

**FINAL REPORT  
OF THE  
PROCUREMENT SYSTEM REVIEW  
OF  
THE CONCHO VALLEY TRANSIT DISTRICT  
(CVTD)**



**SAN ANGELO, TX**

**OCTOBER 2013**

**Conducted by a Procurement  
Management Review Team from  
Business Management Research Associates, Inc.  
Fairfax, Virginia**

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## **EXECUTIVE SUMMARY**

Business Management Research Associates (BMRA), under contract with the Federal Transit Administration (FTA), performed an on-site Procurement System Review of the Concho Valley Transit District (CVTD) during the period of March 18 through March 22, 2013.

The Federal Transit Administration (FTA) has a vested interest in assisting recipients to maintain efficient and effective procurement systems as well as a legal responsibility to ensure that its recipients expend their funds in accordance with FTA regulations, the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (49 CFR Part 18), and the contractual agreements between FTA and the local recipient. In order to carry out this responsibility, FTA has established an oversight framework that is composed of recipient self-certifications, annual single audits conducted in accordance with OMB Circular A-133, and FTA oversight reviews, including the Procurement System Review (PSR). The BMRA team conducted the review in accordance with the FTA Guide for Procurement System Reviews (October 2009).

This review was performed in accordance with FTA procedures and included a risk assessment phase and a contract review phase. The risk assessment phase included a review of data available at the FTA Regional Office. The contract review phase consisted of a recipient document review and a systemwide requirements review. During this phase, interviews were conducted with the CVTD Chief Executive Officer, Chief Procurement and Logistics Officer, Chief Financial Officer, Contracts Manager, Director of Maintenance, Manager of Grants, and DBE-EEO Officer.

The contract review phase included a review of contract files and documents collected during the risk assessment phase and the contract files at CVTD. The specific documents referenced in this report are available at FTA's Regional Office or at the CVTD Contracts Office. The BMRA team conducted discussions with CVTD's Procurement and Fiscal Department personnel who were involved with FTA funded projects for the acquisition of goods, services, and architect-engineering services. CVTD did not contract for buses during the past five years.

CVTD has a dedicated and competent professional staff. Of the 56 elements that were reviewed, CVTD was found not deficient in 25 elements, deficient in 27 elements, and 4 elements were not applicable.

These deficiencies, identified below, are addressed in the body of the report.

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## PROCUREMENT SYSTEM REVIEW BACKGROUND

### DESCRIPTION

The objectives of the Procurement System Review (PSR) are to encourage and facilitate improved recipient procurement operations, promote the use of best practices, and assess the recipient's compliance with all Federal requirements, specifically the requirements of FTA Circular 4220.1F and the Pre-Award, Post-Delivery Rule, applicable to Buy America requirements. The PSR is designed to be a customer-oriented review that encourages working relationships between FTA and the recipients.

The reviews are performed in accordance with FTA procedures. They include discussion with the FTA Regional Office, site visit, interviews with key management and staff personnel, systemwide requirements review, sample contract selection, contract file reviews, and follow-up interviews. The specific documents reviewed are referenced in this report and are available at FTA's Regional Office or at the recipient's office.

### REQUIRED ELEMENTS

The PSR looks at both systemwide and individual procurement elements. Systemwide procurement elements are requirements that apply to the procurement system as a whole. Individual procurement elements are evaluated on an individual contract basis and summarized across all contracts reviewed.

### CLASSIFICATION OF FINDINGS

The reviewer determined the status (not deficient/deficient) for each systemwide and individual procurement element. The reviewer determined the status for: (1) systemwide elements based on the results of the Systemwide Elements Review Checklist; and (2) each individual procurement element based upon all the contract files reviewed.

Two levels of findings are used:

***Not Deficient:*** A finding of "not deficient" indicates that the recipient complied with the basic requirements of the element. This is defined as, "The review of selected procurement files found that in all instances the recipient complied with the requirement."

***Deficient:*** A finding of "deficient" indicates that the recipient did not always comply with the requirements of the element. This is defined as, "The review of selected procurement files found that in one or more of the applicable instances, the recipient did not comply with the requirement."

## DESCRIPTION OF THE RECIPIENT

The Concho Valley Transit District provides urban transit service, known as Transa, in the City of San Angelo and rural transit service to the twelve-county region surrounding San Angelo. The service area for the City of San Angelo is approximately 56 square miles and the population is 93,200 persons.

In 2006, the City of San Angelo and Concho Valley Council of Governments (CVCOG) entered into an intergovernmental agreement that led to the consolidation of the fixed route and rural transit programs into the newly formed Concho Valley Transit District, as permitted under Texas state statutes. CVTD operates all service in house, except maintenance, which it outsources to local vendors.

CVTD operates a network of five fixed routes. Service is provided weekdays from 6:30 a.m. to 6:30 p.m. and Saturdays from 7:30 a.m. to 6:30 p.m. Service is not operated on Sundays or holidays. CVTD's complementary paratransit service operates within the City during the same days and hours of services as the fixed routes.

The basic adult fare for bus service is \$1.00. A reduced fare of \$0.50 is offered to seniors 60 years or older, Medicare card holders, and persons with disabilities during all hours. The fare for ADA paratransit service is \$2.00.

CVTD operates a fleet of 10 buses for fixed-route service. The fixed route bus fleet consists of ten standard 30foot transit coaches. The current peak requirement is for five vehicles. CVTD also has a fleet of 14 vans for its complementary paratransit service.

