

Performance and security and labor and material payment bonds may be waived by the County Executive or his designee, prior to the bid date, in accordance with State Finance Law 137(1), provided that the aggregate amount of the Contract is under \$15,000 and that the County retains twenty percent (20%) from each progress payment or estimate until the entire contract work has been completed and accepted, at which time the County Executive or his designee may authorize, pending the payment of the final estimate, the release of up to seventy-five percent (75 %) of the retained percentage.

**29. INSURANCE**

Each Contractor/Vendor shall maintain the following kinds and limits of insurance as imposed by law or the contract upon him with respect to all work and operations performed under the contract by the Contractor/Vendor and each of their subcontractors. Additionally the County will request it's Insurance Consultant to review insurance limits on a contract by contract basis.

- A. Worker's Compensation and Employers Liability Insurance  
Limits: Not less than required by law.
- B. New York State Disability Insurance  
Limits: Not less than required by law.
- C. Comprehensive General Liability including:
  - Premises-Operations
  - Explosion and Collapse and Underground hazards (XCU)
  - Products/Completed Operations
  - Contractual
  - Broad Form Property Damage
  - Independent Contractors
  - Personal Injury Liability, Hazards A, B & C
  - Products including Completed Operations, to be kept in force for a least two (2) years after work has been completed.

Each policy shall have Bodily Injury and Property Damage limits not less than:

\$1,000,000 per occurrence  
\$2,000,000 Products/Completed Operations Aggregate  
\$1,000,000 Personal & Advertising Injury Aggregate  
\$2,000,000 General Aggregate

- D. Comprehensive Automobile Liability Insurance including coverage for owned, non-owned or hired automobiles. Limits not less than:
  - \$1,000,000 per accident, Bodily Injury and Property Damage
- E. Excess (Umbrella) Liability providing Bodily Injury and Property Damage Liability limits not less than:

\$5,000,000 per occurrence  
\$5,000,000 aggregate

Oneida County shall be included as additional named insured on the Contractor's/Vendor's policy. The Amendment to the Contractor's/Vendor's policy naming the County, et al as additional insured for liability coverage shall state that such coverage shall be primary insurance protection on behalf of the County et al. Insurance Services Office, Inc. (ISO) form #CG0043 or its equivalent shall be included in the policy.

F. Other requirements:

All of the required insurance coverage shall be written through insurance carriers licensed to do business in the State of New York.

Each insurance contract shall be amended to provide for sixty (60) days prior written notice of cancellation, non-renewal or reduction in coverage to be given to the County, et al.

All liability insurance contracts shall be amended to eliminate the provisions applicable to the insurance carriers' rights of subrogation as it pertains to the County, et al.

All liability insurance contracts shall be amended to not eliminate or reduce the coverage provided to the County et al in the event of a breach of the Contract/Vendor, their agents, employees, directors and/or sub-contractors to comply with the terms, provisions and conditions of liability insurance contracts.

If any of the liability coverage are provided on a claims-made basis, the policy date or retroactive date shall predate this contract. The termination of any such claims-made contract or applicable reporting period shall be no earlier than the termination date of coverage required to be maintained by the applicable provisions of this agreement.

Certificates of Insurance shall be filed with: County of Oneida, Attention: Director of Purchasing, 800 Park Ave., Utica, NY 13501. Such certificates of insurance shall contain specific language so as to adequately advise the County of compliance with the aforesaid requirements of insurance. At the County's request, each Contractor/Vendor agrees to provide actual certified copies of the required insurance contracts.

The County, et al reserves the right to amend the requirements of insurance protection it may deem necessary.

**30. PROMPT PAYMENT PROCEDURES**

In accordance with Section 2880 of the New York Public Authorities Law, the County has developed the following rules and regulations detailing its prompt payment policy:

Requesting a Payment

The Contractor may submit an invoice/voucher for goods and/or services only after properly completing an appropriately executed Purchase Order and providing the goods and/ services contracted for.

A proper invoice submitted by the Contractor shall be required to initiate any payment, except where the Contract provides that the Contractor will be paid at predetermined intervals.

Schedule for Making a Payment

The County will make payment on the properly submitted invoice within thirty (30) days of receipt of a complete and proper invoice.

Interest will be paid when prompt payment is not made; interest will accrue to the Contractor at the same rate as the rate the County is receiving on its invest able funds. Interest will be paid from the mortgage tax revenues received by the County on a monthly basis.

Conditions Which Justify an Extension of the Payment Date

In the opinion of the County, the following conditions may reasonably justify extension of the date by which Contract payment must be made:

- a. When, in accordance with specific statutory or Contractual provisions, payment must be preceded by an inspection period or by an audit to determine the resources applied or used by a Contractor in fulfilling the terms of the Contract;
- b. When the necessary governmental appropriation required authorizing payment has yet to be enacted;
- c. When the invoice must be examined by the federal or state government prior to payment; or
- d. When the date by which the Contract payment must be made is modified in accordance with the following section.

The County shall have fifteen (15) calendar days after receipt of an invoice at its designated payment office to notify the Contractor of:

- a. Defects in the delivered goods or services;
- b. Defects in the invoice; or
- c. Suspected improprieties of any kind, and the existence of such defects or improprieties shall prevent the commencement of the time period for computing interest.

In the event the County fails to notify a Contractor of such defects within fifteen (15) calendar days of receiving the invoice, the number of days allowed for payment of a properly corrected invoice will be reduced by the number of days between the fifteenth (15th) day and the day that notification of said defect was actually transmitted to the Contractor. If the County, in such situations, fails to provide reasonable grounds for its contention that a defect or impropriety exists, the date by which the Contract payment must be made in order for the County not to become liable for interest payments shall be calculated from the date of receipt of an invoice.

Inapplicability

These procedures shall not apply to payments due and owing by the County:

- a. Under New York's Eminent Domain Procedure Law;
- b. As interest allowed on judgments rendered by a court pursuant to any provision of law other than those contained in this procedure;
- c. To the Federal government, to any state agency or its instrumentalities, to any duly constituted unit of local government, including but not limited to counties, cities, towns,

villages, school districts, special districts, or any of their related instrumentalities, to any other public authority or public benefit corporation, or to any employees of the foregoing when acting in, or incidental to, their public employment capacity; and

- d. In situations where the County exercises a legally authorized set-off against all or part of the payment due the Contractor.

### **31. BUY AMERICA REQUIREMENTS**

The County is a grantee of the FTA. As a recipient of FTA funds, the County is required to comply with the Buy America requirements specified in 49 CFR Part 661, which state that, except in certain enumerated situations, no funds may be obligated by the FTA for a grantee project unless all iron, steel and/or manufactured items used in the project are produced in the United States. The "Buy America" requirements apply to Construction Contracts and Acquisition of Goods or Rolling Stock. Currently, there is no dollar threshold in the FTA regulations, thus "Buy America" provisions apply to all contracts, both operating and capital, regardless of the dollar amount involving Federal funds. However, FTA has established a general waiver for inclusion of this provision in small purchase procurements (defined by Federal Regulations as less than \$100,000), so actual applicability for this clause is for contracts greater than \$100,000.

The "Buy America" requirements state that:

- a. The County shall adhere to the "Buy America" clause set forth in its grant contract with the FTA.
- b. The County shall include in its bid specification for procurement an appropriate notice of the "Buy America" provisions; such specifications to require, as a condition of responsiveness, that the bidder submit with its bid a completed "Buy America" certificate.
- c. Whether or not a bidder certifies that it will comply with the applicable requirement, such bidder is bound by its original certification and is not permitted to change its certification after bid opening. A bidder that certifies that it will comply with the applicable "Buy America" requirements is not eligible for a waiver of those requirements.

The following statement is contained in the County's grant contracts with FTA:

"Sections 165(a) and (b) of the Surface Transportation Assistance Act of 1982, as amended, require that Federal funds shall not be appropriated or utilized for any contract awarded unless all iron, steel and manufactured products used in FTA-funded projects are produced in the United States; however, these general requirements may be waived by the Administrator of the FTA or his/her designee if the Administrator finds:

1. That the application of such general requirements would be inconsistent with the public interest;
2. That the materials for which a waiver is requested are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;
3. That the inclusion of a domestic item or domestic material will increase the cost of the contract between the grantee and its supplier of that item or material by more than twenty-five percent (25 % ). The Administrator will grant this "price differential" waiver if the amount of the lowest responsive and responsible bid offering the item or material that is not produced in the United States multiplied by 1.25 is less than the amount of the lowest responsive and responsible bid offering the item or material produced in the United States; or

With regard to the procurement of buses and other rolling stock (including train control, communication and traction power equipment) under the Urban Mass Transportation Act of 1964, that (1) the cost of components produced in the United States is more than sixty percent (60%) of the cost of all components, and (2) **final** assembly takes place in the United States.

A Certificate of Compliance with Section 165(a), whereby the bidder certifies compliance with the requirements of Section 165(a) of the Surface Transportation Assistance Act of 1982, as amended, and the applicable regulations contained in 49 C.F.R. Part 661, shall be completed for all federally-assisted procurements of steel, iron, or manufactured products. A Certificate of Compliance with Section 165(b)(3), whereby the bidder certifies compliance with the requirements of Section 165(b)(3) of the Surface Transportation Assistance Act of 1982, as amended, and the applicable regulations contained in 49 C.F.R. Part 661, shall be completed for all federally-assisted procurements of buses, other rolling stock and associated equipment."

### **32. LIQUIDATED DAMAGES**

Liquidated damages assessment in applicable County contracts shall be at a specific rate per day for each day of overrun and this daily rate must be specified in the specific contract. For Federally funded contracts, any damages recovered must be credited to the project involved unless FTA permits otherwise.

## **SECTION III: DETAILED PROCUREMENT GUIDELINES**

When a purchase is initiated by the County, it will fall into one of the following three procurement categories:

**Micro-Purchases:** purchases resulting in cost to the County under \$1,000

**Small Purchases:** purchases resulting in cost to the County between \$1,000 and \$10,000 per year

**Large Purchases:** purchases resulting in an aggregate cost to the County of \$10,001 or more per year.

### **Methods of Purchase**

Purchases for FTA funded projects can be done using one of the following methods:

Sealed Bids/Invitation for Bids

Competitive Negotiation/Request for Proposals

Procurement of Architectural and Engineering Services

Non-competitive Negotiation/Sole Source

Following are the steps that must be performed to correctly acquire goods and services on behalf of the County. All documents used in any procurement must be filed in the Procurement file. The folder should be labeled with the name of the actual item or service procured and the contract term. The County Procurement Checklist shall be inside the front cover of the folder. All applicable documents shall then be filed in the order they are listed on the Procurement Checklist. The responsibility for assuring that the file contains the required documents rests with the lead Purchasing Personnel for the particular procurement.

The County reserves the right to determine the time frame concerning the solicitation and awarding of bids.

### **1. INFORMAL PROCUREMENT PROCEDURES**

Informal procurement procedures are appropriate and applicable to those relatively simple and informal procurements of goods and/or services costing, in the aggregate, **less than \$10,000**. Following is a summary of the County micro-purchases and small-purchases procurement procedures:

#### **A. Procurement by Micro-Purchase: <\$1,000**

Procurements of goods and/or services costing less than \$1,000 do not require competitive quotations. When employing this type of procurement, the Department of Purchasing must ensure equitable distribution among qualified suppliers in the local area. Determination that the price is fair and reasonable, and how this determination was derived, must accompany the requisition or be present in the procurement file. For micro-purchases, a fair and reasonable price determination is made based on price analysis. Purchases of this amount are exempt from *Buy America Requirements*.

#### **B. Procurement by Small Purchase: >\$1,000 and <\$10,000**

Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, bus parts or other property that cost more than \$1,000 but do not cost more than \$10,000. NOTE: *The Davis-Bacon Act applies to federally funded construction contracts over \$2,000.*

There are two levels and two categories of small purchases:

- **\$1,000.00 - \$2,500:** require a minimum of three verbal quotations and Director of Purchasing signature.
- **\$2,501.00 - \$10,000:** require a minimum of three written quotations and signature from Director of Purchasing.

Purchase greater than \$10,000 require Board of Acquisition and Contracts Approval.

Documentation of quotations shall accompany the requisition or be present in the procurement file. A determination that the price is fair and reasonable and how this determination was derived must accompany the requisition or be present in the procurement file.

The County procurement files contain vendor lists that are compiled and maintained by the County Procurement Manager/DBE Liaison Officer. These lists include interested vendors, who request to be placed on the lists, as well as DBE-certified vendors and former vendors supplying goods and/or services to the County. These lists are to be used when obtaining quotations for this type of procurement. Whenever possible, the County seeks to award contracts for goods/services with DBE-certified or potential DBE-certifiable vendors.

For all procurements of non bus parts goods and/or services costing at least \$1,000, but less than \$10,000, the following procedures must be followed:

1. The department requesting the purchase shall prepare an *independent cost estimate* (approximate cost) for the desired item or service.
2. The requesting department shall develop *written specifications* for use in the solicitation of quotations. The nature and extent of items and/or services requested should be limited to only that deemed necessary to meet the needs of the user department
3. The requesting department shall prepare and submit a *Purchase Requisition* to the Purchasing Department for review and distribution through the approval process. The independent cost estimate shall be included on this Form with appropriate levels of approval, proper account number and suggested vendors. The *Purchase Requisition* must include a price justification explaining why the price accepted by the County is fair and reasonable and how this determination was made. (Performed by Procurement Manager)
4. All *Purchase Requisitions* must have signature of the respective Commissioner, Department Head or their designee of requisitioning department.
5. To assure reasonable competition, at least three (3) verbal quotations for purchases >\$1,000 and <\$2,500 and 3 written quotes for purchases >\$2,500 and >\$10,000 shall be obtained. The Purchasing Department shall make every effort to provide an opportunity for qualified vendors, including certified DBEs, to offer quotes for procurements. Solicitations may be limited to one source only if the Director of Purchasing/Senior Buyer determines that only one source is reasonably available.
6. If three (3) or more quotes cannot reasonably be obtained due to an insufficient number of suppliers capable of meeting the specifications, including timely delivery, the Director of Purchasing/Senior Buyer shall make such facts known in a written memorandum that shall be part of the file for the purchase.



7. The Director of Purchasing/Senior Buyer shall examine the NYS OGS Commodity Index to determine whether the required item may be obtained from that source on terms advantageous to the Authority. If the item is available under a NYS OGS contract at a price lower than the three quotes, the Director of Purchasing/Senior Buyer shall purchase the item off the NYS contract providing that the contract is in compliance with FTA Circular 4220.1E.
8. The names and addresses of the vendors solicited and the prices quoted shall be retained in the Procurement File for such time period as established by the County, in accordance with its records retention policy, or for such time period as is otherwise required by law. The Director of Purchasing/Senior Buyer shall obtain written confirmation of the successful vendor's quote, containing the terms and conditions of sale, which requirement may be satisfied by the successful vendor's invoice.
9. The Director of Purchasing/Senior Buyer shall complete a Requisition Worksheet explaining why the successful vendor was selected and why this vendor's offer was the most advantageous to the County; price and other factors must be detailed. This form must be part of the Procurement File as well as Board approval for purchases >\$10,000.
10. The most common contractual instrument used to accomplish a small purchase is a purchase order. Once the successful vendor is chosen and approved by the Board for purchases >\$10,000 the Assistant Director/ Buyer shall prepare a purchase order and send the purchase order information to the vendor. A copy of the PO is also forwarded to the requisitioning department.
11. Once the goods/services are received, the requisitioning department receives the PO in the software system. Once the PO has been received in the software system the Accounting Department can pay the invoice.

Purchase greater than \$10,000 require Board of Acquisition and Contracts Approval.

## **2. FORMAL BIDDING (ITEMS/SERVICES \$10,000 and OVER)**

All procurements of **\$10,000 or more** require the selection of contractors on a formal, competitive basis, unless otherwise indicated in these Guidelines, and must be advertised in the New York State Contract Reporter. Advertisements may also be placed in local newspapers or trade publications as deemed appropriate by the Director of Purchasing.

