

Chapter 4 - Purchasing, Procurement & Contracting

Important: All subrecipients must consult with their MTA 5310 Program Manager or Regional Planner for any FTA- and/or MTA-funded purchases exceeding \$1,000 for purchases funded by capital grants and \$3,500 for purchases funded by operating grants. MTA concurrence is needed for any grant-funded purchase exceeding these thresholds.

INTRODUCTION

Federal and State requirements related to purchasing, procurement, and third-party contracting are intended to ensure contracts that make use of Federal and State funds:

- are consistently managed following locally established procedures that ensure compliance with State and Federal procurement requirements,
- are not awarded to fraudulent, debarred, or technically unqualified vendors,
- are cost-efficient - price consistent with the current market,
- provide qualified vendors a fair opportunity to obtain contracted work through full and open competition (without local geographic preference),
- do not discriminate against businesses owned by persons of racial or ethnic minorities or women (i.e., comply with DBE requirements),
- make preference for materials manufactured in the United States (i.e., complying with Buy America requirements), as applicable, and
- include contract clauses that require contractors to comply with applicable Federal and State requirements.

As part of the grant application process, each applicant for Section 5310 funding certifies that its procurements and procurement system will comply with all applicable requirements imposed by Federal laws, executive orders or regulations and the requirements of FTA Circular 4220.1F, "Third Party Contracting Guidance."

Subrecipients also must certify that they will not discriminate on the basis of race, color, national origin, or sex in awarding contracts and sub-agreements supported by US DOT funds, and will comply with DOT regulations, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs," 49 CFR Part 26. All subrecipients that receive planning, capital (excluding transit vehicles), and/or operating assistance and will award prime contracts exceeding \$250,000 in FTA

funds in a fiscal year are required by FTA to have a Disadvantaged Business Enterprise (DBE) program. Few Section 5310 subrecipients will meet or exceed this threshold. Should this occur, MTA will work with the subrecipient to develop and implement a formal DBE program.

It is important to emphasize that this chapter is not an all-inclusive reference on Federal and State procurement and contracting requirements. Federal requirements are extensive, and FTA has prepared detailed guidance on these requirements. Subrecipients are advised to review FTA Circular 4220.1 carefully. This circular is frequently updated. At the time of preparing this manual, the most recent version was 4220.1F, revised through March 2013. This circular can be found online at <https://www.transit.dot.gov/regulations-and-guidance/fta-circulars/third-party-contracting-guidance>. Appendix 4A provides a more expansive description of the procurement requirements for FTA subrecipients, particularly as they apply to larger purchases (valued over \$25,000).

PROCUREMENT RESPONSIBILITY

All procurement activities are the responsibility of the subrecipients. However, the MTA conducts a centralized procurement for small buses funded by the Section 5310 program and subrecipients awarded this type of vehicle must participate in the State procurement of small buses rather than procuring FTA grant-funded vehicles locally.

Subrecipients must procure other equipment, including equipment that is installed on vehicles after delivery from the factory, such as mobile radios. Funding for such equipment must be applied for separately from the vehicle in the grant application, and the equipment must be procured by the subrecipient under a separate procurement process from the vehicle. Other equipment that the subrecipient must procure themselves includes computer hardware and software.

Service contracts and purchases that make use of Federal or State funds are also subject to procurement requirements. This includes administrative services (legal, accounting, insurance) as well as vehicle operations and maintenance.

As noted earlier, as part of the grant application process, each subrecipient is required to self-certify that its procurement system complies with Federal requirements for any FTA-assisted third-party contract the subrecipient undertakes and administers.

MTA CONCURRENCE

Because of the scope and complexity of Federal and State procurement requirements (summarized in this chapter), all subrecipients are required to consult with the MTA Office of Local Transit Support for guidance before engaging in any procurement activities that make use of Federal and/or State funds.

The MTA must concur in writing with subrecipient solicitation documents prior to initiation of the procurement process for all items purchased with capital and technical assistance funds, as well as for all items purchased through small purchase, sealed bids, competitive proposal, competitive negotiation, or noncompetitive negotiation. This includes MTA written approval of bid specifications for vehicles and equipment.