CVTD operates from a single operations facility in San Angelo. It maintains its administrative offices in spaces leased from the Concho Valley Council of Governments. Its service is oriented around a transit center in the downtown area.

CVTD's National Transit Database Report for FY 2010 provided the following financial and operating statistics for its fixed-route and paratransit service:

|                     | <b>Fixed-Route Service</b> | <b>Paratransit Service</b> |
|---------------------|----------------------------|----------------------------|
| Unlinked Passengers | 212,056                    | 136,758                    |
| Revenue Hours       | 24,024                     | 65,899                     |
| Operating Expenses  | \$1,526,430                | \$2,779,553                |

Over the past three years, CVTD completed a study of the effectiveness of the system.

Noteworthy projects that are ongoing include the construction of a new Multi-Modal Center, the implementation of a communication and tracking system for fixed route buses, and coordination with the City of San Angelo to provide access downtown.

Over the next three to five years, CVTD will be acquiring and improving land for a new vehicle maintenance facility and continuing to improve rider access to transit in underserved areas.

***ARRA Projects***

CVTD was awarded one ARRA grant, TX-96-X014. This grant funds the construction of the Multi-Modal Center.



## **RESULTS OF THE REVIEW**

The results of the review are summarized for each systemwide and individual procurement element. For each procurement guidance element, the report describes the required element, cites a reference to FTA Circular 4220.1F and other applicable regulations, discusses the issues and identifies the finding, presents best practices/advisory comments, and recommends corrective actions and schedules. The procurement review summary table is provided in Appendix B.

### **SYSTEMWIDE PROCUREMENT ELEMENTS**

Systemwide procurement elements provide guidance that applies to the procurement system as a whole. The systemwide procurement elements are primarily evaluated during the Assessment Phase. The findings in this section are a result of these interviews and additional insights gained during the Contract Review Phase. The results are presented below. Those elements for which the recipient is “not deficient” are shown first, and those defined as “deficient” with respect to that element are shown second. Within each category, the numbered element appears as it is listed in FTA’s PSR Guide.

#### **Not Deficient**

A full description of the elements for which the recipient is not deficient is in Appendix C.

The recipient is not deficient in the following systemwide procurement elements:

Element 1 – Written Standards of Conduct

#### **Deficient**

The recipient is deficient with respect to the following systemwide elements:

Element 2 - Contract Administration System

Element 3 – Written Protest Procedures

Element 4 – Prequalification System

Element 5 – Procedures for Ensuring Most Efficient and Economic Purchase

Element 6 – Procurement Policies and Procedures

## Element (2) Contract Administration System

*The Common Grant Rules require the recipient to maintain a contract administration system to ensure that it and its third party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders and applicable Federal, State, and local responsibilities.*

(FTA C4220.1F, III, 3.)

### Discussion

CVTD is deficient with respect to this element.

FTA C4220.1F requires the recipient to have a contract administration system that ensures that it and its third party contractors perform in accordance with the terms, conditions, and specifications of the contracts or purchase orders.

CVTD did not have a documented contract administration system.

### Best Practices/Advisory Comments BPPM § 9.1 – Documentation of Contract Administration

The documentation contained in the contract file is maintained by, or on behalf of, the contracting officer. It reflects the actions taken by the contracting parties in accordance with the requirements of the contract and documents the decisions made, and the rationale therefore, of matters which may result (or have resulted) in controversy or dispute.

The documentation contained in a procurement file details the history of the procurement through award of the contract. It includes, at a minimum, the rationale for the method of procurement, the selection of the contract type, the reasons for selection or rejection of the contractor, and the basis for the contract price.

It is important to get off to the right start in terms of documenting the administration of the contract and identifying what information should be maintained in the contract administration files. Different people involved in the project (QA, engineers, inspectors, financial, DBE office, safety, etc.) may have their own individual files relating to the contract reflecting their involvement with the administration of the contract; but it is a good practice for the procurement official to maintain the “official” contract file. The “official” file would include all official correspondence relating to the administration of the contract so as to verify the contractor’s adherence to the terms of the contract and demonstrate that the agency is following good administrative practice and sound business judgment in settling all contractual and administrative issues arising during contract performance.

For sealed bid procurements and competitive negotiations, consider including as standard practice in the contract administration file the following:

- The executed contract and notice of award;
- Performance and payment bonds, bond-related documentation, and correspondence with any sureties;

- Contract-required insurance documentation;
- Post-award (pre-performance) correspondence from or to the contractor or other Government agencies;
- Notice to proceed;
- Approvals or disapprovals of contract submittals required by the contract and requests for waivers or deviations from contractual requirements;
- 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;
- 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;
- Documentation regarding stop work and suspension of work orders and termination actions (convenience as well as default); and
- Documentation relating to contract closeout.

For small purchases and micro-purchases, you may wish to automate the documentation or keep some of the above elements on a standard record.

Every type of contract will have different contract administration actions and the documentation required to support that administration will differ as well. Supply contracts have different specific administrative actions than construction contracts do just as fixed price contracts are administered differently than cost-reimbursement contracts. The Federal Acquisition Regulation has an extensive listing of contract administration functions that are considered 'normal' and you might want to review them to see what might be applicable to your particular contract.

On any given contract, there may be a number of different agency personnel involved in monitoring various aspects of the administration of the contract such as the maintenance department, quality control office, the engineering department, the construction management office, the safety office, the disadvantage business department, and the finance department. In some agencies, these offices may have official contract roles for which they will be maintaining an "official" file as to their delegated responsibility. For instance, your contract may have a "contracting officer's representative" or "contracting officer's technical representative" who has delegated authority from the contracting officer to approve submittals and payments. Your agency may have delegated to your program office the authority, up to a certain dollar amount, to issue change orders and settle claims. In all situations, whether the contracting role is performed by the contracting officer or another designee, the files should be documented so that it would be possible to recreate, from the files alone, what happened and how issues were resolved.