Procurements in this category fall into one of two types: Invitation for Bids (IFB) or Request for Proposals (RFP). County Executive approval must be given in order to proceed with purchases greater \$10,000. Board recommendation and approval is required prior to award. Contracts for all formal procurements must contain *termination for cause and termination for convenience provisions, as well as breach of contract provisions and remedies for breach of contract.*

### **A. Sealed Bid/Invitation for Bids Method of Procurement**

This method of procurement is the preferred method for acquisitions with an annual cost totaling **ten thousand dollars (\$10,000) or more** when one or more of the following factors is present:

- A complete, realistic, and exact specification or purchase description is available;

- Two or more responsible bidders are willing and able to compete effectively for the business;
- 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 lowest price or best value, when the best value determination can be made on price alone, among responsive bids and responsible bidders;
- No discussion with bidders is needed either before or after bid submission.

**Sealed Bid Procedures:**

Sealed bids shall be publicly solicited and a firm, fixed-price contract (lump sum or unit price) shall be awarded to the bidder whose bid is (1) lowest in price and (2) conforms with all the material terms and conditions of the bid specifications, including a successful responsible bidder and responsive bid determination.

The following procedures must be followed in this type of procurement:

- 1. Request to Initiate Procurement**
- 2. Determination of Funding Source and Grant Status**
- 3. Bid Development**
- 4. Distribution**
- 5. Accept Bids**
- 6. Conduct Bid Opening**
- 7. Review bids for conformity and responsiveness:**
- 8. Prepare Certified Bid Tabulation**
- 9. Prepare Resolution for Board of Directors**
- 10. Award Bid**

**1. Request to Initiate Procurement:**

The Department of DPW and Department of Planning requesting the purchase shall prepare an *independent cost estimate* (approximate cost) of the desired item or service. The cost estimate ensures a clear basis for the County determination that the benefits of the procurement warrant its cost. The cost estimate also provides a basis for price analysis prior to contract award to assure reasonableness of prices received in the procurement process.

The independent cost estimate may be presented in the following formats:

- An estimate included in the purchase requisition;
- The estimate included in the local Transportation Improvement Program;
- An independent estimate prepared by a professional services consultant retained by the County to prepare the specifications.

The cost estimate must be included in the Procurement File as part of the procurement history.

The Commissioner requesting the procurement shall prepare a *Purchase Requisition* with the appropriate authorization and submit it to the Director of Purchasing for review at least 10 weeks and 12 weeks respectively prior to date of Board approval for standard goods/services and non-standard goods/services. This form shall include a written statement containing, at a minimum, a description of the services required, the reason(s) such services are required, and the required or estimated schedule or duration of the services.

All Purchase Requisition >\$10,000 must have the Commissioner signature of authorization. The independent cost estimate shall accompany the Purchase Requisition.

## **2. Determination of Funding Source and Grant Status:**

Purchasing Department shall review the Purchase Requisition to determine the funding source for the procurement. The funding source account number shall be indicated on the Purchase Requisition. In instances where a procurement activity is to be financed in whole or part by either federal or New York State grants, the procurement activity will not be commenced until there is written confirmation from the Grants Administrator that grant funding is available.

## **3. Bid Development:**

Purchasing Department shall review trade magazines, attend trade shows, conferences, etc. to ensure thorough knowledge of new technologies regarding the equipment or services to be procured.

Purchasing Department shall review bid documents and specifications used in former bids for the requested item/service as a starting point for developing the current solicitation.

Purchasing Department shall incorporate relevant information from previous bids or other transit authority bids to meet the needs of the current bid.

Purchasing Department shall review and update current bid with regard to all recently promulgated regulations.

The Invitation for Bids (IFB) shall provide prospective offerors with all the information necessary to develop a responsive bid. The IFB shall inform bidders of the specific steps in the bid process, the scope of commodities, services, hardware, or software to be provided, the method of award, and the terms and conditions of the contract. A copy of the IFB shall be included in the Procurement File.

Specifications defining the items or services sought shall be outlined, in detail, by the requesting department of the County, with the advice and assistance of Department of Planning and Department of DPW. These specifications/product descriptions must be complete, adequate and realistic.

Specifications must not only describe the product, but must also include reliability and quality assurance requirements. Criteria for inspecting, testing, and accepting the product shall also be included in all the County specifications.

The County may request specifications for information regarding a product or service from qualified vendors, but must exercise great care to ensure that the final specification is generic.

The detailed specifications shall be forwarded to the Purchasing Department for review and inclusion in the bid package. The DBE Officer will assist in determining DBE percentage goals for individual contracts and review applicable DBE clauses. The DBE Officer shall also provide a list of DBE firms eligible to provide a quote for the particular procurement.

Bid specifications must clearly define the scope of work or clearly describe the desired item. The nature and extent of items and/or services requested should be limited to only that deemed necessary to meet the needs of the user department; there shall be no "gold plating" in the County specifications.

Specifications shall encourage full and open competition, and must not rule out one or more vendors or favor a particular vendor. Therefore, use of brand names in specifications is allowed solely for the

purpose of providing a standard for quality of performance. When requesting a "brand name or equal" the County shall carefully identify its minimum needs and clearly set forth those salient physical and functional characteristics of the brand name product in the solicitation.

After the completion of draft bid specifications, and prior to public advertisement, the Director of Purchasing shall provide a copy of the specifications to the department or division representative requesting the procurement for review and comments. The department or division representative shall return his/her comments to the Director of Purchasing within five (5) business days.

The Bid Package shall include the following minimum elements:

- Part 1: Invitation for Bids, including bid opening date, time, and location,
- Part 2: Detailed Specifications, including an estimated quantity to be purchased,
- Part 3: Bid forms
  - Bid Checklist
  - Price Bid Form "Official Tender"
  - Non-Collusion/Ineligible Bidders Certification
  - Certificate of Authority
  - DBE Certification, if applicable
  - Certificate of Lower Tier Participant
  - Buy America, if applicable
  - Lobbying, if applicable
  - Approved Equals, if applicable
  - Executive Order 127, if applicable
- Part 4: Instruction to Bidders
- Part 5: General Conditions
- Part 6: Insurance Requirements

The Bidder's Qualifications section of an IFB defines the minimum acceptable qualifications for a bidder to be considered acceptable for an award. In addition to a determination of the bidder's responsibility when drafting this section, the County shall consider which qualifications should be specified to ensure the bidder:

- Is technically qualified to perform the proposed work;
- Has, or can secure, adequate financial resources to perform the proposed work or deliver the proposed goods;
- Is able to comply with the delivery or performance schedule, taking into account all existing business commitments;
- Has a satisfactory record of past performance;
- If selected, would not result in a conflict of interest, with regard to other work performed by the firm, or individual staff conflicts.

Qualifications may include the length of time a firm has been in business, the expertise and experience of staff and the bidder's experience with projects of similar scope and size. Appropriate business references shall also be required.

To ensure uniformity, all IFB's must include a Bid Form on which bidders insert bid prices in a uniform format. This form shall provide bidders the ability to record all relevant costs in an organized manner.

The Method of Award must be:

- I. determined in advance of releasing the IFB,
- II. specified in the IFB,
- III. followed in awarding the contract, and
- IV. documented in the Procurement File. Awards can be made by item, by lot, by grand total bid for all items, by district or zone, if the County is bidding for multi-location delivery, or a combination of these methods.

To protect both the bidder and the County, the IFB shall specify that the bids shall be sealed.

The County shall identify possibilities where a firm or its subcontractors may have the corporate capability to compete for follow-up work resulting from a contractual design effort or R&D effort. In these cases, a firm may have a bias in performing design work; therefore, consideration will be given to restricting the firm's eligibility for follow-up contracts in such situations.

It is often necessary to communicate with potential contractors prior to receipt of bids or proposals. These communications usually involve the need to clarify the County requirements or are requests to modify specifications. It is important that all communications be documented in writing and, when appropriate, distributed to other bidders or proposers. Bid and proposal documents should state that verbal communications are non-binding.

The Director of Purchasing/Procurement Manager shall anticipate the possibility of additional quantity requirements when preparing bid specifications and, if necessary, will include option provisions for additional quantities in the bid document and the contract.

#### **4. Distribution**

Advertisements requesting bids shall be placed in at least one newspaper of general circulation in Oneida County, the *New York State Contract Reporter*, and other publications as deemed advisable to promote the opportunity for competitive bidding. The Director of Purchasing shall advertise solicitations in such a way as to ensure free and open competition, and shall make every reasonable effort to apprise bidders of solicitation opportunities. Such efforts may include, but are not limited to:

- Notifications in local news publications, trade journals and magazines, and national publications;
- Mailings to industry associations;
- Notifications to known offerors on the County Bid Lists;
- Mailing lists maintained by OGS and other State Agencies; and
- Contact with the Department of Economic Development to determine known M/WBE bidders.

Notice of the IFB shall also be placed on the County web site. (Once the website has been developed)

Potential bidders shall be advised as to the date, time and place of the bid opening in any bid advertisements.

It is advisable when publishing in a local newspaper to publish the advertisement for one (1) day. In national trade magazines, one publication is considered to be sufficient. The County advertises in the *Observer Dispatch and Rome Sentinel* (fulfilling local advertisement requirements), the *New York State Contract Reporter*, and, for those items with a national market, *Passenger Transport*, published by APTA (fulfilling national public advertisement requirements). The County is currently researching a publication with a primarily minority readership to fulfill minority business advertisement requirements.

Requests for publication shall be e-mailed to the above-referenced publications at least one week prior to the desired publication date.

As a general rule, bidding time (time from bid release to bid opening) will be not less than fifteen (15) calendar days when procuring standard commercial goods and/or services and not less than thirty (30) calendar days when procuring other than standard goods and/or services. Bidding time may be limited to fifteen (15) days for non-standard goods and/or services.

#### Pre-Bid Conference

The County shall provide all information to all prospective bidders for any procurement which is formally bid. When deemed appropriate, the Director of Purchasing/ Commissioner of DPW and technical support staff shall conduct a pre-bid conference with prospective bidders regarding applicable bidding procedures, forms, terms and conditions, goals, requirements, and other relevant information. Attendance at such pre-bid conferences shall be determined on an event to event basis. A written record of questions posed and answered at pre-bid conferences shall be distributed to all prospective bidders.

#### Mail Bid Package to current vendor list and update list as requested

The County shall maintain current lists of vendors for regular procurements. A bid package shall be sent to all vendors on these lists on the day of release. Vendors shall be advised that such vendor lists are a courtesy offered by the County and that all prospective bidders are responsible for keeping themselves apprised of upcoming bid opportunities with the County.

Any vendors requesting a bid package shall be mailed a package and shall be added to the bid list. DBE-certified vendors shall be noted on the vendor lists.

### **5. Accept Bids:**

All bids received under formal bidding procedures shall remain sealed until the bid opening time and date specified in the Invitation for Bids and the advertisements. Immediately upon receipt, bids must be date stamped and the time must be written on the package. The package must be initialed by the the County employee taking receipt of the package.

Within five minutes prior to bid opening, a survey should be performed of the mail room and reception area to determine if any additional bids have arrived. No bids shall be accepted after the due

date and time. Bids received after the due date and time shall be returned unopened to the vendor with a cover letter of explanation, a copy of which shall be maintained in the Procurement File.

Vendor bids contain confidential information which is protected under the law and may not be released prior to opening. It is therefore essential to keep vendor bids under secure, locked conditions.

Prior to bid award, vendor bid information is excluded from Freedom of Information Act requirements.

## **6. Conduct Bid Opening:**

The Purchasing Department shall determine when the time set for bid opening has arrived and will so declare to those present.

The designated Department of DPW/ Purchasing personnel shall make the following announcement prior to opening any bids:

"We are here to open bids for \_\_\_\_\_ I will not answer any questions at this bid opening. Vendors may submit questions in writing, and I will respond in writing. Nothing said at this meeting shall change any information contained in the written Invitation for Bid document."

The bid opening shall be open to all bidders, as well as the general public.

Bids shall be publicly opened and read at the date, time and place specified in the *Invitation for Bids*. Only bids registered up to the time indicated in the IFB shall be opened. Any bid received after the date and time specified shall be retained unopened by the Director of Purchasing, unless return is requested by the late bidder/proposer.

At least two (2) representatives of the County shall be present during bid opening.

Upon request, the County shall provide an attorney for a bid opening to assure compliance with the bid opening procedures and provide advice as needed. Other the County personnel may attend bid opening upon request by the Director of Purchasing/ Commissioner of DPW.

During the opening of each bid, an indicator shall be placed in the *Received* column of the *Procurement Documentation Information* section of the *Bid Procurement Checklist* as each required document is found to be included in the bid submission. Remaining sections of this form are utilized in the postaward review of each bid.

All bids received on time will be opened and the bid information will be read aloud to all present and recorded as part of the bid file. Specific information other than announcement of the bid price and name of the bidder will not be given to prospective bidders at bid opening. The Director of Purchasing will inform all present that any such request must be submitted in writing and will be responded to in like form.

No determination as to the validity of any bid, the qualification of any bidders or the compliance of any bid package with the provisions of the bid documents will be made at the bid opening.

When specified in bid documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which is the lowest bid. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of.

The Director of Purchasing, or a designee thereof, shall compile a list of all the County personnel, bidders, and their representatives present at the bid opening. This list shall be placed in the Procurement File.

### **7. Review bids for conformity and responsiveness:**

Immediately after the bid opening, the Director of Purchasing/ Procurement Manager shall review all submitted bids to determine which bid packages are complete and responsive to the bid requirements as set forth in the official Invitation for Bids document.

Contractors must be considered responsible to receive an award, regardless of the procurement method used to select the contractors. The Procurement File shall include a written outline of the specific basis for a determination of contractor responsibility.

#### Evaluating Responsiveness and Responsibility

Factors which should be considered by the County in evaluating **responsiveness** should include the following:

- Has all required information been provided?
- Does the bid contain mistakes?
- Has bidder failed to commit to a firm price?
- Are there unacceptable qualifications or conditions tied to the bid?
- Has the bid been prepared in accordance with the bidding instructions?
- Are unacceptable provisions included in the bid?
- Has the bidder altered or limited any of the contract or solicitation provisions?
- Has the bidder offered non-conforming products or services?
- Has the bidder failed to acknowledge amendments to the IFB issued by the County?

To be considered **responsible**, consideration must be given to all the following requirements:

- Financial resources adequate to perform the contract, or the ability to obtain them
- Ability to meet the required delivery or performance schedule, taking into consideration all existing commercial and government business commitments
- A satisfactory performance record with the County or references
- A satisfactory record of integrity and business ethics (talk with references)
- The necessary organization, experience, accounting, and operational controls, and technical skills, or the ability to obtain them
- Compliance with applicable licensing and tax laws and regulations
- The necessary production, construction, and technical equipment and facilities, or the ability to obtain them
- Compliance with Affirmative Action and Disadvantaged Business Program requirements
- Other qualifications and eligibility criteria necessary to receive an award under applicable laws and regulations

Note that the foregoing list is not exhaustive. Minor deviations which are immaterial and do not effect quantity, quality or delivery may, be waived by the County if such waiver does not prejudice or affect the relative standing of the bidders.



In evaluating the **responsibility** of an apparent low bidder or proposed subcontractor, the County may consider, among other factors, whether the subject's record with the County or other public owners includes or demonstrates:

- Lack of adequate expertise, prior experience with comparable projects, or financial resources necessary to perform the work outlined in the contract in timely, competent, and acceptable manner. Evidence of such factors may include failure to submit satisfactory evidence of insurance, surety bonds, or financial responsibility, or a history of terminations for cause.
- Engagement in criminal conduct in connection with any other government contracts or the conduct of business activity that involves such crimes as extortion, racketeering, bribery, fraud, bid-rigging and embezzlement.
- Grave disregard for the safety of employees, State personnel, or members of the public. Consideration will be given to whether employees who will be assigned to work on the project are properly trained and whether the equipment to be used is safe and functioning properly.
- Willful noncompliance with the State's Labor Laws regarding prevailing wage and supplement payment requirements, including consideration of any pending violations.
- Disregard for other State Labor Laws, including child labor, proper and timely wage payments and unemployment insurance laws.
- Violations of the State Workers' Compensation Law including failure to provide proof of proper workers' compensation or disability coverage.
- The failure to abide by State and federal statutes and regulations regarding efforts to solicit and utilize disadvantaged, minority and women-owned business enterprises as potential sub-contractors.
- The submission of a bid that is mathematically or materially unbalanced.
- The submission of a bid which is so much lower than the County's confidential engineer's estimate that it appears unlikely that the contractor will be able to complete the project satisfactorily at the price bid.
- The presentation of false or misleading statements or any other issue that raises serious questions about the responsibility of the bidder or proposed subcontractor,

The County must award to the lowest bidder whose bid is responsive and who is determined to be a responsible bidder. Not only must the submitted bid be responsive to the bid solicitation, the vendor must also exhibit that (s)he is responsible.