The MTA must also concur in writing with the recommendation for award prior to the execution of a local contract or purchase order valued more than:

- \$1,000 if capital grant funds are involved, or
- \$3,500 if operating grant funds are involved.

ETHICS/WRITTEN STANDARDS OF CONDUCT

Subrecipients must maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. These standards must prohibit conflict of interest in the selection, award, or administration of a contract supported with FTA assistance, the acceptance of gifts, gratuities, favors, or anything of monetary value from contractors or subcontractors, and provide for disciplinary action for violation of such standards. A sample of a code of ethics/conduct is provided as Attachment 4.A.

FTA takes very seriously the requirement to avoid conflicts of interest in conducting procurements and awarding FTA-funded contracts, and any form of fraud can be prosecuted as a criminal act.

CONTRACT ADMINISTRATION SYSTEM

Subrecipients must maintain a contract administration system that ensures that:

- Subrecipients have written procurement and purchasing procedures that address each of the requirements described in this chapter and as listed in FTA Circular 4220.1F, pages III-2 and III-3.

- All procurements funded wholly or in part with MTA and FTA funds are done in accordance with State and Federal regulations,
- Contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders, and
- Subrecipients follow their procedures for all local procurements as long as they meet Federal and State requirements. If there is no State law on a particular aspect of procurement, then Federal contract law principles will apply.
 - Subrecipients that are part of local government organizations may use the procurement procedures of their jurisdiction as long as they conform to the minimum standards prescribed by the FTA and MTA, which are summarized in this chapter.
 - Subrecipients that are private organizations must develop written procurement procedures that meet Federal and State requirements as outlined in FTA Circular 4220.1F.

Attachment 4.B provides a sample Small Procurement Policy and Procedure Template and Guide you may use that will satisfy most Federal and State Procurement requirements.

AWARDS TO RESPONSIBLE CONTRACTORS

Subrecipients may make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement.

The subrecipient must apply USDOT's debarment and suspension requirements to itself and each third-party contractor and their subcontractors. The subrecipient must seek concurrence from MTA before awarding any contract or procurement. MTA requires that the subrecipient check the Excluded Parties List System (EPLS) maintained by the GSA's System for Award Management (SAM) (www.sam.gov) before awarding a third party contract. A screen print of the EPLS search results must be placed in the procurement file. Any prospective contractor or subcontractor listed on the Maryland State government debarment and suspension list, which can be found online at <http://bpw.maryland.gov/Pages/debarments.aspx>, should also be regarded as non-responsible and ineligible for contract award.

WRITTEN RECORD OF PROCUREMENT HISTORY

Subrecipients must maintain records detailing the history of each procurement. Such records are usually kept in the form of a file for three years from the procurement and, at a minimum, usually include:

For all procurements regardless of value:

- An independent cost estimate (ICE),
- Rationale for the method of procurement, solicitation document (e.g., the formal RFP, IFB, or other form of written solicitation),
- Documentation of outreach efforts (advertising of your procurement, to include posting on eMaryland Marketplace for all procurements exceeding \$15,000)
- Contractor responses/bids/proposals/quotes,
- Fair and equitable cost analysis of winning proposal (basis for contract price),
- Selection of contract type,
- Contractor selection or rejection,
- Screen shot of the EPLS search results from www.sam.gov, and
- Copy of signed and executed final contract.

For each procurement valued more than \$25,000:

- Debarment certification
- DBE goal evaluation/analysis

WRITTEN PROTEST PROCEDURES

Subrecipients must have written protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding protests to MTA and FTA. All protest decisions must be in writing. A protester must exhaust all administrative remedies with the subrecipient before pursuing a protest with FTA. Copies of all documentation related to protests should be on file (e.g., disclosure to FTA and MTA, written protest decisions, etc.), and a sample Protest Procedure is provided as Attachment 4.C.