### **Corrective Action and Schedule**

CVTD should develop and document a contract administration system that will ensure both CVTD and its third party contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders. Although it appears CVTD is administering

its contracts adequately, it does not have a formalized system to ensure all contract administration issues are properly addressed.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### **CVTD's Response**

CVTD has developed a PIN log system to identify contractual vehicles for tracking purposes. Further, copies of all CVTD contracts will be maintained by CVTD Procurement who shall be responsible for following FTA's guidelines, rules and regulations while conducting business for and on behalf of CVTD. The following steps shall be taken to ensure incorporation of CVTD Procurement Policy:

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 complete     |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

CVTD has also established the following:

1. Establish tracking system for contractual vehicles.
2. Ensure compliance with FTA, State, UGMS, FAR and TxDOT.  
(Checklists have been created for the following price points: micro purchases, \$3K-\$100K, \$100K plus.)
3. Maintain copies of contracts with all pertinent information and documentation.

### **BMRA's Comments**

BMRA concurs with CVTD's response.

With the implementation of a contract administration system that will be controlled by CVTD Procurement and identified in the Draft Procurement Policy, CVTD can be considered "not deficient" for this element.

This corrective action was scheduled to be completed by August 15, 2013.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

### **Element (3) Written Protest Procedures**

*The Common Grant Rules assign responsibility to the recipient for resolving all contractual and administrative issues arising out of their third party procurements, including source evaluation and selection, including protests of awards, disputes, and claims using good administrative practices and sound business judgment. The*

*Federal Transit Administration (FTA) also encourages the recipient to use appropriate alternative dispute resolution procedures. Neither FTA nor the Common Grant Rules relieve the recipient of any responsibility under its contracts to resolve disagreements that may arise in the course of contract formation or contract administration.*

*In general, FTA will not substitute its judgment for that of the recipient or subrecipient unless the matter is primarily a Federal concern. Examples of "Federal concerns" include, but are not limited to, situations "where a special Federal interest is declared because of program management concerns, possible mismanagement, impropriety, waste, or fraud." Nevertheless, FTA can become involved in the recipient's administrative decisions when a recipient's protest decision is appealed to FTA, or when the recipient seeks to use FTA assistance to support the costs of settlements or other resolutions of protests, disputes, claims, or litigation.*

**PROTESTS:**

- a. The Recipient's Role and Responsibilities. *The Common Grant Rules charge the recipient with the initial responsibility to resolve protests of third party contract awards.*
  - (1) Protest Procedures. *Apart from other methods the recipient may have to resolve third party contract issues, such as mediation or arbitration, the Common Grant Rule for governmental recipients requires the recipient to have protest procedures. While the Common Grant Rule for non-governmental recipients does not impose a similar requirement on a non-governmental recipient, FTA expects each recipient to have appropriate written protest procedures, as part of its requirement to maintain or acquire adequate technical capacity to implement the project.*
  - (2) Responsibilities to FTA. *The recipient's minimum responsibilities to FTA consist of the following:*
    - (a) Timely Notification. *The Common Grant Rule for governmental recipients requires a governmental recipient to notify FTA when it receives a third party contract protest to which this circular applies, and to keep FTA informed about the status of the protest. A non-governmental recipient involved in a protest is similarly expected to notify FTA when it receives a third party contract protest to which the circular applies, and to similarly keep FTA informed about the status of the protest. The recipient is expected to provide the following information:*
      1. Subjects. *A list of protests involving third party contracts and potential third party contracts that:*
        - a. *Have a value exceeding \$100,000, or*

- b* Involve a controversial matter, irrespective of amount, or
- c* Involve a highly publicized matter, irrespective of amount.

**2** Details. The following information about each protest:

- a* A brief description of the protest,
- b* The basis of disagreement, and
- c* If open, how far the protest has proceeded, or
- d* If resolved, the agreement or decision reached, and
- e* Whether an appeal has been taken or is likely to be taken.

**3** When and Where. The recipient should provide this information:

- a* In its next quarterly Milestone Progress Report, and
- b* At its next Project Management Oversight review, if any.

*Small recipients may report less frequently if no protests are outstanding.*

**4** FTA Officials to Notify. When a recipient denies a bid protest, and especially if an appeal to FTA is likely to occur, FTA expects the recipient to inform the FTA Regional Administrator for the region administering a regional project, or the FTA Associate Administrator for the program office administering a headquarters project directly. FTA also encourages the recipient to keep its FTA project manager informed about protests with which it is involved. In particular, the recipient should contact its project manager about any unusual activity.

- (b) Access to Information. FTA expects the recipient to disclose information about any third party procurement protest to FTA upon request. FTA reserves the right to require the recipient to provide copies of a particular protest or all protests, and any or all related supporting documents as FTA may determine necessary.

**b.** FTA's Role and Responsibilities. FTA has developed an appeals process for reviewing protests of a recipient's procurement decisions.

(1) Requirements for the Protester. The protester must:

- (a) Qualify as an "Interested Party." Only an "interested party" qualifies for FTA review of its appeal. An "interested party" is a party that is an actual or prospective bidder or offeror whose direct economic interest would be affected by the award or failure to award the third party contract at issue.