The County shall award the contract in accordance with the Method of Award set forth in the IFB.

The County may award all items bid, or award some and not others, provided that the Method of Award description allows for award by item or lot. The County may elect not to award a contract. The County may award a contract to an offeror, even if only one bid is submitted.

The Director of Purchasing/ Procurement Manager shall analyze the lowest responsive quote from the responsible bidder to determine if the price quoted is fair and reasonable. This analysis can be

performed by comparing the quoted price to other recent equivalent purchases and/or current published catalog pricing.

The low responsive bid shall be compared to the independent cost estimate. If only a single bid is received, staff will prepare a cost and/or price analysis to determine if the bid is fair and reasonable.

Previous to awarding any procurement, the *New York State List of Debarred Contractors* and the U. S. *General Comptroller's List of Debarred Contractors* must be reviewed to assure that the apparent successful vendor is not included on that list.

The Director of Purchasing shall complete the *Bid Procurement Checklist* and place in the Procurement File.

When a bid is rejected because the prospective contractor is found to be not responsible, the Director of Purchasing shall sign, and place in the file a *Determination of Non-Responsibility* form that states the basis for this determination. Documents and reports supporting a determination of responsibility or non-responsibility, including any pre-award survey reports, shall also be included in the contract file.

### **Rejection of Low Bid**

Any and all bids may be rejected if there is a sound documented business reason.

In all cases where a low bid is being rejected, or is being recommended for rejection, whether the procurement is being solicited through formal or informal bidding procedures, the Director of Purchasing, in concert with the originating department or division, shall submit a memorandum to the Board of Acquisition and Contracts, copied to all parties concerned, stating the reasons for such rejection and summarizing the bids received. Reasons may include, without limitation, the failure to meet DBE goals or to show a good faith effort regarding the same, or that the proposed goods and/or services are not in conformance with the bid specifications. A copy of the recommended vendor's quote and the rejected vendor's quote shall be attached to the memorandum.

With respect to Contracts funded by the Federal Transit Administration (the "FTA"), FTA concurrence (approval) must be obtained in cases where the lowest responsive and responsible bid is being rejected.

### **8. Prepare Certified Bid Tabulation:**

The Director of Purchasing/ Commissioner of DPW or designee shall prepare a Certified *Bid Tabulation*, listing all the vendors who participated in the bid, and the prices they submitted. The bids are ranked from lowest to the highest, based on the stated Method of Award.

The selection process shall begin with the lowest bid and continues upward until a responsive bid/responsible bidder is determined. If the award is not being made to the lowest price or best value offer among responsive and responsible bidders, the County shall document in the Procurement File the reason(s) for rejection of each bid. In all cases, the award must be made in accordance with the Method of Award outlined in the IFB.

Upon request, copies of the bid tabulation may be faxed to those vendors who submitted bids and could not attend the bid opening.

A copy of the *Certified Bid Tabulation* must be placed in the Procurement File.

### **9. Prepare Resolution for Board of Acquisition and Contracts:**

All contracts in excess of \$10,000, as well as all contracts financed by grants from outside agencies, must be approved by the County Board of Acquisition and Contracts. The Director of Purchasing/ Commissioner of DPW or designee shall prepare a resolution for approval by the Board authorizing the County Executive to enter into a contract with the apparent successful vendor. The resolution must be prepared and adopted prior to contract award.

The resolution shall include the procurement method used, the advertising venues used, successful vendor's name and address, the unit price of the item solicited, the estimated annual cost of the contract, determination of responsiveness, the account number to which the purchases of the item shall be charged, and an award recommendation.

A copy of the resolution shall be included in the Procurement File.

### **10. Award Bid:**

In cases where a substantial effort has been made to solicit bids and no bids are tendered, the County Executive shall be so advised by the Director of Purchasing. A decision regarding the iteration of the bid process or the negotiation of a contract for the purchase of the goods and/or services from a Sole Source shall be made by the Director of Purchasing.

#### Notice of Award

After all pre-award approvals have been obtained, a firm, fixed-price contract award will be made to the lowest responsive bid from a responsible bidder. The Director of Purchasing or designee shall send a "Notice of Award." This letter shall notify the contractor that it has been determined as the lowest bidder and shall request submission of any post-award documentation required by the bidding documents or by legal counsel.

Bonds and insurance certificates received from the contractor will be reviewed to assure that the contents comply with the requirements of the bid documents. To make this assurance, it is useful to seek the review of the County insurance consultant and legal counsel. Once the bonds and insurance certificates are approved, the contract documents are sent to the successful vendor.

#### Notice to Proceed

The Director of Purchasing will issue a "Notice to Proceed" to the successful vendor when the appropriate *Certificates of Insurance* and/or bonds have been received by the County from the vendor. Such Certificates of Insurance and/or bonds must be placed in the Procurement File. The "Notice to Proceed" makes reference to all the terms and conditions in the bid documents which now represent the subject contract. The "Notice to Proceed" executes the contract.

#### Notification of Unsuccessful Bidders

The Director of Purchasing/ Commissioner of DPW shall notify unsuccessful vendors promptly in writing. Upon request, an unsuccessful offeror shall be provided a debriefing as to why his/her bid was unsuccessful; this debriefing shall occur as soon as possible after selection of the successful bidder.

#### Contract Execution

A Purchase Order shall be issued for each contract awarded (with the exception of those procurements exempt from the PO process) at the request of the Director of Purchasing, against which all charges for the contracted item shall be made for the term of such contract. However, if the contract award does not commit the County to a fixed price amount but, rather is a function of the number of units to be acquired, the amount of the Purchase Order is to be based upon the best estimate of costs to be incurred, as determined by the end-user in consultation with the Director of Purchasing.

**B. Procurement by Competitive Negotiation/Request for Proposals (RFP)**

Competitive negotiation is generally used when conditions are not appropriate for the use of sealed bids. As costs become less important in relation to other factors driving the procurement, competitive negotiation becomes a more appropriate procurement tool. In competitive negotiation, proposals are requested from a number of sources. Negotiations are normally conducted with more than one of the sources submitting offers. Either a fixed-price or cost reimbursable type contract is awarded in this type of procurement.

This method of procurement is the preferred method for acquisitions of **ten thousand dollars (\$10,000) or more** when one or more of the following factors is present:

- The desired goods or services cannot be precisely defined, described or standardized.
- The desired end product is conceptual in nature.
- A Cost Reimbursement type contract is contemplated.
- Discussions concerning the technical aspects and price negotiation are intended.
- Offerors are to be given the opportunity to revise the price or technical aspects of their proposal.
- Price alone cannot be the determinative factor in award. Quality, qualifications, performance data, or other contractual factors are to be considered in selecting the most advantageous offering.
- Artistic or aesthetic values supersede price as primary selection criteria.

**Competitive Negotiation Procedures:**

1. **Request to Initiate Procurement:**
2. **Determination of Funding Source and Grant Status**
3. **Request for Proposal Development**
4. **Distribution:**
5. **Accept Proposals**
6. **Open proposals**
7. **Review proposals for conformity and vendor responsibility**
8. **Prepare Certified Bid Tabulation**
9. **Proposal Evaluation**
10. **Prepare Resolution for Board of Legislators**
11. **Award Contract**

1. **Request to Initiate Procurement:**

Same as # 1 under **A. Sealed Bid/Invitation for Bids Method of Procurement**

2. **Determination of Funding Source and Grant Status:**

Same as # 2 under **A. Sealed Bid/Invitation for Bids Method of Procurement**

### **3. Request for Proposal Development and Distribution:**

#### **Investigate new technologies**

Director of Purchasing shall review trade magazines, attend trade shows, conferences, etc. to ensure thorough knowledge of new technologies regarding the equipment or services to be procured.

#### **Review former RFP documents and specifications; Incorporate relevant information**

Director of Purchasing shall review RFP documents and specifications from previous procurements of the desired item/service as a starting point for developing the current solicitation.

Director of Purchasing shall perform research and incorporate relevant information to meet the needs of the current bid.

Director of Purchasing shall review and update current RFP with regard to all recently promulgated regulations.

#### **Prepare RFP**

Requests for Proposals shall set forth generic specifications or requirements that define the goods or services sought, but may not, knowingly, favor a particular offeror, product, or service offering.

Specifications, or a Scope of Work, shall be outlined by the Planning Department/ DPW, with the advice and assistance of the department or division requesting the procurement and, when necessary, any and all supporting departments.

Specifications are critical in communicating to the vendors the services requested. In an effort to provide vendors with a clear understanding of their role and responsibilities, the County shall provide as much specificity as possible in describing the scope of work, thereby reducing vendor risk and providing an opportunity for the proposal of the best solution at the least cost.

The nature and extent of items and/or services requested should be limited to only that deemed necessary to meet the needs of the user department.

The County may request specifications for information regarding a product or service provided by a vendor, but will exercise great care to ensure that the final product or service specification is generic.

For procurements of technology, if a vendor has sole responsibility for preparing and furnishing specifications for a technology proposal which is to be competitively procured, that vendor is prohibited from subsequently bidding on the procurement either as a prime vendor or as a subcontractor.

Similarly, a vendor may not be awarded a contract to evaluate offers for products or services which would include evaluation of the vendor's own products or services. These prohibitions shall be discussed with potential vendors as early as possible in the procurement process and prior to issuing an RFP.

The above prohibitions shall not apply if:

- o The vendor is the sole source or single source of the product or service;

- More than one vendor has been involved in preparing the specifications for a procurement proposal;
- The vendor has furnished specifications or information regarding a product or service it provides at the request of the agency, but the vendor has not been directly requested to write specifications for the product or service or for the agency technology proposal.

The detailed specifications/scope of work shall be forwarded to the Director of Purchasing for review and inclusion in the RFP. The DBE Officer will assist in determining DBE percentage goals for individual contracts and review applicable DBE clauses.

After the completion of draft specifications, and prior to public advertisement, the Director of Purchasing shall provide a copy of the specifications to the department or division representative requesting the procurement for review and comments. The department or division representative shall return his/her comments to the Director of Purchasing within five (5) business days.

The RFP shall include the following minimum elements:

- Request for Proposal, including date of any pre-proposal conference, proposal due date, time, and location for delivery;
- Detailed Specifications or Scope of Work;
- Vendor Qualifications;
- General Conditions, including contract term;
- Identification of all evaluation factors, and their relative importance;
- Identification of Evaluation Methodology and Method of Award;
- Outline of Financial/Cost Proposal Requirements;
- Any relevant Federal or State Required Contract Clauses;
- Appropriate Required Forms.

### **Vendor Qualifications**

The Vendor Qualifications section defines the minimum acceptable qualifications a vendor must have to be considered acceptable for an award. In addition to a determination of the vendor's responsibility when drafting this section, the County shall consider which qualifications should be specified to ensure the bidder:

- Is technically qualified to perform the proposed work;
- Has, or can secure, adequate financial resources to perform the proposed work or deliver the proposed goods;
- Is able to comply with the delivery or performance schedule, taking into account all existing business commitments;
- Has a satisfactory record of past performance;
- If selected, would not result in a conflict of interest, with regard to other work performed by the firm, or individual staff conflicts.

Qualifications may include the length of time a firm has been in business, the expertise and experience of staff and the bidder's experience with projects of similar scope and size. Appropriate business references shall also be required.

### **Evaluation Methodology and Method of Award**

Given the unique character of proposal evaluation methods, the the County Procurement Guidelines do not set forth strict evaluation procedures or all inclusive processes and methods. Typically, evaluations comprise a comparative analysis of the technical proposals, a separate comparative analysis of the cost proposals, and a method for combining the results of the technical and financial proposal evaluations to arrive at the selection of the proposal judged most advantageous to the County.

The objective of the evaluation process is to develop and apply evaluation criteria to ensure that:

- o Proposals are evaluated objectively, and
- o the County selects the vendor proposing the "best value" solution.

The Evaluation Instrument/Methodology and Method of Award must be:

- o determined in advance of releasing the RFP,
- o specified and described in the RFP,
- o followed in evaluating the submitted proposals and awarding the contract, and
- o documented in the Procurement File.

The overall evaluation criteria must not be altered after opening the proposals, with the exception of minor changes and only if the modifications are justified and evidence presented to ensure that the changes would not materially benefit or disadvantage an offeror.

The evaluation criteria and methodology must be documented in the procurement file **prior to** receipt of proposals.

### **Financial Proposal Requirements**

The County shall provide instructions in all its RFPs for developing cost proposals. The objective of this component of the vendor's proposal is to ensure that both the County and the vendor understand the financial terms and conditions associated with the services to be provided.

The County shall structure the requirements to ensure that financial terms and conditions are defined for purposes of both Cost Proposal evaluation and terms and conditions of the contract, if awarded.

With respect to the latter, the County shall require that fees be defined for services over the life of the contract term. For example, to the extent that the County desires to cap fee increases over time, the bases for the cap shall be defined in the cost requirements (e.g., annual inflation capped by the Consumer Price Index).

The County shall require the following information from vendors in their cost proposals:

#### Outline Cost Proposal Approach

- Distinguish one-time fees (e.g., development) from on-going fees (e.g., operations) and specify appropriate assumptions (e.g., annual volumes).
- Define and Describe Reimbursement Approach; examples include:
  - Fixed fee for deliverables,
  - Daily rates for defined categories of staff services,
  - Price per unit, possible sliding scale based on volume increments,
  - Cost plus profit margin,
  - Maximum upset price.
- Describe Pricing Strategies for Future Services (development, goods and operations);
- Describe Potential Fee Increases, including adjustments for inflation, etc. over life of contract (CPIU, or cost based justification);
- Describe Strategies for Providing Savings to the County;
- Financial Proposal shall be inclusive of all fees.
- Means of Compensation
- Define billing structure and frequency,
- Define reimbursement mechanism (direct fee).

#### **Standards and Penalties**

The County shall consider approaches to be used during the life of the contract to monitor vendor performance. To the extent that the County plans to monitor performance against standards, the County shall include the standards in the RFP, along with any plans for enforcing the standards (e.g., financial penalties).

Standards shall be structured to be easily quantified and objectively measurable. For example:

- Standards may be set for timeliness, quality, and performance;
- Sanctions for not meeting these standards may include:
  - Reduction in fees,
  - Liquidated damages,
  - Cost recovery (e.g., interest).



### **Sample Agreement**

The County shall publish invariable and mandatory contract terms and conditions in the RFP. These conditions assist the offerors in assessing the risk associated with the required contract terms and the extent to which the contract terms are compatible with the offerors' policies.

Prior to public advertisement, the Director of Purchasing shall circulate the Request for Proposals ("RFP") to the following persons for written approval:

- o County Executive;
- o end user department head(Commissioner of DPW and Planning;
- o the County legal counsel; and
- o DBE Liaison Officer

The County will identify possibilities where a firm or its subcontractors may have the corporate capability to compete for follow-up work resulting from a contractual design effort or R&D effort. In these cases, a firm may have a bias in performing design work; therefore, consideration will be given to restricting the firm's eligibility for follow-up contracts in such situations.

It is often necessary to communicate with potential contractors prior to receipt of proposals. These communications usually involve the need to clarify the County requirements or are requests to modify specifications. It is important that all communications be documented in writing and, when appropriate, distributed to other proposers. Proposal documents should state that verbal communications are non-binding.