Responsibility for Settlement of Contract Issues/Disputes

Subrecipients are responsible for settling any contract issue or dispute arising from their procurements, following their own locally-adopted protest procedures. Subrecipients 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.

FTA/MTA will not mediate contract disputes. FTA/MTA will only address technical procedural issues related to compliance with Federal and State requirements (per FTA Circular 4220.1F and COMAR Title 21). Violations of the law will be referred to the local, State, or Federal authority having proper jurisdiction. If the procedures followed did not comply with Federal and State requirements, FTA/MTA may withhold Federal/State funds until a fully-compliant procurement is conducted.

INDEPENDENT COST ESTIMATE

A required first step in any procurement is to prepare an Independent Cost Estimate (ICE). An ICE is:

- necessary to determine the approximate cost of the project (which will determine what types of procurement methods may be used),
- an important step in developing a project's specifications, and
- needed to determine if the subrecipient has enough resources to conduct the project. MTA expects the subrecipient to prepare an ICE as a basis for each grant request.

ICE documentation must be maintained as part of the written record for each procurement. A sample template for documenting an ICE is provided as Attachment 4.D.

FTA's *Best Practices Procurement Manual* provides guidance on how to prepare and document an ICE, including a sample ICE form within Appendix B of that manual: <https://www.transit.dot.gov/funding/procurement/best-practices-procurement-manual>.

Information is also available through the National RTAP ProcurementPRO web application: <http://nationalrtap.org/Web-Apps/ProcurementPRO>.

COST OR PRICE ANALYSIS FOR EVERY PROCUREMENT ACTION

Subrecipients must perform a cost or price analysis in connection with every procurement action, including contract modifications. Procurement actions specifically requiring a cost or price analysis include:

1. Independent Cost Estimate - An ICE must be prepared as an initial step in the process.
2. Evaluating Options - The value of options needs to be considered at the time the award is made.
3. Evaluating Offers - A fair and reasonable cost analysis must be conducted immediately prior to making the award.
4. Exercising Options - A fair and reasonable cost analysis must be conducted prior to exercising options.
5. Change Orders - A fair and reasonable cost analysis must be conducted prior to making any changes to the contract.

The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, subrecipients must make independent estimates (ICEs, referred to earlier) before receiving bids or proposals.

- A cost analysis must be performed when the offeror is required to submit the elements (such as labor hours, overhead, materials, etc.) of the estimated cost.
- A price analysis may be used in all other instances to determine the reasonableness of the proposed contract price.
- Subrecipients will negotiate profit as a separate element of the price for each contract. The cost plus a percentage of cost and percentage of construction cost methods of contracting is prohibited.

eMARYLAND MARKETPLACE

Solicitations for all Section 5310-funded purchases exceeding \$15,000 must be published in the eMaryland Marketplace. MTA encourages subrecipients to list all solicitations on eMaryland Marketplace.

INTERGOVERNMENTAL PROCUREMENT AGREEMENTS

Subrecipients 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, subrecipients 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 subrecipient's purchase document.

Subrecipients are also encouraged to jointly procure goods and services with other subrecipients. When obtaining goods or services in this manner, subrecipients must ensure all Federal requirements, required clauses, and certifications are properly followed and included in the resulting joint solicitation and contract documents.

SMALL PROCUREMENTS

For projects up to \$25,000 (State limit), while a formal request for bids or proposals is not required, the subrecipient must solicit price or rate quotations from an adequate number of sources. The State requires at least two and preferably three quotes.

The State categorizes Small Procurements as follows, each with its own procurement guidelines:

- **Category I (known as Micro-purchases under Federal methods):** For purchases under \$3,500, oral, written or published solicitation may be used. The subrecipient is responsible for ensuring that the price is fair and reasonable, and is encouraged to distribute multiple purchases equitably among local qualified suppliers. The basis for the award should be the judgment of the subrecipient's procurement officer. Once a subrecipient has identified a preferred vendor, MTA concurrence is required prior to the issuance of a purchase order.
- **Category II:** For procurements more than \$3,500 but not more than \$15,000, oral, written, or published solicitation may be made.
- **Category III:** For procurements more than \$15,000 but not more than \$25,000, written or published solicitation must be made, which may be supplemented by oral solicitation.