- 1 Subcontractors. A subcontractor does not qualify as an “interested party” because it does not have a direct economic interest in the results of the procurement.
  - 2 Consortia/Joint Ventures/Partnerships/Teams. An established consortium, joint venture, partnership, or team that is an actual bidder or offeror and is acting in its entirety, would qualify as an “interested party” because it has a direct economic interest in the results of the procurement. An individual member of a consortium, joint venture, partnership, or team, acting solely in its individual capacity, does not qualify as an “interested party” because it does not have a direct economic interest in the results of the procurement.
  - 3 Associations or Organizations. An association or organization that does not perform contracts does not qualify as an “interested party,” because it does not have a direct economic interest in the results of the procurement.
- (b) Exhaust Administrative Remedies. The protester must exhaust its administrative remedies by pursuing the recipient’s protest procedures to completion before appealing the recipient’s decision to FTA.
- (c) Appeal Within Five Days. The protester must deliver its appeal to the FTA Regional Administrator for the region administering its project or the FTA Associate Administrator for the program office administering its project within five (5) working days of the date when the protester has received actual or constructive notice of the recipient’s final decision. Likewise, the protester must provide its appeal to the FTA Regional Administrator for the region administering its project or the FTA Associate Administrator for the program office administering its project within five (5) working days of the date when the protester has identified other grounds for appeal to FTA. For example, other grounds for appeal include the recipient’s failure to have or failure to comply with its protest procedures or failure to review the protest.
- (2) Extent of FTA Review. As provided in the Common Grant Rule for governmental recipients, FTA will limit its review of third party contract protests as follows:
- (a) The Recipient’s Procedural Failures. FTA will consider a protest if the recipient:
    - 1 Does not have protest procedures, or
    - 2 Has not complied with its protest procedures, or
    - 3 Has not reviewed the protest when presented an opportunity to do so.
  - (b) Violations of Federal Law or Regulations. FTA will not consider every appeal filed by a protestor of an FTA recipient’s protest decision merely because a

- (c) *Federal law or regulation may be involved. Instead, FTA will exercise discretionary jurisdiction over those appeals involving issues important to FTA's overall public transportation program. FTA will refer violations of Federal law for which it does not have primary jurisdiction to the Federal authority having proper jurisdiction.*
- (d) *Violations of State or Local Law or Regulations. FTA will refer violations of State or local law to the State or local authority having proper jurisdiction.*
- (3) *FTA Determinations to Decline Protest Reviews. FTA's determination to decline jurisdiction over a protest does not mean that FTA approves of or agrees with the recipient's decision or that FTA has determined the contract is eligible for Federal participation. FTA's determination means only that FTA does not consider the issues presented to be sufficiently important to FTA's overall program that FTA considers a review to be required.*

(FTA C4220.1F, VII, 1.a.b.)

## **Discussion**

CVTD is deficient with respect to this element.

The Common Grant Rules assign responsibility to the recipient for resolving all contractual and administration issues arising out of their third party procurements. FTA expects each recipient to have appropriate written protest procedures and make these procedures available to all interested parties. The recipient's protest procedures should address the extent of FTA review. FTA will only consider a protest if the recipient:

- does not have protest procedures; or
- has not complied with its protest procedures; or
- has not reviewed the protest when presented an opportunity to do so; or
- there is a violation of federal law or regulations.

CVTD's protest procedure did not address any involvement of FTA, or how to keep FTA informed about the status of the protest.

## **Best Practices/Advisory Comments BPPM § 11.1 - Protests**

***Content of Procedures*** – To ensure that protests are received and processed effectively, all recipients must have adequate written bid protest procedures. It is recommended that these procedures be included or referenced in the solicitation document. If they are referenced, information must be included on how a copy of the procedures may be acquired by an interested party. When the procedures are requested, they should be provided immediately. The written procedures typically address the following elements:

- Difference in procedures for pre-bid, pre-award, and post-award protests;



- Specific deadlines (in working days) for filing a protest, filing a request for reconsideration, and for the recipient's response to a protest;
- Specific contents of a protest (Name of protester, solicitation/contract number or description, statement of grounds for protest);
- Location where protests are to be filed;
- Statement that the recipient will respond, in detail, to each substantive issue raised in the protest.
- Identification of the responsible official who has the authority to make the final determination;
- Statement that the recipient's determination will be final;
- Statement that FTA will only entertain a protest that alleges the recipient failed to follow their protest procedures and that such a protest must be filed in accordance with the Circular; and
- Allowance for request for reconsideration (if data becomes available that was not previously known, or there has been an error of law or regulation).

### **Corrective Action and Schedule**

CVTD should update its current protest process to include the notification requirements to keep the FTA informed and the current status of any existing protest per the current C4220.1F guidance.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### **CVTD's Response**

CVTD has established protest procedures recommended by FTA to ensure compliance with all FTA and Protest requirements as listed in the draft CVTD Procurement Policy (this policy shall be addressed and accepted by CVTD Board of Directors). The following steps shall be taken to ensure incorporation of CVTD Procurement Policy:

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

## **BMRA's Comments**

BMRA concurs with CVTD's response.