### **4. Advertise RFP**

An advertisement requesting proposals shall be placed in at least one newspaper of general circulation in Oneida County, the *New York State Contract Reporter*, and other publications as deemed advisable to promote the opportunity for competitive bidding. The County shall advertise solicitations in such a way as to ensure free and open competition, and shall make every reasonable effort to apprise bidders of solicitation opportunities. Such efforts may include, but are not limited to:

- o Notifications in local news publications, trade journals and magazines, and national publications;
- o Mailings to industry associations
- o Notifications to known offerors on the County Bid Lists;
- o Mailing lists maintained by OGS and other State Agencies;
- o Contact with the Department of Economic Development to determine known M/WBE bidders.

Notice of the RFP shall also be placed on the County's web site, when it is complete.

The due date and time and delivery location for proposals shall be included in any advertisements.

It is advisable when publishing in a local newspaper to publish the advertisement for one (1) day. In national trade magazines, one publication is considered to be sufficient. The County advertises in the Observer Dispatch and Rome Sentinel (fulfilling local advertisement requirements), the New York State Contract Reporter, and, for those items with a national market, the Passenger Transport, published by APTA (fulfilling national public advertisement requirements).

Requests for publication shall be faxed to the above-referenced publications at least one week prior to the desired publication date.

As a general rule, bidding time (time from RFP release to due date) will be not less than thirty (30) calendar days.

### **Pre-Proposal Conference**

The County shall provide all information to all prospective bidders for any procurement which is formally bid. When deemed appropriate, the Director of Purchasing and technical support staff will conduct a pre-proposal conference with prospective proposals regarding applicable proposal procedures, forms, terms and conditions, goals, requirements, and other relevant information.

Attendance at such conferences shall be determined on an event by event basis. A written record of questions posed and answered at pre-proposal conferences shall be distributed to all prospective bidders.

Events may arise which require the County to modify RFP requirements prior to submission of proposals. In such cases, the County shall communicate such modifications, in writing, to all vendors participating in the process, and shall require written acknowledgement from each vendor that the modifications have been received.

### **Mail RFP to current vendor list and update list as requested**

The County shall maintain a current vendor list for regular procurements. All vendors on this list shall be sent an RFP on the day of release. Vendors shall be advised that such vendor lists are a courtesy offered by the County and that all prospective proposers are responsible for keeping themselves apprised of upcoming proposal opportunities with the County.

Any vendors requesting an RFP shall be mailed a package and shall be added to the bid list. DBE-certified vendors shall be noted on the vendor lists.

## **5. Accept Proposals:**

All proposals received under formal procedures shall remain sealed until the proposal due date and time specified in the Request for Proposals and the advertisements.

Immediately upon receipt, proposals must be date stamped and the time must be written on the package. The package must be initialed by the County employee taking receipt of the package.

Within five minutes prior to proposal due date and time, a survey should be performed of the mail room and reception area to determine if any additional proposals have arrived. No proposals shall be accepted after the due date and time. Proposals received after the due date and time shall be returned unopened to the vendor with a cover letter of explanation, a copy of which shall be maintained in the Procurement File.

Proposals contain confidential information that is protected under the law and may not be released prior to opening. It is therefore essential to keep proposals under secure, locked conditions. Prior to bid award, proposals are excluded from the Freedom of Information Act.

#### **6. Open proposals:**

The Director of Purchasing shall determine when the due date and time set for proposals has arrived.

RFPs shall be opened at the time and date specified in the *Request for Proposals*. Only proposals registered up to the time indicated in the RFP shall be opened. Proposals received after the filing date must be returned to the offeror(s) unopened.

##### Deleting Requirements After Proposal Submission

The County may eliminate requirements provided that the basis for the change is justified and the discretionary authority to make such changes is set forth in the RFP. The RFP need not be reissued, although vendors submitting proposals must be notified, in writing, of the deletions.

##### Modifying or Adding Requirements After Proposal Submission

The County may elect to either modify or add requirements. Under these circumstances, the RFP must be reissued, with the changes, to all vendors known to be participating in the RFP.

If the RFP is reissued after 45 days from the original date of RFP issuance, a notice must be published in the publication(s) where the original RFP notice appeared;

The County shall establish a new proposal submission date and modify the evaluation criteria and instrument to reflect the requirement modifications or additions;

The County shall request written acknowledgements from the vendors that the reissued RFP has been received.

#### **7. Review proposals for conformity and vendor responsibility:**

Same as # 7 under **A. Sealed Bid/Invitation for bids Method of Procurement**

#### **8. Prepare Certified Bid Tabulation:**

(1)A *Certified Bid Tabulation* shall be prepared, listing all the vendors who submitted proposals, and the prices they quoted. Upon request, copies of the bid tabulation may be faxed to those vendors who submitted proposals.

(2)A copy of the *Certified Bid Tabulation* shall be placed in the Procurement File.

#### **9. Proposal Evaluation:**

Depending on the scope and breadth of the procurement, the County may organize an evaluation team to meet the unique nature of the procurement.

The Director of Purchasing shall distribute the proposals to the appropriate staff members or evaluation team for review, with a *Proposal Review Spreadsheet*. The Director of Purchasing shall schedule a proposal review meeting for the Evaluation Team, and include this date with the distribution memorandum.

Technical proposals shall be evaluated by measuring the extent to which the proposal and the offeror can attain the objectives of the solicitation as set forth in the RFP and fulfill the requirements outlined in the RFP. Criteria used in evaluating proposals may include, but not be limited to:

- Proposal work plan and methodology.
- Experience of vendor in providing similar services and/or goods.
- Management capability of vendor.
- Vendor's overall past performance.
- Extent to which the proposal is responsive to RFP requirements,
- Qualifications and experience of vendor's proposed staff.
- Conformance with the schedule of work set forth in the RFP.

Numerically based quantitative approaches (e.g., Criterion A is four times more important than Criterion B, which is two times more important than Criterion C).

Price shall be considered in the evaluation unless the procurement is a federally funded Architectural and Engineering procurement.

Overall cost and/or distribution of cost over the scope of work may be considered (distribution of cost across tasks).

Qualitative approaches (e.g., Criterion A is more important than Criterion B, which is more important than Criterion C).

The County may award all or parts of the proposed scope of services provided that such agency discretion is set forth in the RFP. The County may elect not to award a contract. The County may award a contract to an offeror if only one proposal is submitted.

#### Rejection of Proposals

Any and all proposals may be rejected if there is a sound documented business reason.

In all procurements, the Director of Purchasing, in concert with the originating department or division, shall prepare and place in the Procurement File, a memorandum stating the rejection reasons for the unsuccessful offerors and summarizing the proposals received. Reasons may include, without limitation, the failure to show a good faith effort regarding DBE Goals, or that the proposed goods and/or services are not in conformance with the RFP requirements. A copy of the recommended vendor's quote and the rejected vendors' quotes shall be attached to the memorandum.

#### Negotiation

- a. The Evaluation Team shall identify the proposals that are technically compliant with the RFP.

- b. The Evaluation Team shall individually review and evaluate all technically compliant proposals, and develop scores for each proposal.
- c. The full Evaluation Team will then convene to review and discuss the individual evaluations and to combine the individual scores to arrive at a composite technical score for each firm.
- d. Once the overall ranking of the technical proposals is determined, firms with an unacceptably low technical score will be eliminated from further consideration. The remaining proposals are within the "competitive range" (those proposals that can potentially be awarded the contract).
- e. After the composite technical score for each firm has been established, the cost proposal will be opened and additional points will be added to the technical score, based on the price bid. The maximum score for price will be assigned to the firm offering the lowest total all-inclusive maximum price. Appropriate fractional scores will be assigned to other proposers.
- f. The County may select one (1) or more firms with which to negotiate after preliminary evaluation of the proposals or, if negotiations are not necessary, the Evaluation Team may select the firm with the highest composite score.
- g. Invariable required contract conditions should be set forth as such in the RFP to facilitate negotiations.
- h. For strategic advantage, the County shall negotiate any controversial contract terms prior to the notice of award.
- i. Best and final offers (BAFOs) shall be requested of all proposers determined to be in the "competitive range" (technically compliant with the RFP).
- j. The County must evaluate the BAFOs and award either a Firm Fixed Price-type or a Cost Reimbursement-type contract to the vendor whose BAFO is most advantageous to the County.
- k. Previous to awarding any procurement, the *New York State and United States Lists of Debarred Contractors* shall be reviewed to assure that the apparent successful vendor is not included on that list.
- l. The award shall be made to the firm(s) whose proposal(s) will be the most advantageous to the County, with price, qualification and other factors considered, using the evaluation criteria set forth in the RFP as the basis for the County decision.
- m. The Director of Purchasing shall analyze the successful vendor's price or cost quote to determine if the cost/price is fair and reasonable. The Director of Purchasing may also obtain support information from the department head requesting the procurement and evaluating the proposals.
- n. The successful vendor's quote shall be compared to the independent cost estimate. Staff shall prepare a cost and/or price analysis to determine if the bid is fair and reasonable.

#### **10. Prepare Resolution for Board of Legislators:**

All contracts in excess of \$10,000, as well as all contracts financed by grants from outside agencies, must be approved by the County Board of Legislators. The Director of Purchasing shall prepare a resolution for approval by the Board authorizing the County Executive to enter into a contract with the apparent successful vendor. The resolution must be prepared and adopted prior to contract award.

The resolution shall include the procurement method used, the advertising venues used, successful vendor's name, the unit price of the item solicited, the estimated annual cost of the contract, determination of responsiveness, the account number to which the purchases of the item shall be charged, and an award recommendation.

A copy of the adopted resolution shall be included in the Procurement File.

#### **11. Award Contract:**

In cases where a substantial effort has been made to solicit proposals and none are submitted, the County Executive shall be so advised by the Director of Purchasing. A decision regarding the iteration of the RFP process or the negotiation of a contract for the purchase of the goods and/or services from a Sole Source shall be made by the Board of Acquisition and Contracts.

##### Notice of Award

After all pre-award approvals have been obtained, a contract award will be made to the successful vendor. The Director of Purchasing or designee shall send a "Notice of Award." This letter shall notify the contractor that it is the successful vendor and shall request submission of any post-award documentation required by the RFP documents or by legal counsel (insurance certificates, bonds, etc.).

##### Notice to Proceed

Bonds and insurance certificates received from the contractor shall be reviewed to assure that the contents comply with the County requirements. To make this assurance, it is useful to seek the assistance of the County's insurance consultant and legal counsel. Such Certificates of Insurance and/or bonds must be placed in the Procurement file.

The Director of Purchasing will issue a "Notice to Proceed" to the successful vendor. The "Notice to Proceed" makes reference to all the terms and conditions in the bid documents which now represent the subject contract. The "Notice to Proceed" executes the contract.

##### Notify Unsuccessful Vendors

The Director of Purchasing shall notify unsuccessful vendors promptly in writing. Upon request, an unsuccessful vendor shall be provided a debriefing as to why his/her proposal was unsuccessful; this debriefing shall occur as soon as possible after selection of the successful vendor, and must be limited solely to the evaluation results as they apply to the requesting vendor's proposal. .

#### **C. Procurement of Architectural and Engineering (A&E) Services**

The County shall use a qualifications-based procurement method based on the **Brooks Act** when contracting for Federally-funded A&E Services Contracts (as required in 40 U.S.C., Section 541 and 49 U.S.C. Section 5325(d)). Other types of services considered to be A&E Services include program

management, construction management, feasibility studies, preliminary engineering, design, surveying, mapping, and services which require performance by a registered or licensed architect or engineer. .

The **Brooks Act** requires that:

1. Offeror's qualifications are evaluated excluding price as a factor
2. Negotiations be conducted only with the most qualified offeror
3. Failing agreement on price, negotiations with the next most qualified offeror are conducted until a contract award can be made to the most qualified offeror whose price is determined to be fair and reasonable.

The procedures for general competitive bidding outlined in Section III, above, apply to procurements of this type, with the following changes in the evaluation process:

#### **RFP Preparation**

The County shall solicit only technical proposals from each offeror. The RFP shall not request any price information.

#### **Proposal Evaluation/Negotiation**

The methodology for evaluating proposals shall be qualifications based. The evaluation factors and the weighting of each factor must be included in the RFP package.

Submitted proposals are ranked based solely on the evaluation factors outlined in the RFP.

Price negotiations commence with the most qualified firm resulting from the evaluation factor review. If price negotiations are not successful, negotiations will end, and can then commence with the second most qualified firm. This process continues until a successful negotiation is achieved. Once negotiations end with a potential contractor, they cannot be re-established at a later time.

According to Federal Requirements, this "qualifications based procurement method" can be used only for the procurement of A&E Services. This method of procurement cannot be used to obtain other types of services, even if 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 that any state adopts, or has adopted by statute, a formal procedure for the procurement of architectural and engineering services.

In this procurement type, knowledge of local conditions and building codes is a relevant factor in the quality of the A&E services, so the prohibition against geographic preferences does not apply. A&E Proposals may be evaluated in terms of their knowledge of the locality of the project, provided that application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project.

#### **D. Procurement by Non-Competitive Negotiation (Sole Source).**

Non-competitive negotiation involves procurement through solicitation of a proposal from a Sole Source, or, after solicitation of a number of sources, competition is determined to be inadequate. A

contract amendment or change order that is not within the scope of the original contract is considered a Sole Source procurement that must comply with this section.

Procurement by noncompetitive negotiation may be used only when procurement is infeasible under micro-purchase, small purchase, competitive bidding (formal advertising), or competitive negotiation procedures and at least one of the following circumstances applies:

1. The item is available only from a Single Source;
2. A public exigency or emergency exists whereby the urgency for the requirement will not permit a delay resulting from competitive solicitation
3. The FTA authorizes non-competitive negotiation (for Federally-funded contracts only)
4. After solicitation of a number of sources, competition is determined to be inadequate
5. For *Federally funded procurements*, the item is an associated capital maintenance item as defined in 49 U.S.C. Section 5307 (a)(1) that is procured directly from the original manufacturer or supplier of the item to be replaced. The County shall certify, in writing, to FTA that: (1) such manufacturer or supplier is the only source for such item; and (2) the price of such item is no higher than the price paid for such item by like customers.

When a noncompetitive procurement is necessary in circumstances other than those outlined above, written FTA approval is required only if Federal funds are involved in the procurement.

A single source is not acceptable for purposes of sole source award until the County staff investigates and documents one (1) or more of the following circumstances:

1. The proposed source is the original manufacturer and the terms and conditions of a viable warranty would be violated by the installation of unauthorized parts or components in existing equipment, machinery, vehicles, or systems, or "servicing" by uncertified or unauthorized personnel, and there are no other sources from which authorized parts or servicing from certified or authorized personnel may be obtained.
2. The proposed source possesses exclusive, limited rights in data, patent rights, copyrights, secret processes, or control of the basic raw material.
3. The proposed source is the provider under an existing "term contract" and the procurement constitutes a sub-award there under.
4. The goods or services or services are not available through an existing contract awarded through a competitive procurement method,
5. A price or cost analysis establishes that the proposed price is fair and reasonable.

A single bid is not acceptable for purposes of sole source award until the County staff:

1. Canvas all prospective bidders from whom bids were solicited to learn the causes for the lack of bid submissions,
2. Evaluate and document the responses received in number 1, above,



3. Reconsider the bid requirements and specifications,
4. Document findings supporting the need for the original requirements and the sufficiency of the specifications, and that the single bidder is responsive and responsible or that the proposer is qualified and the proposal is acceptable, and
5. Conduct a price or cost analysis to establish that the bid price is fair and reasonable.

#### Advertising Sole Source Procurements

For Proposed Single Source awards in the actual or estimated amount of ten thousand dollars (\$10,000) or more, for which competitive bids or proposals have not been solicited in the preceding twelve (12) months, a *Notice of Procurement Opportunity* must be published in the New York State Contract Reporter.

The notice shall set forth the County's intent to award the contract without competitive bidding or proposals on the basis that the goods or services are available from one (1) responsible source. Further, the notice shall invite any person or firm to submit data and information proving that the required item/service can be obtained from other than the proposed single source.