Selection of a vendor under Categories II and III should be based on the most favorable bid price or evaluated bid price, or most advantageous offer, as specified in the solicitation (COMAR 21.05.07.06).

As specified under COMAR 21.05.07.06, a written or published solicitation for a small procurement must contain, at a minimum:

1. description of the item requested;
2. time, date, place, and form of response requested;
3. basis for award; and

4. name and telephone number of the procurement officer to whom inquiries regarding the solicitation may be directed.¹

A procurement may not be artificially divided in order to use the small procurement method instead of the other procurement methods. A checklist of required steps for small procurements and their record requirements (up to \$25,000) are provided as part of Attachment 4.B.

Projects exceeding the small purchase threshold (\$25,000) must be procured through one of the methods described in Appendix 4.A, with a checklist of steps required provided as well. Any subrecipient making a procurement greater than \$25,000 using Federal and/or State funding must contact MTA before initiating any procurement activity and must review Appendix 4.A.

THIRD-PARTY CONTRACT RESPONSIBILITIES REGARDING COMPLIANCE WITH FEDERAL AND STATE REQUIREMENTS

Most Federal and State requirements regarding the use of FTA/MTA grant funds that apply to the primary subrecipient of the grant (your organization) also apply to your third-party contractors, vendors, and/or lessees. This includes such requirements as drug and alcohol testing for safety sensitive positions, possession of a valid Commercial Driver's License (CDL) by mechanics that test drive vehicles calling for CDLs, and meeting all ADA service requirements.

Federal and State requirements that pertain to those grants funding your contract with the third party should be clearly spelled out in the contract or your purchase order, and you are responsible for ensuring that your contractor complies with them. You must also monitor Federally-funded procurements of the private contractor's procurement process to ensure Federal requirements are met. Subcontractors must sign a series of certifications and assurances and forward them to the subrecipient.

Refer to Attachment 4.E for a list of Federally-required contract provisions when they apply, and to Attachment 4.F for a summary template of each FTA-required clause. Third Party Procurement Clauses are found in the FTA Master Agreement updated each year

¹ COMAR 21.05.07.06 also indicates that the solicitation must contain provisions concerning mercury content under COMAR 21.11.07 (<http://www.dsd.state.md.us/comar/comarhtml/21/21.11.07.07.htm>): "Procurement solicitations for products that may contain mercury shall give a price preference not exceeding 5 percent to bids or proposals for products that are mercury free or, if the procurement solicitation states, to products containing the least amount of mercury." This provision may not be pertinent for all procurements, but is required in the State code. Products in which mercury is likely to be a concern in transportation agencies include florescent light bulbs, batteries, disinfectant soaps, and certain electronics.

by FTA. Always check the latest FTA Master Agreement and circulars to ensure you are including the current FTA-required provisions.

SUMMARY

Under Chapter 4 of this manual, as a subrecipient of Federal and/or State funding, you will be required to provide the following information, forms or programs:

- Written Code of Ethics/Conduct. A sample Code of Ethics/Conduct Template is provided as Attachment 4.A.
- Written Procurement Policies and Procedures meeting FTA procurement requirements. A sample Procurement Policy and Procedures Template is provided as Attachment 4.B.
- Written Protest Procedure which can/should be part of your Procurement Program. A sample Protest Procedure Template is provided as Attachment 4.C.
- ICE Form with each procurement. A sample ICE Form Template is provided as Attachment 4.D.
- Documentation required for each procurement meeting FTA funding thresholds as detailed in the checklists found in Attachment 4.B.
- Appropriate FTA third-party Procurement Clauses and a checklist with each procurement meeting FTA funding limits. A checklist of current FTA-required provisions is provided as Attachment 4.E, with suggested clause language provided in Attachment 4.F.
- Procurement requirements described in this chapter are for COMAR Category I, II, and III small procurements (valued \$25,000 or less). Appendix 4.A covers the more extensive requirements for procurements valued more than \$25,000.