With the implementation of a protest procedure as stated in Section 5 of CVTD's Procurement Policy, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

## **Element (4) Prequalification System**

A recipient may prequalify people, firms, or products for participation in its procurements provided that:

*Prequalification lists are most commonly used in procurements of property involving lengthy evaluations needed to determine whether it satisfies the recipient's standards. The Common Grant Rule for governmental recipients permits a recipient to prequalify people, firms, and property for procurement purposes if:*

*Lists. The recipient ensures that all prequalification lists it uses are current.*

*Sources. The recipient ensures that all prequalification lists it uses include enough qualified sources to provide maximum full and open competition.*

*Qualification Periods. The recipient permits potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date). FTA, however, does not require a recipient to hold a particular solicitation open to accommodate a potential supplier that submits property for approval before or during that solicitation. Nor must a recipient expedite or shorten prequalification evaluations of bidders, offerors, or property presented for review during the solicitation period.*

*Prequalification should not be confused with reviews of technical qualifications-that are an essential process in two-step procurements and qualifications-based procurements, as discussed further in subsections 3.e and 3.f of this Chapter, respectively.*

(Note: Recipients are not required, or encouraged, to have a prequalification system. Prequalification systems are difficult and costly to maintain in a way that does not inhibit competition. The intent of this element is to ensure that, if a recipient maintains a prequalification list for one or more products or services, or a qualified manufacturers list, such lists are current and provide full and open competition.)

(FTA 4220.1F, VI, 1.c.)

## Discussion

CVTD is deficient with respect to this element.

The Common Grant Rule permits recipients to prequalify people, firms, and property for procurement purposes under the following standards:

- the recipient ensures that all prequalification lists it uses are current;
- the recipient ensures all prequalification lists it uses include enough qualified sources to provide maximum full and open competition;
- the recipient permits potential bidders or offerors to qualify during the solicitation period.

CVTD did not have documented procedures that adequately address this requirement.

### Best Practices/Advisory Comments BPPM§ 2.4.2.2.4 - Prequalification

**Documenting your decision to establish a QPL or QBL** – Care must be taken to ensure that prequalification procedures are not used to restrict full and open competition. Toward this goal Federal Agencies are required to justify in writing the necessity for establishing a prequalification requirement. Some transit agencies have also chosen to follow this practice of documenting the reasons why a particular part or service is being placed on a qualified products list (QPL) or a qualified bidders list (QBL), although they are not required to do so by FTA.

**Qualified during solicitation period** – Some transit agencies have two different policies as to bids offering products, which have not been qualified prior to the solicitation. When using non-Federal funds, the agency will not allow bidders to offer non-qualified products in response to a solicitation —bidders must obtain certification of their product before, and independently of, any solicitation for that item. *When using grant funds, however, recipients must allow vendors an opportunity to qualify their products during the solicitation period* (FTA Circular 4220.1F, ¶8.d) A recipient would not be expected, however, to delay a proposed award (extend the solicitation period) in order to afford a vendor the opportunity to demonstrate that its product meets the standards in the specification. The Federal procurement rules do not require Federal agencies to delay awards, and the standard applicable to these agencies should be appropriate for recipients as well.

### Corrective Action and Schedule

CVTD should establish necessary prequalification policies and procedures to ensure that potential bidders are not precluded from participating in the qualification process during the solicitation period.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### CVTD's Response

Prequalification procedures have been addressed in the CVTD draft Procurement Policy. The following steps shall be taken to ensure incorporation of CVTD Procurement Policy:

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

### **BMRA's Comments**

BMRA concurs with CVTD's response.

With the implementation of a prequalification system as stated in Section 2 of CVTD's Procurement Policy, CVTD can be considered "not deficient" for this element. The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

### **Element (5) Procedures for Ensuring Most Efficient and Economic Purchase**

*To support a third party contract with Federal assistance awarded by the Federal Transit Administration (FTA), the Common Grant Rules require the recipient to adopt adequate procedures for determining the type and amount of property and services it needs to acquire:*

- a Eligibility. The property and services to be acquired must be eligible under the Federal law authorizing the FTA assistance award and any regulations thereunder. For example, FTA prohibits the use of capital assistance for the recipient's operations expenses. If FTA assistance will be used to finance the cost of property or services, the property or services must be within the scope of the specific project from which that FTA assistance will be derived.*
- b Necessity. The Common Grant Rules require the recipient to establish procedures to avoid the purchase of unnecessary property and services it does not need (including duplicative items and quantities or options it does not intend to use or whose use is unlikely). In monitoring whether a recipient has complied with its procedures to determine what property or services are unnecessary, FTA bases its determinations on what would have been a recipient's reasonable expectations at the time it entered into the contract.*
  - (1) Unnecessary Reserves. FTA expects the recipient to limit the acquisition of federally assisted property and services to the amount it needs to support its public transportation system. In particular, FTA seeks information about the recipient's fleets to ensure that the recipient does not acquire more vehicles than it needs for public transportation service in its service area. Further guidance on spare ratios is contained in the most recent versions of FTA Circulars 5010.1, 9030.1, and 9300.1.*