#### **E. Rolling Stock Procurements: Pre-award and Post-Delivery Audits**

**Rolling** stock procurements shall be conducted in accordance with the requirements of Section 120) of the Federal Mass Transit Act of 1964, as amended, and the FTA regulations contained in 49 CFR Part 663 ("Pre-Award and Post-Delivery Audits of Rolling Stock Purchases"). Specifically, the County shall complete a pre-award audit prior to entering into a formal contract for the purchase of rolling stock. .

**The pre-award audit shall include:**

- o ***A Buy America Certification;***
- o ***A Purchaser's Requirements Certification; and***
- o ***Where appropriate, a manufacturer's Federal Motor Vehicle Safety Standards ("FMVSS") Certification.***

The pre-award Buy America Certification certifies that:

FTA granted a written waiver from the Buy America requirements for the rolling stock to be purchased, or

The County is satisfied that the rolling stock to be purchased meets the following requirements of the *Surface Transportation Assistance Act of 1982*, as amended:

1. The procured rolling stock will contain a minimum of 60% domestic products;
2. Final assembly of the procured rolling stock will occur in the United States.

Each vendor must complete Buy America Certification (included in the bid package) certifying compliance with the Buy America Requirements and the Federal Motor Safety Standards as

prescribed in 49 CFR 663.1 and 663.43. In addition, each vendor must supply documentation verifying that their vehicles meet the criteria listed in #2 above.

The pre-award Purchaser's Requirements Certification certifies that:

1. the rolling stock presented for purchase is the same product described in the solicitation specifications, and
2. the proposed manufacturer is a responsible manufacturer with the capability to produce a vehicle that meets the County specifications as set forth in its solicitation.

If a vehicle is procured that is subject to the FMVSS issued by the National Highway Traffic Safety Administration (the "NHTSA"), the County shall maintain all applicable certifications received (in both the pre-award and post-delivery stages) in the procurement file, including a copy of the manufacturer's self-certification that the vehicle complies with the relevant FMVSS. In the event the procured vehicle is not subject to the FMVSS issued by the NHTSA, the County shall compile a memorandum certifying receipt of a statement to that effect from the manufacturer.

the County shall complete a post-delivery audit prior to accepting title to the rolling stock.

The post-delivery audit shall include:

1. **A post-delivery Buy America Certification;**
2. **A post-delivery Purchaser's Requirements Certification; and**
3. **When appropriate, a manufacturer's FMVSS Self- Certification Information Form.**

The Buy America and FMVSS post-delivery certification processes are similar to those completed during the pre-award audit, with the exception that the post-audit review reflects information based on the buses actually delivered, as opposed to the buses proposed for purchase.

The post-delivery purchaser's requirements certification process is different from the pre-award purchaser's requirements certification process. For the post-delivery purchaser's requirements certification, the County must certify that:

1. For procurements involving ten (10) or more vehicles:
  - The County sent an inspector to the manufacturer's final assembly facility to visually inspect and road test the vehicles.
  - The inspector prepares a report that includes, at a minimum, accurate records of all bus construction activities, description of how the construction and operation of the buses fulfills the contract specifications
  - The delivered vehicles were visually inspected and road tested
2. For procurements of ten (10) or fewer vehicles, or any number of primary manufacturer standard production and unmodified vans:
  - The vehicles were visually inspected and road tested and they meet the contract specifications.

**The County staff shall review FTA publication No. *DOT-T-94-06 Conducting Pre-Award and Post-Delivery Audits for Bus Procurements* for further guidance.**

## **SECTION IV: PROTEST PROCEDURES**

The following Protest procedures apply to both the pre-and post-bid stages of procurement, both of which contain elements that may be subject to protest. If the pre-bid stage has passed and no protest or appeal has been filed in accordance with the regulations set forth herein, the pre-bid elements will no longer be subject to appeal. When the post-bid procedure begins, only issues that have become evident through the opening of the bids are subject to appeal. Any issue which falls within the definition of a pre-bid element cannot be appealed during the post-bid stage unless said issue is only detectable by award of the bid.

The County must notify FTA of written protests in all instances when FTA funds are involved in the procurement for which the protest is being filed.

All appeals and protests must be in writing and must be marked "Protest" and sent via certified mail or courier to the following address:

**ONEIDA COUNTY**  
**ATTENTION: County Executive**  
**PROTEST**  
**800 Park Ave**  
**Utica NY, 13501**

The County assumes no responsibility for appeals or protests that do not reach the County Executive office on a timely basis.

No awards will be made until all bid protests are resolved.

Failure to maintain strict compliance with these procedures as set forth herein will result in automatic disqualification of the protest.

### **A Pre-Bid Opening Protests**

If a bidder can demonstrate that the specifications issued by the County are unduly exclusionary and restrictive, or that Federal, state or local laws or regulations have been violated during the course of the procurement process, the bidder may seek a review by the County Executive or his appointed representative. Pre-bid opening protests shall be clearly identified "Protest" and submitted in writing to the County as early as possible, but in no event later than five (5) days prior to the date of bid opening. Within four (4) business days after receipt of a pre-bid/proposal protest, the County Executive shall make one of the determinations outlined in paragraph (C) below.

### **B Post-Bid/Proposal Opening Protests**

If a bidder has grounds to protest the acceptance or rejection of any or all offers or bids to a contract, or to the award thereof, or to any such action proposed or intended by the County, the bidder must formally submit a written protest to the County Executive no later than five (5) business days after the bid/proposal opening date, outlining in detail the action or the proposed or intended action to which he/she protests.

**C Rulings on Protests**

Within ten (10) business days after receipt of a pre-bid or post-bid protest, the County Executive shall render one of the following determinations:

- Protest is overruled
- Protest is substantiated. The County Executive shall issue instructions to remedy issues relating to the protest
- Procurement activity is suspended until further written notification by the County Executive.

The determination shall be in writing and shall provide, at a minimum, a general response to each material issue raised in the protest. All documents submitted by the protestor and/or County's staff and reviewed by the decision-maker in the determination shall form and be retained by the County as the formal record of the dispute resolution process.

The issuance of the foregoing determination is the County's final decision of the dispute.

All interested parties (including the successful bidder, all rejected bidders and any other parties which the County in its sole discretion determines are interested parties) shall be notified of any protests that are filed.

The County shall refrain from awarding a contract within five (5) days of the date a decision is rendered by the Executive Director regarding a protest, unless the County determines that any one or more of the following criteria exist:

1. The items to be procured are urgently required;
2. Delivery or performance will be unduly delayed by the failure of the County to make a prompt award; or
3. Failure to make a prompt award will otherwise cause undue harm to the County or the Federal government.

**D Protestor's Appeal to the FTA**

In the event that the County fails to abide by the protest procedures set forth above, and Federal funds are being utilized in connection with the procurement, the protestor may seek a review by the FTA.

Protests shall be filed with the FTA no later than five (5) days after a final decision is rendered under the County's protest procedure. In instances where the protestor alleges that the grantee failed to make a final determination on the protest, protestors shall file a protest with FTA no later than five (5) days after the protestor knew or should have known of the County's failure to render a final determination on the protest.

Specific FTA filing procedures are set forth in FTA Circular 4220.1E. The County shall also provide all further information necessary to file a protest with the FTA.

**APPENDIX A**

**FTA CIRCULAR C.4220.1E**



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.<sup>1</sup>
- 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 21<sup>st</sup> 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.

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<sup>1</sup> 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.

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**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.<sup>2</sup>

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.<sup>3</sup>

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<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup>

- 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.<sup>5</sup>
  - 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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<sup>4</sup> 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).]

<sup>5</sup> 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.<sup>6</sup>

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

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<sup>6</sup> 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.<sup>7</sup>

**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.<sup>8</sup>

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.<sup>9</sup>

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<sup>7</sup> 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](http://www.gsa.gov/Portal/gsa/ep/contentView.do?P=FCIM&contentId=8273&contentType=GSA_OVERVIEW) ]

<sup>8</sup> 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.<sup>10</sup>
- 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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<sup>9</sup> 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.

<sup>10</sup> 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.<sup>11</sup>

- 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.<sup>12</sup>
- i. “Design-Build” refers to a system of contracting under which one entity performs both architectural/engineering and construction under one contract.<sup>13</sup>

## **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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<sup>11</sup> 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.

<sup>12</sup> This definition was added only to acknowledge this method of construction contracting.

<sup>13</sup> 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.<sup>14</sup>
  - (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.<sup>15</sup>

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<sup>14</sup> 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.

<sup>15</sup> 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.<sup>16</sup>
- 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).<sup>17</sup>
- 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.<sup>18</sup>

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<sup>16</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

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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.

<sup>19</sup> 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.

<sup>20</sup> 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.<sup>21</sup>

- 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<sup>22</sup>

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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.]

<sup>21</sup> 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.

<sup>22</sup> 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 1<sup>st</sup>, 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.<sup>23</sup>
- 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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<sup>23</sup> 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.<sup>24</sup>

- 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.<sup>25</sup>

## 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:<sup>26</sup>
- (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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<sup>24</sup> 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.

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

<sup>26</sup> 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'<sup>27</sup>; and
  - (c) Any arbitrary action in the procurement process.<sup>27.5</sup>
- 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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<sup>27</sup> 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.

<sup>27.5</sup> [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.<sup>28</sup>

**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.<sup>29</sup>

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<sup>28</sup> 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.

<sup>29</sup> 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.<sup>30</sup>
- 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;

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<sup>30</sup> 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.<sup>31</sup>
- 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. §541 and 49 U.S.C. §5325(d).<sup>31.5</sup> Services subject to this requirement are program management,

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<sup>31</sup> 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.

<sup>31.5</sup> [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.<sup>32</sup>

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.<sup>33</sup>

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<sup>32</sup> 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).

<sup>33</sup> 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.<sup>34</sup>
- (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;<sup>34.5</sup>
  - (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).

<sup>34</sup> 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.

<sup>34.5</sup> [*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.<sup>35</sup>

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<sup>35</sup> 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:<sup>36</sup>

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<sup>36</sup> 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.<sup>37</sup>

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<sup>37</sup> 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:<sup>38</sup>
- (1) Progress payments are only made to the contractor for costs incurred in the performance of the contract.<sup>38.2</sup>
  - (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.<sup>38.5</sup>

**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.<sup>39</sup>

**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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<sup>38</sup> 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.

<sup>38.2</sup> [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.]

<sup>38.5</sup> [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.]

<sup>39</sup> 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 to each 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?pageTypeld=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 1<sup>st</sup>, 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.

## **APPENDIX B**

### **CONTRACT ADMINISTRATION SYSTEM**

Any contract involving the expenditure of public funds is subject to review/audit during and after performance to ensure that, at the very broadest level, the Government got what it paid for. This concept means that, at the contract administration level, the file (standing alone and without need of interpretation or augmentation of the contract administrator or other staff element) should demonstrate that the Commissioner of DPW and the contractor have complied with the terms of the contract (i.e., bonds have been submitted, contractual issues requiring the approval of the contracting officer have been submitted and approved, requests for payment have been submitted, reviewed, approved, and processed, etc.) and that contractual and administrative issues in dispute have been addressed and settled in accordance with good administrative practice and sound business judgment.

#### **I. Project Initiation**

Proper actions taken immediately after contract award can be critical to the success of the project.

The first step to be taken by the County will be to designate a Project Manager for each project involving a contract. This individual will be the primary contact with the contractor and is the only individual who, with proper consents and documentation, can authorize changes to the contract. In most cases, this individual will be the staff member who led the procurement process for the project.

#### **II. Monitoring Contractor Progress**

The County Project Manager shall establish frequent and direct communications with the Contractor. For complex projects and/or projects which require more extensive periods of time to complete, the County may establish regular progress meetings with the County and the Contractor; such meetings will assist in identifying and correcting problems as they arise.

If a cost reimbursement or progress payment form of contract is used, the Contract Administrator/ Project Manager shall monitor contractor progress to ensure that the maximum allowable contract amount is not exceeded and that funds are not paid to the contractor in an amount greater than either the percentage of work completed or actual costs incurred.

the County shall require two types of reports from contractors, both of which will be reviewed by the Project Manager:

- Cost Control Report
- Monthly progress report. This report should contain the status of the contractor's work and any problems or delays perceived by the contractor to completing the project on schedule and/or within budget.

#### **III. Progress Payments**

When contractor invoices are submitted to the County, the Project Manager shall compare the invoices to the Contract Document to ensure compliance with the price information outlined in the contract.

#### **IV. Modify An Existing Contract**

Occasionally, additional funding will be needed which exceeds the amount of the originally awarded funding amount of the contract. The following represent various modification scenarios and related documentation requirements:

1. Modification to extend term (where options to extend are in original contract)
  - Two copies of Renewal Request signed by vendor and the County Commissioner of Planning and Commissioner of DPW.
2. Modification to extend term (where options to extend are not in original contract)
  - Two copies of Renewal Request signed by vendor and Commissioner of Planning and Commissioner of DPW.
  - Sole source justification
  - Board of Acquisition and Contracts Approval
3. Additional funding needed for work within the scope of a requirements contract and within the original term of the contract
  - Board of Acquisition and Contracts Approval
4. Increased scope of Work
  - Sole Source justification

Cost and Price Analysis Requirement Circular 4220.1E states that "*grantees must perform a cost or price analysis in connection with every procurement action, including contract modifications.*"

#### **V. Terminating A Contract**

- Termination for Convenience
- Termination for Default/Clause

#### **VI. Contract Closeout**

When the contracted services have been adequately performed and all invoices have been paid under the contract, the contract will be closed out. Project Managers should submit a completed Contract Closeout Memorandum to the Department of Public Works. The Department of Public Works will change the status of the contract to "closed." The contract file located in the Department of Public Works files will be removed from the active file section to the inactive section.

## **VII. Standard Contract Officer Functions**

Responsibilities of the Contract Officer function include:

1. Review contractors' compensation structures.
2. Review contractors' insurance plans.
3. Conduct post-award orientation conferences.
4. Review and evaluate contractors' proposals and, when negotiation will be accomplished by the contracting officer, furnish comments and recommendations to that officer.
5. Determine the allow-ability of costs suspended or disapproved, direct the suspension or disapproval of costs when there is reason to believe they should be suspended or disapproved, and approve final vouchers.
6. Issue Notices of Intent to Disallow or Not Recognize Costs.
7. Attempt to resolve issues in controversy, prepare findings of fact and issue decisions under the Disputes clause on matters in which the administrative contracting officer (ACO) has the authority to take definitive action.
8. Review and approve or disapprove the contractor's requests for payments under the progress payments or performance-based payments clauses.
9. Ensure timely notification by the contractor of any anticipated overrun or under-run of the estimated cost under cost-reimbursement contracts.
10. Monitor the contractor's financial condition and advise the contracting officer when it jeopardizes contract performance.
11. Track any limitations (quarterly, etc.) on payments and recover overpayments from contractor.
12. Issue tax exemption forms, upon request from contractors.
13. Issue work requests under maintenance, overhaul, and modification contracts.
14. Negotiate prices and execute supplemental agreements for spare parts and other items selected through provisioning procedures when prescribed by agency acquisition regulations.
15. Negotiate and execute contractual documents for settlement of partial and complete contract terminations for convenience.
16. Negotiate and execute contractual documents settling cancellation charges under multiyear contracts.



17. In facilities contracts evaluate the contractor's requests for facilities and for changes to existing facilities and provide appropriate recommendations to the contracting officer; ensure required screening of facility items before acquisition by the contractor; approve use of facilities on a noninterference basis; and ensure payment by the contractor of any rental due.
18. Monitor contractor industrial labor relations matters under the contract; apprise the Director of Procurement and, if designated by the agency, the appropriate labor relations advisor, of actual or potential labor disputes; and coordinate the removal of urgently required material from the strikebound contractor's plant upon instruction from, and authorization of, the contracting officer.
19. Ensure contractor compliance with contractual quality assurance requirements.
20. Ensure contractor compliance with contractual safety requirements.
21. Perform engineering surveillance to assess compliance with contractual terms for schedule, cost, and technical performance in the areas of design, development, and production.
22. Report any inadequacies noted in specifications.
23. Review, approve or disapprove, and maintain surveillance of the contractor's purchasing system.
24. Consent to the placement of subcontracts.
25. Review, evaluate, and approve disadvantaged and women-owned business subcontracting plans.
26. Obtain the contractor's currently approved plan for disadvantaged and women-owned business subcontracting, or, if there is no currently approved plan, assist in developing such a plan.
27. By periodic surveillance, ensure contractors' compliance with disadvantaged and women owned business subcontracting plans, and maintain documentation of the contractor's performance under, and compliance with, these plans and requirements; and provide advice and assistance to the firms involved, as appropriate.
28. Assign and perform supporting contract administration.
29. Ensure timely submission of required reports.
30. Cancel unilateral purchase orders when notified of non-acceptance by the contractor.
31. Accomplish administrative closeout procedures.
32. Determine that the contractor has a drug-free workplace program and drug-free awareness program.