- (2) Acquisition for Assignment Purposes. *The recipient may contract only for its current and reasonably expected public transportation needs and may not add quantities or options to third party contracts solely to permit assignment to another party at a later date. These limits on assignments, however, do not preclude joint procurements that are entered into simultaneously by two or more parties to obtain advantages unavailable for smaller procurements.*
- (a) General Prohibition. *The recipient may contract only for its current and reasonably expected public transportation needs, and may not add quantities or options to third party contracts solely to permit assignment to another party at a later date.*
- (b) Changes in the Recipient's Needs. *FTA recognizes that the quantity of property or services a recipient reasonably believes it may need at the time of contract award may change. A recipient's later needs might decrease due to changed circumstances or honest mistakes. In those situations, the recipient may assign its unneeded contract authority to another entity that would like to acquire the property or services.*
- (c) Exceptions. *These limits on assignments, however, do not preclude:*
- (1) Joint Procurements. *Two or more recipients may enter into a single procurement at the same time to obtain advantages unavailable for smaller procurements as discussed more fully in Chapter V, section 3 of this circular.*
- (2) State or Local Government Purchasing Schedules or Purchasing Contracts. *A State or local government may enter into contracts that support its purchasing schedules or purchasing contracts established as discussed more fully in Chapter V, section 4 of this circular.*
- c Procurement Size. *The recipient should consider whether to consolidate or break out the procurement to obtain a more economical purchase.*
- (1) Joint Procurements. *It may be economically advantageous for a recipient to enter into a joint procurement with others that have similar needs. The recipient responsible for undertaking the joint procurement may, upon contract award, assign to the other participants responsibilities for administering those parts of the contract affecting their property or services. Participation in a joint procurement, however, does not relieve any participating recipient from the requirements and responsibilities it would have if it were procuring the property or services itself, and does not relinquish responsibility for the actions of other participants merely because the primary administrative responsibility for a particular action resides in an entity other than in itself.*
- (2) Smaller Procurements. *In other circumstances, breaking out procurements may provide greater opportunities for Disadvantaged Business Enterprises (DBEs), small and minority firms, and women's business enterprises to participate. As stated in paragraph 1.b(2) of this Chapter, the FTA expects the recipient to ensure that it contracts only for its current and reasonably expected needs. Absent efforts to foster greater opportunities for DBE, small and minority firms, and women's business enterprises, the recipient should*

*not split a larger procurement merely to gain the advantages of small purchase procedures available for federally assisted procurements of \$100,000 or less (\$100,000 is the current Federal "simplified acquisition" threshold).*

- d Options. The recipient's contracts may include options to ensure the future availability of property or services, so long as the recipient is able to justify them as needed for its public transportation or project purposes. An option is a unilateral right in a contract by which, for a specified time, a recipient may acquire additional equipment, supplies, or services than originally procured. An option may also extend the term of the contract.*
- e Lease Versus Purchase. To obtain the best value, the recipient should review lease versus purchase alternatives for acquiring property and, if necessary, should obtain an analysis to determine the more economical alternative. The recipient may use FTA capital assistance to finance the costs of leasing eligible property if leasing is more cost effective than full ownership. Before the recipient may lease an asset, FTA regulations, "Capital Leases," 49 CFR Part 639, Subpart C, require the recipient to make a written comparison of the cost of leasing the asset compared with the cost of purchasing or constructing the asset. Costs used in the comparison must be reasonable, based on realistic current market conditions, and based on the expected useful service life of the asset.*
- f Specifications. Typically, the recipient is responsible for preparing specifications that describe its needs while assuring that those specifications are not exclusionary, discriminatory, unreasonably restrictive, or otherwise in violation of Federal laws or regulations. In general, the specifications should clearly describe the property or services to be procured and state how the proposals will be evaluated. For additional guidance, see section 2 of this Chapter, and Chapter VI, section 3 of this circular.*

(FTA C4220.1F, IV, 1.)

## **Discussion**

CVTD is deficient with respect to this element.

FTA Circular 4220.1F requires recipients to have procedures in place that provide for a review of proposed documents to avoid purchase of unnecessary or duplicative items. Ensuring an economic purchase could include breaking out or combining purchases, or using annual contracts. Also, lease versus buy analyses are required for applicable purchase to ensure the most economical approach.

CVTD currently does not have an adequate system of requirements or annual planning to ensure compliance with FTA C4220.1F.

## **Corrective Action and Schedule**

CVTD should update its Procurement Manual to include the requirements and procedure for a system for ensuring most efficient and economic purchase.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### CVTD's Response

CVTD has established guidelines in the draft Procurement Policy to ensure only those items necessary to accomplish the mission are procured, contracted for, or agreements established. The following steps shall be taken to ensure incorporation of CVTD Procurement Policy.

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

### BMRA's Comments

BMRA concurs with CVTD's response.

CVTD has included guidelines in its draft Procurement Policy Manual that when implemented will ensure that only those items necessary to carry out CVTD's mission are procured. When the draft Procurement Policy is approved and implemented that meets the guidance of FTA C4220.1F, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action is completed.

### Element (6) Procurement Policies and Procedures

*Written Procurement Procedures. The Common Grant Rule for non-governmental recipients requires the recipient to have written procurement procedures, and by implication, the Common Grant Rule for governmental recipients requires written procurement procedures as a condition of self-certification.*

(FTA C4220.1F, III, 3.a.)

### Discussion

CVTD is deficient with respect to this element.

FTA C4220.1F requires recipients to have written procurement procedures as a condition of self-certification. CVTD's procurement policies were lacking or inadequate with respect to the following topical areas:

- history of the procurement;

- time and material type contracts;
- contract term limitation;
- tag-ons;
- Piggybacking;
- arbitrary action;
- contractor selection procedures;
- micro-purchases;
- simplified small purchases;
- sealed bid;
- competitive proposal (RFP) method of procurement;
- A&E services (The Brooks Act) procedures;
- Design-bid-build;
- design-build ;
- sole source;
- options;
- cost or price analysis;
- independent cost or price estimates (ICE);
- cost or profit analysis;
- Federal cost principles;
- Bonding;
- advance payments;
- progress payments;
- liquidated damages;
- remedies for breach of contract above the small purchase threshold;
- termination provisions in contracts in excess of \$10,000.00;
- Federal statutory and regulatory requirements; and
- revenue contracts

In addition to adding the above-stated policies to the CVTD Procurement Manual, CVTD shall include procedures on how to implement these policies.



## **Corrective Action and Schedule**

CVTD should revise its Procurement Manual to include guidance as contained in FTA Circular 4220.1F on the above-listed items. Some of the items listed above are currently contained in the purchasing manual; however, no procedures are included to explain how the above areas would meet FTA guidance.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

## **CVTD's Response**

CVTD has re-drafted the Procurement Policy to address all items identified by the Audit team and come in line with FTA guidelines, rules and regulations. Further, CVTD Procurement shall be responsible to ensure all acquisitions and agreements are within FTA CFR 4220.1F. The following steps shall be taken to ensure incorporation of CVTD Procurement Policy:

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

## **BMRA's Comments**

BMRA concurs with CVTD's response.

CVTD has stated that it will re-draft its Procurement Policy Manual that will address all items identified in the Draft PSR Report.

When the draft Procurement Policy is approved and implemented, and is in accordance with FTA guidelines, rules, and regulations, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

## **INDIVIDUAL PROCUREMENT ELEMENTS**

The individual procurement elements are applicable to the contract files reviewed. We compiled the findings from all contracts reviewed by each individual procurement element. The results are organized by category of findings. Those elements for which the recipient is in compliance are shown first, followed by the elements that are found to be deficient.

## **Not Deficient**

A full description of the elements for which the recipient is not deficient is in Appendix C.

- Element 11 – Organizational Conflict of Interest
- Element 14 – Geographical Preference
- Element 15 – Contract Term Limitation
- Element 20 – No Splitting (Micro-purchase)
- Element 25 – Adequate Competition – Two or More Competitors
- Element 26 – Firm Fixed Price (Sealed Bid)
- Element 27 – Selection on Price (Sealed Bid)
- Element 28 – Discussions Unnecessary (Sealed Bid)
- Element 31 – Sufficient Bid Time (Sealed Bid)
- Element 32 – Bid Opening (Sealed Bid)
- Element 33 – Responsiveness (Sealed Bid)
- Element 34 – Lowest Price (Sealed Bid)
- Element 35 – Rejecting Bids (Sealed Bid)
- Element 38 – Sole Source if Other Award is Infeasible
- Element 39 – Cost Analysis Required (Sole Source)
- Element 44 – Out of Scope Changes
- Element 45 – Advance Payments
- Element 46 – Progress Payments
- Element 48 – Cost Plus Percentage of Cost
- Element 51 – Qualification Exclude Price (A&E and Other Services)
- Element 52 – Serial Price Negotiation (A&E and Other Services)
- Element 53 – Bid Security (Construction Over \$100,000)
- Element 54 – Performance Security (Construction Over \$100,000)
- Element 55 – Payment Security (Construction Over \$100,000)

## **Not Applicable Elements**

The following elements were rated as “not applicable” because CVTD did not award the types of contracts/purchase orders that included these elements. A full description of these elements is contained in Appendix D.

- Element 22 - Micro-Purchase Davis Bacon
- Element 40 – Evaluation of Options
- Element 43 – Exercise of Options
- Element 47 – Time and Materials Contracts

## Deficient

The recipient is deficient with respect to the following individual procurement elements:

- Element 7 – Independent Cost Estimate
- Element 8 – A&E Geographic Preference
- Element 9 – Unreasonable Qualification Requirements
- Element 10 – Unnecessary Experience and Excessive Bonding
- Element 12 – Arbitrary Action
- Element 13 – Brand Name Restrictions
- Element 16 – Written Procurement Selection Procedures
- Element 17 – Solicitation Prequalification Criteria
- Element 18 – Award to Responsible Contractors
- Element 19 – Sound and Complete Agreement
- Element 21 – Fair and Reasonable Price Determination (Micro-purchase)
- Element 23 – Price Quotations (Small Purchase)
- Element 24 – Clear, Accurate, and Complete Specification
- Element 29 – Advertised/Publicized (Sealed Bid) (RFP)
- Element 30 – Adequate Number of Sources Solicited (Sealed Bid) (RFP)
- Element 36 – Evaluation (RFP)
- Element 37 – Price and Other Factors (RFP)
- Element 41 – Cost or Price Analysis
- Element 42 – Written Record of Procurement History
- Element 49 – Liquidated Damages Provisions
- Element 50 – Piggybacking
- Element 56 – Clauses

### Element (7) Independent Cost Estimate

***COST AND PRICE ANALYSIS.** The Common Grant Rules require the recipient to perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis depends on the facts and circumstances surrounding each procurement, but as a starting point, the recipient must make independent estimates before receiving bids or proposals*

(FTA C4220.1F, VI, 6.)

### Discussion

CVTD is deficient with respect to this element.

FTA C4220.1F requires the recipient to make and document an independent cost estimate (ICE) before receipt of proposals or bids. The review team did not find an ICE in the contract files reviewed for the following procurement actions:

| <b>ID Number</b> | <b>Contractor</b>    | <b>\$ Amount</b> |
|------------------|----------------------|------------------|
| (No Number)      | The Goodman Corp.    | \$932,590.00     |
| IT TRN 123101A   | Hewlett Packard      | \$8,489.62       |
| IT TRN 120105A   | Dell                 | \$8,769.48       |
| IT TRN 120105b   | Dell                 | \$16,534.56      |
| (No Number)      | The Goodman Corp.    | \$932,590.00     |
| 12834            | Dell                 | \$3,153.80       |
| 12864            | Angelo Tire & Align. | \$10,363.02      |
| 12044            | Angelo Tire & Align  | \$14,053.23      |
| 11982            | Angelo Tire & Align. | \$3,926.13       |
| 10695 NH         | National Bus Sales   | \$185,721.00     |
| 10694 NH         | National Bus Sales   | \$249,052.00     |
| 11935            | SKG Engineering      | \$3,548.00       |
| 10653            | Lindamood Demolition | \$85,284.00      |

**Best Practices/Advisory Comments BPPM § 2.3.2 – Independent Recipient Cost Estimate**

A logical element of your annual procurement plan is a cost estimate for each major procurement. It is normally cost-effective to have an independent cost estimate that also satisfies the Federal requirement to have such an estimate at some time before receiving bids or proposals. You may obtain such estimates from published competitive prices, results of competitive procurements, or estimates by in-house or outside estimators.