33. Monitor contractors' compliance with the requirements of environmental laws including the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6901, et seq.) and other environmental requirements as specified in the contract.
34. Verification of contractor compliance with specifications requiring the use of environmentally preferable and energy-efficient materials and the use of materials or delivery of end items with the specified recovered material content. This shall occur as part of the quality assurance procedures set forth in Part 46.

### **VIII. Contract Administration Documents**

Documents resulting as part of Contract Administration include, but are not limited to, the following:

1. Approvals or disapprovals of contract submittals required by the contract and requests for waivers or deviations from contractual requirements;
2. Modifications/changes to the contracts including the rationale for the change, change orders issued, and documentation reflecting any time and or increases to or decreases from the contract price as a result of those modifications;
3. Documentation regarding settlement of claims and disputes including, as appropriate, results of audit and legal reviews of the claims and approval by the proper authority (i.e., city council, board of directors, executive director) of the settlement amount;
4. Documentation regarding stop work and suspension of work orders and termination actions (convenience as well as default); and
5. Documentation relating to contract close-out.

### **IX. Contract Close Out**

A completed contract is one that is both physically and administratively complete. A contract is *physically complete* only after all deliverable items and services called for under the contract have been delivered and accepted by the grantee. These deliverable items include such things as reports, spare parts, warranty documents, and proof of insurance (where required by the contract terms). These deliverable items may or may not have been priced as discrete pay items in the contract, but they are required deliverables, and the contract is not physically complete until all deliverables are made. A contract is *administratively complete* when all payments have been made and all administrative actions accomplished. The steps that must be completed to close out a contract will depend upon the type and/or nature of the contract.

Routine commodity procurements - The closeout of routine purchase orders and contracts for commodities and other commercial products is usually a straightforward and uncomplicated process. The procurement person responsible for closeout will need to ensure that his end item user has inspected and accepted the deliverable items as being in conformance with the purchase order/contract specifications. An inspection/acceptance form should be in the file attesting to the contractor's delivery of all contract end items, including any descriptive literature or warranty documentation. There must also be documentation attesting to final payment by the accounts payable department.

Non-routine contracts for services, construction, rolling stock, etc. - Contracts for personal services, complex equipment, construction, and other one-of-kind items will require a number of steps to effect an administrative closeout. Major elements of the closeout process, and related documentation, might include:

1. Resolution of all contract changes, claims, and final quantities delivered.
2. Determination/recovery of liquidated damages
3. Review of the insurance claim file by counsel/insurance specialist to determine if funds need to be withheld from final payment to cover unsettled claims against the contractor.
4. Settlement of all subcontracts by prime contractor
5. Performance of all inspections (and acceptance tests if any) by the grantee's project management office, with appropriate documentation
6. Conduct of a cost audit for cost-reimbursement contracts and resolve questioned costs, if any.
7. Generation of a Contractor Performance Report, See *Best Practice* below.
8. The submittal of all required documentation by the Contractor, including such items as:
9. Final reports
10. Final payroll records and wage rate certifications
11. Spare parts list
12. Manufacturer's Warranties and Guarantees
13. Final corrected shop drawings
14. Operation and maintenance manuals
15. Catalogues and brochures
16. Invention disclosure (if applicable)
17. Federally-owned property report (if there was Government-furnished property)
18. Resolution of final quantities (construction contracts)
19. Final invoice
20. Consent of Surety to release final payment to Contractor
21. Contractor's Affidavit of Release of Liens
22. Contractor's General Release (releasing the grantee from any further liabilities/claims under the contract)

23. Maintenance Bond (if required)
24. Conduct a Post-delivery Audit for rolling stock contracts as required by 49 CFR Part 663 Pre-award and Post delivery Audits of Rolling Stock Purchases.

### **Best Practice**

Establishing That a Contract Is Completed - It is generally the responsibility of the Project Manager (PM) to establish that the work under a contract has been completed and the contract is ready for closeout. When the PM determines that the work is complete, the PM should prepare a checklist showing all the contract deliverables and submittals, and indicating on the checklist that all submittals and deliverables have been reviewed, inspected and accepted. The PM should notify the contract administrator by memorandum that the contract is complete and all required deliverables have been inspected and accepted.

Contract Closeout Checklist - The PM should have a *contract closeout checklist*, listing all the administrative steps required to close out a contract. The checklist is an extremely useful tool for the contract administrator or project manager who is responsible for contract closeout. Given the different requirements for the various contracting situations, grantees may wish to have different checklists for different types of contracts; e.g., commodities, services, construction, cost-type contracts, etc.

Contractor Performance Report - Documentation of a contractor's performance for future source selection decisions is an option that grantees should consider for certain types of procurements such as professional services, complex equipment, construction, etc. These performance reports can be an important reference point for future source-selection decisions. If the grantee chooses to document a contractor's performance, input to the report should be received from the technical office, contracting office, disadvantaged business office (if contract contained DBE requirements) and end users of the product or service (if appropriate). Contractors should be furnished with the report and given an opportunity to submit comments, rebutting statements or additional information. The Contractor's comments should be retained in the report file. It would be advisable to have a review level above the grantee Director of Procurement to consider disagreements between the parties regarding the evaluation. However, final decision on the content of the report must rest with the grantee. Copies of the final evaluation should be furnished to the Contractor. Grantees should have a time limit on the retention of these reports!

Review by legal counsel - For procurements involving services, construction, and larger dollar value equipment purchases, grantees may wish to have their legal counsel review the closeout file to ensure the adequacy of the contractor's legal documents, including the contractor's general release, insurance certificates, surety's release, maintenance bonds, etc.

Proof of insurance coverage - For all contracts requiring the Contractor to maintain insurance for its products or services (e.g., professional liability or product liability insurance), the contract administrator should obtain *proof of insurance* from the Contractor as part of the closeout process. This documentation should be submitted to the grantee's Insurance Department for approval prior to final payment of the Contractor. The Insurance Department will be required to maintain these documents as "active" files until such time as the insurance requirement ceases under the terms and conditions of the contract; i.e., these insurance terms will continue past (survive) the final contract payment.

Final payment - The contract officer (CO) must be sure that all administrative steps have been accomplished prior to final payment. Contract officer should make use of a *contract closeout checklist* to the extent that the Program Manager's checklist does not cover everything in the closeout process (e.g., the contract officer may have certain areas of concern not assigned to the Program Manager). The CO must ensure that all required inspections have been performed by the technical program office, and a memorandum has been received from the project manager certifying to the satisfactory completion of the contract, which includes all required documentation from the Contractor, before they authorize final payment or the release of any funds being retained under the contract. Contract officer need to pay careful attention to those types of documents that are notoriously problematic, such as warranties. In fact, grantees may wish to consider making these warranty documents a pay item in their contracts when the contract pay items are being established, so that the Contractor will be motivated to deliver the documents in a timely manner, and there will be no dispute as to the proper amount that should be paid for these items.

Contractor's General Release - As part of the contract closeout process, the contract administrator must send the Contractor a closeout letter that includes the Contractor's "general release." This document must be a standard statement prepared by the grantee's legal counsel for use on all of the grantee's contracts. The release will say that for the payment of a sum certain, which is the final contract amount agreed to by both parties, the Contractor releases the grantee from any and all claims of every kind arising directly or indirectly out of the contract. The release may also contain a certification that the contractor has paid its subcontractors and suppliers for all their labor, materials, services, etc. furnished under the contract. The release is to be signed by a corporate official authorized to bind the Contractor. The *general release* is important to obtain prior to final payment because it assures the grantee that there will be no further claims from the Contractor once the final payment has been made. The grantee should have the release reviewed by its legal counsel if the Contractor makes any changes to the grantee's standard release language that was sent to the Contractor for signature. Of course it will be necessary for the grantee and the Contractor to have resolved all open issues of a financial nature prior to the execution of the release (change orders, claims, liquidated damages, etc.), and this resolution of all outstanding claims is an important step in the contract closeout process.

Retainage and the problem of contractors who quit work - Occasionally a construction contractor may "walk away" from a project that is almost complete, refusing to sign a general release and forgoing final payment. This situation may occur when the contractor lacks sufficient financial incentive to complete the contract; e.g., if the "punch list" is large and there is very little money left in retainage, the contractor may profit by refusing to correct the punch list items and leave the retainage with the grantee. Or the contractor may have been awarded another contract which requires the reassignment of his personnel to another job. Whatever the reason, *the grantee should anticipate this possibility by carefully estimating the amount of retainage in such a way that it represents twice the amount of the punch list work and undelivered items (manuals, drawings, spare parts, etc.).* For example, MARTA's procedures (which are spelled out in the contract provisions) call for the retainage of at least 5% of the total contract value as the work progresses (10% if there are problems observed with the work). At the point of final inspection and punch list preparation, the resident engineer estimates the value of the punch list items and the undelivered items such as spares, manuals, warranties, etc., and then MARTA pays out the retainage minus twice the value of all the unfinished work. By establishing the retainage in this way, the contractor is motivated to complete the contract, because the contractor will actually receive twice the amount of money that it takes to finish the work. In other words, the contractor is given a strong incentive to complete the contract. When all else fails, the grantee should definitely involve the surety in the issue of unfinished work (even if the amount of work is relatively small)

because the contractor's relationship with its surety is a vital one for its future business. If the contractor loses the confidence of its surety, it is effectively foreclosing on its ability to bid on future work requiring performance bonds.

Warranty and Guarantee Register - The contract specifications may require that individual warranties or guarantees be furnished for various installed equipment or building systems. For each completed contract requiring warranties, the contract administrator should develop a *Warranty and Guarantee Register*, which is a status form listing:

- each individual item of equipment and system for which a warranty or guarantee is specified (roofing, doors, sealants, etc.);
- the pertinent section in the contract specification;
- the name of the company providing the warranty;
- the expiration date of the warranty; and
- the address of the providing company

An example of a *Warranty and Guarantee Register*, used by MARTA, can be found in Appendix B.13. The *Warranty and Guarantee Register* will enable the grantee to monitor upcoming warranty expirations so that the equipment or building system can be inspected before the expiration date, and corrective actions taken by the Contractor if required.

The Federal policy is to retain these reports for not more than three years [FAR Part 42.1503(e)]

Appendix C: Required Contract Clauses 07/07

**Required Third-Party Contract Clauses**

**All FTA-Assisted Third-Party Contracts and Subcontracts**

CATEGORIES OF FEDERAL REQUIREMENTS	COMMENTS	MASTER AGREEMENT REFERENCES
No federal government obligations to third-parties by use of a disclaimer		§2.f
Program fraud and false or fraudulent statements and related acts		§3.f
Access to Records		§15.o
Federal changes		§2.c(1)
Civil Rights (EEO, Title VI & ADA)		§12
Termination provisions	Contracts >\$10,000(49 CFR §18)	§15.a
Disadvantaged Business Enterprises (DBEs)	Contracts awarded on the basis of a bid or proposal offering to use DBEs	§12.d
Incorporation of FTA Terms	Per FTA C 4220.1E	§15.a
Debarment and Suspension		§3.b

**Awards Exceeding the Simplified Acquisition Threshold (\$100,000) 49 CFR §29**

CATEGORIES OF FEDERAL REQUIREMENTS	COMMENTS	MASTER AGREEMENT REFERENCES
Buy America	When tangible property or construction will be acquired	§14.a
Provisions for resolution of disputes, breaches, or other litigation		§44

**Awards Exceeding \$100,000 by Statute**

CATEGORIES OF FEDERAL REQUIREMENTS	COMMENTS	MASTER AGREEMENT REFERENCES
Lobbying		§3.d

Appendix C: Required Contract Clauses 07/07

CATEGORIES OF FEDERAL REQUIREMENTS	COMMENTS	MASTER AGREEMENT REFERENCES
Clean Air		§25.b
Clean Water		§25.c

**Transport of Property or Persons**

CATEGORIES OF FEDERAL REQUIREMENTS	COMMENTS	MASTER AGREEMENT REFERENCES
Cargo Preference	When acquiring property suitable for shipment by ocean vessel	§14.b
Fly America	When property or persons transported by air between U.S. and foreign destinations, or between foreign locations	§14.c

**Construction Activities**

CATEGORIES OF FEDERAL REQUIREMENTS	COMMENTS	MASTER AGREEMENT REFERENCES
Construction Employee Protections  Davis Bacon Act Contract Work Hours & Safety Standards Act Copeland Anti-Kickback Act	Except for contracts <\$2,000 or third party contracts for supplies, materials, or articles ordinarily available on the open market	§24.a
Bonding for construction activities exceeding \$100,000	5% bid guarantee; 100% performance bond; and Payment bond equal to:  50% for contracts < \$1 M 40% for contracts > \$1 M, but < \$5 M \$2.5 M for contracts > \$5 M	§15.m(1)
Seismic safety	Contracts for construction of new buildings or additions to existing buildings	§23.e

**Nonconstruction Activities**



Appendix C: Required Contract Clauses 07/07

CATEGORIES OF FEDERAL REQUIREMENTS	COMMENTS	MASTER AGREEMENT REFERENCES
Nonconstruction Employee Protection (Contract Work Hours and Safety Standards Act)	Applicable to all turnkey, rolling stock and operational contracts (excluding contracts for transportation services) in excess of \$2,500.	§24.b

**Transit Operations**

CATEGORIES OF FEDERAL REQUIREMENTS	COMMENTS	MASTER AGREEMENT REFERENCES
Transit Employee Protective Arrangements		§24.d
Charter Service Operations		§28
School Bus Operations		§29
Drug Use and Testing	Safety sensitive functions	§31.b
Alcohol Misuse and Testing	Safety sensitive functions	§31.b

**Planning, Research, Development and Documentation Projects**

CATEGORIES OF FEDERAL REQUIREMENTS	COMMENTS	MASTER AGREEMENT REFERENCES
Patent Rights		§17
Rights in Data and Copyrights		§18

**Miscellaneous Special Requirements**

CATEGORIES OF FEDERAL REQUIREMENTS	COMMENTS	MASTER AGREEMENT REFERENCES
Energy Conservation		§26
Recycled Products	Contracts for items designated by EPA, when procuring \$10,000 or more per year	§15.g
Conformance with National ITS Architecture	Contracts and solicitations for ITS projects	§15.p
ADA Access	Contracts for rolling stock or facilities construction/ renovation	§12.g

Appendix C: Required Contract Clauses 07/07

**Awards Exceeding \$500,000**

<b>CATEGORIES OF FEDERAL REQUIREMENTS</b>	<b>COMMENTS</b>	<b>MASTER AGREEMENT REFERENCES</b>
Notification of Federal Participation		§15.n

Appendix D: Required Certifications, Reports and Forms 06/05

**Required Certifications, Reports and Forms**

CATEGORIES OF FEDERAL REQUIREMENTS	COMMENTS	MASTER AGREEMENT REFERENCES
Bus Testing Certification and Report	Procurements of buses and modified mass produced vans	§15.l(4)
TVM Certifications	All vehicle procurements	§12.d(1)
Buy America Certification	Procurements of steel, iron or manufactured products exceeding \$100,000	§14.a
Pre-Award Audit	Vehicle procurements exceeding \$100,000	§15.l(3)
Pre-Award Buy America Certification	Vehicle procurements exceeding \$100,000	§15.l(3)
Pre-Award Purchaser's Requirement	Vehicle procurements exceeding \$100,000	§15.l(3)
Post-Delivery Audit	Vehicle procurements exceeding \$100,000	§15.l(3)
Post-Delivery Buy America Certification	Vehicle procurements exceeding \$100,000	§15.l(3)
Post-Delivery Purchaser's Requirement	Vehicle procurements exceeding \$100,000	§15.l(3)
On-Site Inspector's Report	Vehicle procurements exceeding \$100,000	§15.l(3)
Federal Motor Vehicles Safety Standards (Pre-Award and Post-Delivery)	Motor vehicle procurements (49 CFR §571)	§15.l(3)
Lobbying Certification	Procurements exceeding \$100,000	§3.d(2)

Appendix D: Required Certifications, Reports and Forms 06/05

Standard Form LLL and Quarterly Updates (when required)	Procurements exceeding \$100,000 where contractor engages in lobbying activities	§3.d(2)
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Appendix E: Applicability of Third-Party Contract Clauses 06/05

**Applicability of Third-Party Contract Clauses**

CLAUSE	TYPE OF PROCUREMENT				
	Professional Services/A&E	Operations/ Management	Rolling Stock Purchase	Construction	Materials & Supplies
No federal government obligations to third-parties by use of a disclaimer	All	All	All	All	All
Program fraud and false or fraudulent statements and related acts	All	All	All	All	All
Access to Records	All	All	All	All	All
Federal changes	All	All	All	All	All
Civil Rights (EEO, Title VI & ADA)	All	All	All	All	All
Termination Provisions	>\$10,000	>\$10,000	>\$10,000	>\$10,000	>\$10,000
Disadvantaged Business Enterprises (DBEs)	All	All	All	All	All
Incorporation of FTA Terms	All	All	All	All	All
Debarment and Suspension	>\$25,000	>\$25,000	>\$25,000	>\$25,000	>\$25,000
Buy America		&nbsp;	>\$100,000	>\$100,000	>\$100,000 (for steel, iron, manufactured products)

Appendix E: Applicability of Third-Party Contract Clauses 06/05

Provisions for resolution of disputes, breaches, or other litigation	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Lobbying	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Clean Air	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Clean Water	>\$100,000	>\$100,000	>\$100,000	>\$100,000	>\$100,000
Cargo Preference			Involving property that may be transported by ocean vessel	Involving property that may be transported by ocean vessel	Involving property that may be transported by ocean vessel
Fly America	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air	Involving foreign transport or travel by air
Davis Bacon Act				>\$2,000 (including ferry vessels)	
Contract Work Hours & Safety Standards Act		>\$2,500 (except transportation services)	>\$2,500	>\$2,000 (including ferry vessels)	
Copeland Anti-Kickback Act				>\$2,000 (including ferry vessels)	
Bonding				>\$100,000	
Seismic Safety	A&E for New Buildings & Additions			New Buildings & Additions	
Transit Employee Protective Arrangements		Transit Operations			
Charter		All			

Appendix E: Applicability of Third-Party Contract Clauses 06/05

Service Operations					
School Bus Operations		All			
Drug Use and Testing		Transit Operations			
Alcohol Misuse and Testing		Transit Operations			
Patent Rights	Research & Development				
Rights in Data and Copyrights requirements	Research & Development				
Energy Conservation	All	All	All	All	All
Recycled Products		Contracts for items designated by EPA, when procuring \$10,000 or more per year		Contracts for items designated by EPA, when procuring \$10,000 or more per year	Contracts for items designated by EPA, when procuring \$10,000 or more per year
Conformance with ITS National Architecture	ITS Projects	ITS Projects	ITS Projects	ITS Projects	ITS Projects
ADA Access	Architectural & Engineering	All	All	All	All
Notification of Federal Participation	>\$500,000	>\$500,000	>\$500,000	>\$500,000	>\$500,000



## APPENDIX F

# EXECUTIVE ORDER NO. 127 PROVIDING FOR ADDITIONAL STATE PROCUREMENT DISCLOSURE

## GUIDELINES

Prepared By  
Office of General Services  
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August 1, 2003



1. Overview

**Purpose of Executive Order Number 127**

While laws enacted in 1995 regulate procurement by the State of New York and its public authorities and describe who can appear before State government entities on certain matters, more can be done to enhance public confidence in the State’s procurement process. Towards that end, Governor Pataki issued Executive Order Number 127, *Providing for Additional State Procurement Disclosure*, increasing the disclosure requirements regarding persons and organizations contacting State government about procurement and real estate transactions, and making that information available to the public.

**Applicability**

Executive Order Number 127 requires (i) State agencies, (ii) any public benefit corporation, public authority or commission where at least one member is appointed by the Governor, (iii) the State University of New York and (iv) the City University of New York to collect and record certain information from contractors seeking a “procurement contract,” and to make that information available to the public.

A listing of covered agencies and authorities can be accessed by clicking [here](#). If your agency or authority is not included in the list, but qualifies under the above description of covered agencies or authorities, you will still be subject to Executive Order Number 127. While Executive Order Number 127 is only applicable to state agencies or authorities, the heads of which or at least one member of which is appointed by the Governor, other agencies, such as the Department of Law, Office of the State Comptroller and the State Education Department, are encouraged to voluntarily comply with its terms.

If you are unsure whether Executive Order Number 127 applies to you, please contact the Office of General Services (See Question 26 herein). Hereafter in the Guidelines, covered agencies and authorities will be referred to as “covered entity” or “covered entities” and Executive Order Number 127 will be referred to as “EO 127.” Also for ease of reference, the term “contractor” shall be used to identify bidders, proposers, offerers, contractors or other parties to a “procurement contract”.

**Guidelines**

The New York State Office of General Services (OGS) was directed by EO 127 to issue written guidelines for implementation. Developed in question and answer format for distribution on the OGS internet site, these Guidelines and forms will be updated and re-issued to address questions and provide clarification on an as-needed basis. OGS has included access to additional references and procurement information through electronic web links including model language and forms.

2. **What does EO 127 require of Covered Entities and Contractors?**

In general, EO 127 requires a covered entity and contractors engaged in procurement with such covered entity to undertake the following:

- A. A covered entity must record information about persons or organizations attempting to influence the procurement process.
- B. A covered entity must make determinations of responsibility regarding a contractor that will be awarded a procurement contract. Specifically, a covered entity must determine whether a contractor has complied with the information required by EO 127, and a clause must be included in any resulting contract authorizing the covered entity to terminate a procurement contract under certain circumstances.
- C. Contractors must disclose to a covered entity the identity of persons or organizations retained, employed or designated by them to attempt to influence a procurement process.

3. **What types of procurement are governed by EO 127?**

Generally speaking, EO 127 applies to any procurement contract with an annual estimated value in excess of \$15,000.00. The following list illustrates the types of procurement contracts and is not intended to be limiting. Covered entities should be aware that this list may not include all categories of covered procurement contracts. Questions regarding a particular category or type of procurement contract may be referred to OGS for their future inclusion within these Guidelines.

- A. Statewide term contracts or agency specific (single agency) contracts for procurement of services and technology under Section 163 of the State Finance Law.
- B. Emergency procurement contracts.
- C. Single Source procurement contracts.
- D. Sole Source procurement contracts.
- E. Multiple Award procurement contracts.
- F. Strategic Partnership procurement contracts.
- G. Procurement contracts that result from piggybacking onto another public entity's contract.
- H. Joint procurement contracts with another public entity.
- I. Real estate transactions, including:
  - Purchase, sale, lease, or other acquisition; and grant of interest in real property.
- J. Public Works including, but not limited to, architect, engineering and surveying services contracts. (See exclusions in Question 4 where award is made on the basis of lowest responsive and responsible bid).
- K. Mini-Bid procurements under a Backdrop Contract for services or technology being acquired on a best value basis. (Mini-Bids are used with

Backdrop Contracts to accomplish a procurement for a defined project by a covered entity, See discussion in Question 4-).

- L. Preferred Source procurements.
- M. Revenue contracts.

EO 127 also applies to any amendments to any procurement contracts having an annual value in excess of \$15,000, if ~~the~~such amendments requires a change in the scope of the procurement contract and the covered entity needs to seek formal approvals of the amendment. Exercise of a renewal option is also a procurement determination that could be the subject of an attempt to influence, and it could constitute an amendment within the definition of a procurement contract. EO 127 would not apply to change orders or work orders that do not require formal approvals by control agencies. However if the change order or work order is subject to formal approvals, it could constitute an amendment that is covered by EO 127.

#### 4. Are there types of contracts that are exempt?

Yes, certain types of contracts are exempt from EO 127. Procurement contracts, that by law must be awarded to the lowest responsible bidder, or that must be awarded on the basis of lowest price subsequent to a competitive bid process, are exempted. (In the event that a procurement contract cited as an example in Question 3 is awarded to the lowest responsible bidder or on the basis of lowest price, it would be considered exempt. Likewise, in the case of a sale of real property at public auction, EO 127 would not apply. This could also occur with certain multiple award contracts and mini-bid procurements.) **The following contracts are examples of exempt procurements.**

- A. Centralized or agency specific (single agency) contracts for procurement of commodities under Section 163 of the State Finance Law. (That law requires award of commodities contracts on the basis of lowest price to a responsive and responsible offerer.)
- B. Contracts for departmental printing under Section 7 of the State Printing and Public Documents Law. (Section 3 of such law requires letting the contracts to the lowest responsible bidder.)
- C. Contracts for public works, construction, reconstruction, alteration, repair or improvement of any state buildings. (Section 8 of the Public Buildings Law directs that a contract be awarded to the lowest responsible and reliable bidder.)
- D. Contracts with an estimated annual value less than \$15,000.00.
- E. Contracts for procurement of services or technology where lowest price is the objective, determining factor for contract award.
- F. Back-Drop Contracts. A contract consisting of a pool of pre-qualified contractors who have all agreed to uniform terms and conditions in a standing offer to the State. Such contractors are eligible to participate in the procurement of goods or services by a covered entity through a mini-bid process, which generally would be subject to EO 127. (See Question 3.) Also, if the covered entity is conducting the mini-bid with award based on lowest price, the procurement would not be subject to EO 127.

- G. Real property (surplus state land) sold to the highest bidder at public auction.
- H. Transactions in which a covered entity obtains goods or services directly from another covered entity. For example, if a covered entity obtains architectural services from OGS and it provides OGS reimbursement for such services, EO 127 would not be applicable as the transaction is not a procurement contract.

You should be aware that this list may not include all categories of exempt procurement contracts. Questions regarding a particular category or type of procurement contract may be referred to OGS.

Covered entities may voluntarily apply the standards of EO 127 to exempt categories of procurement contracts.

#### 5. **Who is required to comply?**

EO 127 requires covered entities to collect and record certain information from contractors seeking a procurement contract. Generally speaking, the term covered entity includes state agencies or authorities the heads of which or at least one member of which is appointed by the Governor but does not include those organizations outside the executive [authority of the Governor](#), such as the Department of Law, Office of the State Comptroller and the State Education Department. These organizations are encouraged to voluntarily comply with EO 127. (See discussion about list in Section 17.)

#### 6. **How does EO 127 impact potential contractors?**

EO 127 obligates a covered entity to obtain specific information from potential contractors, including but not limited to: (i) the names of persons or organizations authorized to lobby on their behalf, and (ii) whether there has been a finding of non-responsibility with regard to compliance with EO 127 within the last five years. (Generally, this does not include employees of the contractor acting in the normal course of their employment. It would apply to such employees if their duties include attempting to influence a procurement.) The failure of a potential contractor to provide the information may result in a determination that such contractor is non-responsible and not eligible for award of the procurement contract. EO 127 further requires that a potential contractor certify in the procurement contract that the information provided is complete, true and accurate. A procurement contract including public works and real estate transactions also must include a contractual provision authorizing termination if it is found that the certification is intentionally false or intentionally incomplete.

If a contractor wishes to enter into a procurement contract with a covered entity, it must provide: (i) the requested information, and (ii) certification to the completeness, truthfulness and accuracy of such information. It must agree that the contract can be terminated if such information is found to be intentionally false or intentionally incomplete.

7. **Does EO 127 apply to me?**

In general, EO 127 applies to a covered entity that is conducting a procurement that is not exempt (see Question 4 for more information on exempt procurements). It also applies to a covered entity directly involved in the procurement and directly benefiting from a procurement but not having decision-making authority regarding the procurement.- An example would be a client agency that benefits from the procurement contract for goods, services, public works or real estate that is being awarded for or on its behalf, such as when OGS awards a procurement contract for a client agency's construction needs.

EO 127 also applies to a covered entity that is not conducting a procurement, but that serves as a control agency for certain procurements within the Executive Department; e.g. the Division of the Budget, Department of Civil Service or the Office for Technology. Other control agencies, such as the Department of Law, the State Education Department and the Office of the State Comptroller, would have to voluntarily comply with EO 127.

8. **When do these requirements apply?**

As soon as a covered entity makes an initial decision or determination to proceed with a procurement (such as a decision to obtain a specific commodity or service or to obtain leased space for a specific need), the reporting and record keeping obligations under EO 127 are activated. These obligations continue through contract award and apply to any subsequent amendments or changes to the procurement contract. All involved staff should be advised, or understand and be following an accepted process, to ensure that the requirements of EO 127 have been activated and that records of contacts must be made for incorporation into the procurement record.

9. **Are the obligations of EO 127 activated by:**

A. **Receipt of advertising material?**

No, EO 127 does not require record keeping of those communications that occur in the ordinary course of commercial transactions, such as the distribution of advertising materials.

B. **Intra-agency communications?**

No, EO 127 is not activated by intra-agency communications.

C. **Inter-agency communications?**

The role of the covered entity and the nature of the inquiry will determine whether EO 127 is activated, but inter-agency communications are not generally considered to be attempts to influence the procurement process. Some common circumstances involving

covered entities, however, should be considered when determining if EO 127 is activated. In that regard, there appear to be three possible roles for a covered entity:

(i) A covered entity that is responsible for the bid or proposal and the procurement contract and has decision-making authority over the procurement. As an example, OGS is responsible for establishing and administering contracts for use by all state agencies and other authorized users, such as local governments. The procurement process and resulting contracts are developed by OGS. Prospective users generally do not participate in the procurement process, and where they do, communications are routine and factual in nature. EO 127 would not be activated.

(ii) A covered entity that has direct involvement in the proposal or procurement, but does not exercise decision-making authority for the procurement contract and directly benefits from the procurement. For example, if a client relationship exists between two state agencies, it would appear that communications made within the context of that client relationship would not be subject to EO 127. Thus, communications between OGS and the Department of Transportation (DOT) when OGS is establishing a contract for road salt to be used by DOT would be exempt from EO 127. Conversely, communications where DOT identifies a service to be acquired and provides its requirements based on vendor-supplied specifications would be subject to recording of required information and then referral of the attempt to influence the procurement by the prospective contractor to OGS. OGS would then include the information provided by DOT about its contact in the compiled record. The inter-agency communication from DOT to OGS would not be recorded.

Also, where a contractor contacts a covered entity that is not responsible for the procurement, and such contact is of a routine, factual nature, such inquiry would not activate EO 127. If the contractor's contact urges action or seeks to impact or cause a determination and reasonably appears to be an attempt to influence the procurement process, there would be an obligation to record such contact and refer the information to the covered entity responsible for the procurement.

(iii). A covered entity that is involved in the procurement as a control agency in the Executive Department. Examples of entities within this category are the Division of the Budget, Department of Civil Service and the Office for Technology. Compliance with EO 127 by the Department of Law and the Office of the State Comptroller will be on a voluntary basis. As noted previously, if a contractor contacted a covered entity acting as a control agency, and such contact is of a routine, factual nature, such inquiry would not activate EO 127. If the contractor's contact urges action or seeks to impact or cause a determination, and reasonably appears to be an attempt to influence the procurement process, such covered entity acting as a control agency would be obligated to record such contact and provide the information to the covered entity responsible for the procurement.

**D. A Response by a Contractor to a Request For Information (RFI) issued by a covered entity?**

No. EO 127 requires disclosure and record keeping of contacts once a determination has been made with respect to a planned procurement. An RFI is generally used as a means to collect information upon which to base a decision; it is not a tool employed to award a procurement contract. At the RFI stage, a covered entity has not made a determination to proceed with a procurement.

**E. What kinds of communications are covered by EO 127?**

EO 127 applies to all forms of contact between a covered entity and a contractor, including but not limited to, telephone conversations, correspondence, electronic mail and person-to-person discussions.

**F. Must there be financial interest present for there to be an attempt to influence the procurement process?**

No. ~~A~~ financial interest is not necessary for EO 127 to be activated. Once an initial decision or determination to proceed with a procurement is made, EO 127 is activated and a record is made of the identity of each person or organization that attempts to influence the procurement process regardless of whether such person or organization has a financial interest in the procurement. Financial interest is only one of the pieces of information to be collected.

**10. How does EO 127 apply to real estate transactions?**

The terms of EO 127 apply to a real estate transaction at that point in time when an initial decision or determination is made to proceed with a real estate transaction is made. For example, when a decision is made to obtain leased space for a specific need, EO 127 is activated.

**11. Does EO 127 apply to the sale of real property by a covered entity?**

Yes. ~~It~~ applies to the sale of real property by a covered entity. The definition of procurement contract is broad and expressly includes the sale of real property. (See Question 3.)

**12. Once I've determined that EO 127 applies, what should I do?**

**A. Require Disclosure**

Under EO 127, a covered entity must ask in its solicitation for disclosure from the contractor about retention, employment or designation of persons or organizations attempting to influence the procurement. If the procurement contract is not based on a bid solicitation, disclosure should still be sought as appropriate from the contractor (e.g., this information may be solicited as part of a real estate transaction through a “disclosure sheet”). For purposes of a bid or contract, a model bid provision is included in these Guidelines for review, reference and use by covered entities. (See Form 1.)

Information solicited from the contractor by the covered entity must:

- ❑ Identify any person or organization retained, employed or designated by or on behalf of the contractor, and
- ❑ State whether such person or organization has a financial interest in the procurement.
- ❑ To the fullest extent practicable, disclosure must be made prior to such person or organization contacting the covered entity regarding the procurement.

Information to be disclosed consists of:

- Name of Person
- Name of Organization
- Address
- Telephone Number
- Place of Principal Employment
- Occupation of Person Retained, Employed or Designated
- Financial Interest

#### **B. Record keeping by covered entity**

Under EO 127, it is recognized that a covered entity may also be contacted by persons or organizations that reasonably appear to be attempting to influence the procurement; when information about the contact has not been identified through the bid or competitive solicitation. Under such circumstances, the covered entity also has an obligation to obtain disclosure of the same information in the same manner as described in Question 12 (A).

Good practice by a covered entity will include a written process for consistent record keeping and referral of the disclosed information by all staff who may be contacted, including executive staff, business, legal and financial staff who are involved with the purchase of goods and services, real estate transactions or public works. To the extent possible, a covered entity should collect the name of the person that is retained, employed or designated by or on a contractor's behalf. In the event the contractor does not know the name of the specific person at the time the bid response is due, good practice indicates that the covered entity include language in its proposal that creates a continuing obligation by the contractor to provide the specific person's information when it is available and to keep the disclosed information current. Model language is included in Forms 1 and 5 for your use.

Information that needs to be solicited from the contractor by the covered entity must:



- Identify any person or organization retained, employed or designated by or on behalf of the, contractor, and
- Whether such person or organization has a financial interest in the procurement. (Financial interest may be presumed by the covered entity under circumstances where the attempt to influence procurement is established, but information on the financial interest cannot be determined.)

Under these circumstances, information to be disclosed regarding contacts consists of:

- Name of Person
- Name of Organization
- Address
- Telephone Number
- Place of Principal Employment
- Occupation of Person or Organization Retained, Employed or Designated
- Financial Interest

As part of the procurement record for submission to the control agencies, the covered entity should compile a listing of all those persons or organizations that were retained, employed or designated by or on behalf of the contractor to attempt to influence the procurement process. This listing should include those persons or organizations **initially** reported and those **subsequently** reported. Model language is included in Form 6 for your use.

### C. **Determination of responsibility by a covered entity**

In addition to obtaining disclosure, EO 127 requires the covered entity to make a determination of responsibility of the proposed awardee for a procurement contract. In determining responsibility, the covered entity must ask whether the contractor has been found non-responsible during the past five years in its disclosure of information about persons or organizations attempting to influence procurements. (See Form 2.) A finding of non-responsibility would likely occur where a contractor had failed to timely disclose accurate and complete information or otherwise cooperate in the implementation of EO 127.

A covered entity is precluded from awarding a procurement contract to a contractor who has been previously found non-responsible under EO 127 unless it makes a finding on the record that such contract is in the best interests of the State, notwithstanding the prior finding of non-responsibility. The covered entity must prepare a statement describing the basis of such determination and include it in its procurement record.

Please refer to Question 17 for more information on determinations of responsibility.



13. **Can a covered entity develop a procedure for a contractor to periodically submit the required information regarding those persons and organizations retained, employed or designated by or on its behalf to attempt to influence the procurement process, rather than on a procurement-by-procurement basis?**

Yes. A covered entity may develop a procedure for a contractor to periodically submit the names and required information on those persons and organizations retained, employed or designated by or on its behalf. Solicitation and bid documents would need to include a contractor's certification that the information on file with the covered entity is correct and true. The covered entity must develop a procedure to ensure that the periodically submitted information is added to all appropriate procurement records. A covered entity may adopt its own written guidelines as long as the requirements of EO 127 are satisfied.

14. **Could the compiled record maintained by the covered entity identify contacts that were not required to be disclosed by the contractor?**

Yes. The covered entity may also be contacted by other parties not retained, employed or designated by the contractor that seek to attempt to influence the outcome of the procurement. The covered entity must record the information and maintain it as part of the compiled record in the procurement record.

Examples of such contacts include, but are not limited to, attempts to influence the outcome of the procurement by trade associations, economic development groups or civic organizations where such parties are acting independently to serve their interests. In other words, such parties have not been retained, employed or designated by the contractor.

<sup>2</sup>Retained, employed or designated<sup>2</sup> necessarily implies or requires that a contractor has entered into a working relationship, formal or informal, with general or specific instructions, directions or information being exchanged relative to representation of such contractor on its behalf or to serve its interests. Covered entities should recognize that attempts to influence the outcome of procurements may be initiated by other parties with an interest or stake in the procurement, but who are not directly involved in the procurement contract process. In instances where it is not clear or apparent whether the communication arises due to the fact that the party has a working relationship and is representing the contractor, further inquiry of the contractor may be required. (See Question 12.) However, whenever there is an attempt to influence the outcome of the procurement, the contacts should be recorded and included in the compiled record.

15. **Am I required to record every contact?**

No. The covered entity is required to keep a compiled record from persons or organizations that are deemed retained, employed or designated to attempt to influence a procurement and of those who, while not so designated, actually do initiate such communications. Good practice when the contact is made with staff of a covered entity not directly involved with the ongoing procurement is to record all contacts that appear to

attempt to influence a procurement. Record keeping and referral of each contact to staff of the covered entity directly involved with the procurement will maximize efforts by the covered entity to comply with EO 127. Records of contacts should be forwarded to the covered entity officially responsible for the preparation of the procurement record for inclusion in the compiled record, as appropriate. Duplicate records of contacts can be discarded by such official. (See Question 14.)

Recording and referral of contacts should continue during the term of a procurement contract. (See Question 3.) The decision by the covered entity to proceed with an amendment to an existing contract is an example of when the continuing requirement to obtain disclosure of information would arise.

In the event the contractor has not identified a person or organization attempting to influence a procurement, but a contact is recorded, the covered entity should make diligent inquiry to resolve the discrepancy, including consideration of whether it is a technicality, irregularity or omission, which is not intentional and therefore waivable.

**16. What must I record?**

Form 5 has been prepared to facilitate recording of information and sets forth the required elements.

**17. What is a determination of responsibility?**

EO 127 obligates a covered entity to make a determination of responsibility of the proposed awardee for a procurement contract. (The term “awardee” references a vendor or contractor that has received an award letter on a procurement contract.) Responsibility determinations are already required for state agencies pursuant to State Finance Law § 163(3)(a)(ii), (4)(d) and (9)(f). A determination of responsibility is an implicit or explicit conclusion reached by a procurement official that a proposed contractor is reliable, trustworthy, financially sound and dependable for purposes of award of a procurement contract. Often when a procuring entity receives information that calls into question one or more attributes of responsibility, a due process review is undertaken with diligent inquiry into the facts resulting in a determination for the record.

As part of the responsibility determination, EO 127 mandates consideration of whether a contractor has intentionally provided false or incomplete information under EO 127 within the last five years, and a covered entity must consider whether a contractor has failed to timely disclose accurate and complete information or otherwise cooperate in the implementation of EO 127. For further help and information on the issue of responsibility and making responsibility determinations, you should refer to the New York State Procurement Bulletin entitled “*Best Practices - Determining Vendor Responsibility*” issued by the New York State Procurement Council, May 1999.

A covered entity is precluded from awarding a procurement contract to a contractor that discloses a prior finding of non-responsibility under EO 127 unless the covered entity makes a finding to be included in the procurement record, that such

contract is in the best interests of the State, notwithstanding the prior finding of non-responsibility.

Form 2 provides model language for potential use in bid and proposal documentation for procurements to collect information about prior determinations of non-responsibility.

Specific factors to be considered when determining whether a contractor has failed to timely disclose accurate and complete information or otherwise cooperate in the implementation of EO 127 include, but are not limited to:

- Has the contractor made statements indicating an intentional failure to provide information or a refusal to provide information?
- Has the contractor refused to provide information?
- Has the contractor repeatedly omitted required information?
- Has the contractor engaged in one or more flagrant omissions of the required information?
- Has the contractor refused to provide information about subsequently retained, employed or designated persons or organizations?

**18. What is a procurement record?**

The term procurement record is commonly understood to refer to that file made and maintained by a covered entity that documents the series of decisions made and approaches taken when conducting a procurement. For purposes of EO 127, the procurement record shall include a determination of non-responsibility in the procurement process. (See discussion under Question 15.)

**19. How long must these records be retained?**

These records should be treated as contract files and retained in accordance with the requirements of the Arts and Cultural Affairs Law as set forth in the *General Retention and Disposition Schedule for New York State Government Records* or other applicable law. Generally speaking, such contract files should be retained for a period of six years after the termination of the contract or until there is no further legal need for the records.

**20. How is disclosed information to be made accessible to the public?**

The record of disclosed information and compiled record should be maintained in writing with other bid and contract information in the procurement record. This public record should be made available to anyone requesting it. (See Question 24 for more information on preparing the compiled record.) In keeping with the intent of EO 127,

good practice by a covered entity would include a written directive making such information available for inspection by the public as soon as possible in the process. Under EO 127, the compiled record should be readily available to the public. For example, the contractor disclosure of contacts information can be released after the bid opening and before the final contract award.

**21. Should every covered entity develop a written policy or guidelines implementing EO 127?**

There is no requirement that a written policy be adopted and it is likely that the initial period of adoption will involve questions and clarifications. This set of guidelines can be used by any covered entity. It is good practice for a covered entity to provide through written policy and procedures directions about EO 127 and compliance with it.

**22. Who should be involved with compliance -EO 127?**

Staff of a covered entity whose responsibilities include purchasing, bidding, contracting, and real estate transactions should be involved with compliance with EO 127. Compliance will also be required from executive or senior management, legal and ethics staff and staff dealing with financial administration of the covered entity.

**23. What action does a covered entity need to take if there is a failure to comply with EO 127 by an officer or employee?**

The consequences of non-compliance with EO 127 should be addressed under normal procedures. For instance, it would be good practice to include reference to EO 127 in a Code of Conduct for employees or in any general administrative governance material. Internal communications channels routinely used to advise officers and employees of information affecting their operations are also a good means for introducing the requirements of EO 127.

Counsel and the Ethics Officer for a covered entity should also be apprised of the applicability of EO 127 to officers and employees. (Note: Counsel for a covered entity would also be involved with implementation and interpretation of EO 127.) Covered entity officers and employees should also consider presentation of any compliance issues to their management, Counsel, the State Inspector General and the Ethics Commission.

In keeping with the Ethics Commission's statutory mandate, the Ethics Commission undertakes investigations of alleged violations of the Public Officers Law upon complaint or upon its own initiative. Complaints may be made anonymously. The Commission has the power to subpoena witnesses and require the production of any relevant books or records. Individuals who violate certain provisions of Public Officers Law §73 are subject to a civil penalty not to exceed \$10,000. In lieu of a civil penalty, the Ethics Commission may refer violations to an appropriate prosecutor as a Class A misdemeanor. Individuals who violate Public Officers Law §74 may also be subject to disciplinary action, including a fine, suspension or dismissal by their appointing authority.

24. **How should the compiled record be prepared for inclusion in the procurement record?**

Depending on the nature and complexity of the procurement contract, different means for preparing the compiled record may be appropriate. A covered entity may wish to consider a format that will better enable it to provide inspection by the public in accordance with EO 127.

For a relatively straightforward procurement, it may be appropriate for a covered entity to gather and affix together the contractor's disclosure forms and the records of contacts made by the employees of the covered entity, eliminating any duplicate information. For a more complex transaction, separate documents may be advisable. Model language for the preparation of a separate document is included in Form 6 for your use.

25. **Must I have a central record collection point?**

No. EO 127 does not require a central record collection point. All contract information must be recorded and maintained with the procurement contract and covered entities need to ensure that information recorded by staff not directly involved with the letting and award of the procurement contract is also included with the record of that procurement contract for compliance with EO 127. Inclusion in the procurement record will also ensure the public will have access to that information.

26. **Who can I talk to or contact if I need help?**

Office of General Services  
Legal Services  
41<sup>st</sup> Floor  
Tower Building  
G. N. A. R. Empire State Plaza  
Albany, New York [12242](https://www.ogs.state.ny.us)  
[public.information@ogs.state.ny.us](mailto:public.information@ogs.state.ny.us)  
518-474-5607

27. **When does EO 127 take effect?**

EO 127 was signed by Governor Pataki on June 16, 2003 and takes effect 60 days after that date. A covered entity must implement its provisions for procurements that commenced on or after August 14, 2003. It must also apply these provisions to any amendment to a procurement contract that commences on or after August 14, 2003.

Good practice by a covered entity will include providing its contractors and potential contractors with adequate information regarding its implementation of EO 127. It is recommended that a covered entity actively assist its contractors in understanding and meeting these requirements. During the initial compliance stage, it is recommended

that if contacts are made but no record of contact filed, a covered entity should contact the contractor to determine if it was an inadvertent omission and provide the contractor with [an opportunity](#) to submit the required information.

**28. Are there forms I can use to make compliance easier?**

OGS is exploring the possibility of amending Appendix A, *Standard Clauses for All New York State Contracts*, to include the contractor certification and termination language required under EO 127. It was not possible to complete the necessary review and discussions with involved agencies before the release of the Guidelines. The forms described below were developed to facilitate compliance with the requirements of EO 127 by covered entities. The language may be modified to meet the needs of your organization.

**A. Contractor Disclosure of Contacts**

We have developed Forms 1 and [2 for](#) your use in bids and contracts. They notify contractors that information about persons or organizations [retained](#), employed, or designated to attempt to influence a procurement must be disclosed. It also identifies the information to be provided. In the event that the procurement does not involve a bid or contract, these forms may still be useful to you in securing the same information from all other parties to the procurement transaction.

**B. Contractor Disclosure of Prior Non-Responsibility Determinations**

We have developed Form 2 for your use in soliciting information from contractors [about](#) prior non-responsibility determinations.

**C. Contractor Certification**

We have developed Form 3 for your use in bids and contracts for contractor certification [of](#) the truth and accuracy of disclosed information.

**D. Model Contract Termination Language**

We have developed Form 4 for your use in bids and contracts to establish the right of the covered entity to terminate a contract if the covered entity finds that disclosed information is intentionally false or incomplete.



E. **Covered Entity Record of Contact**

We have developed Form 5 to assist the covered entity in the making of a written record of contacts that reasonably appear to be an attempt to influence the procurement process.

F. **Compiled Record**

| We have developed Form 6 to assist in the process of preparing a compiled record for inclusion in the procurement record.