**Purpose**

The following are purposes of establishing a cost estimate using a method independent from the prospective offerors in advance of the offer:

- It ensures a clear basis for the recipient's determination that the benefits of the procurement warrant its cost;

- It provides essential procurement and financial planning information (see “Advance Procurement Plan,” above); and
- It provides a basis for price analysis, which may assist in obviating the need for a more burdensome cost analysis.

Although it may seem self-evident that the agency has at least implicitly prepared a cost estimate in deciding to proceed with a procurement, many projects can change in scope without clear communication among the people responsible. For example, a management information system for parts inventory control may seem cost-effective, but may grow during discussions to include unanticipated electronic imaging, scanning of repair manual diagrams, unanticipated distributed processing devices, and multi-user programming. An independent cost estimate prepared when the agency first undertook the project could alert all involved that the project had grown beyond the scope originally intended. A deliberate decision to reduce the scope or revise the cost estimate can be made at each step of the project's development.

The cost estimate is essential information for procurement planning. It gives the contracting official some indication of the complexity of the project and the degree of investment that offerors will want to make in the procurement process, thus allowing planning of procurement time and personnel. It is also the basis for determining which procurement procedures apply to the project. If the cost estimate exceeds \$100,000, for example, a competitive solicitation is normally required. (State or local requirements may be stricter.) Similarly, certification and bonding requirements imposed by Federal regulations are triggered based on the value of the contract. (See “Methods of Procurement” FTA Circular 4220.1F, § 9; “Bonding Requirements,” § 11; “Buy America” Master Agreement § 14 (a); “Debarment and Suspension” Master Agreement § 3 b.) However, the application of these and most other requirements depends not on the cost estimate, but on the contract amount.

A final purpose of the independent cost estimate is for price analysis. Either a cost or price analysis is required for every contract and every change order so that the essential objective of a reasonable price is assured. The adequacy of the price or cost analysis is a critical responsibility of the contracting official. In many contract awards the bids alone may be adequate to assure a reasonable price. However, in all negotiated procurements, most contract changes, sealed bids where price competition was not sufficient, and non-competitive awards, further analysis is required. An independent cost estimate prepared before receipt of offers is invaluable in these circumstances. The estimate alone may, if prepared with sufficient detail and reliability in the contracting official's judgment, be sufficient to determine whether the price is reasonable. It will at least supplement other pricing data in making the determination. Because cost analysis can be time consuming, expensive, and raise disputes, the availability of an independent pre-bid estimate, which allows for price analysis and obviates cost analysis, is worth material pre-bid effort.

In these circumstances, it is essential that the recipient's cost estimate be developed independently from the offerors' pricing submissions. If a bus purchase is being prepared, for example, the prospective offerors should not be relied upon for the independent cost estimate, except in the form of prior bids submitted with adequate competition.

Any price analysis or data collection performed after receipt of the offers, in addition to consuming valuable time during the limited validity of the offers, will not be as probative as data collected before the receipt of the offers. An independent cost estimate prepared before the receipt of the offers does not raise the question of whether the particular data and analysis was consciously or unconsciously intended to justify the award.

### **Corrective Action and Schedule**

CVTD should develop and implement policies and procedures that require an independent cost estimate before receiving bids or proposals.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### **CVTD's Response**

CVTD established a Procurement Office responsible for compliance with all guidance, rules, and regulations to ensure compliance with FTA and DOT. Further, CVTD has drafted a Procurement Policy to enforce and ensure compliance by all CVTD personnel. The policy shall be monitored and enforced by CVTD Procurement.

CVTD has further developed draft checklists for acquisitions for the following price points: micro purchase, \$3K-\$10K, \$100K plus.

The following steps shall be taken to ensure incorporation of CVTD Procurement Policy:

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

### **BMRA's Comments**

BMRA concurs with CVTD's response.

CVTD has established a procurement office that will be responsible for compliance with all guidance, rules, and regulations to ensure compliance with FTA and DOT. The re-drafted Procurement Policy states that a written independent cost estimate (ICDE) be prepared prior to receiving price quotes, bids, or proposals. When the draft Procurement Policy is approved and implemented and is in compliance with FTA and DOT, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

## Element (8) A&E Geographic Preference

*Architectural Engineering (A&E) Services. Geographic location may be a selection criterion if an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project.*

(FTA C4220.1F, VI, 2.a.(4)(g)(1))

### Discussion

CVTD is deficient with respect to this element.

FTA permits the recipient to use geographic location as a selection criteria if an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project.

The following document reviewed by the review team did not confirm CVTD was in compliance with the above requirement:

| ID Number   | Contractor        | \$ Amount    |
|-------------|-------------------|--------------|
| (No Number) | The Goodman Corp. | \$932,590.00 |

### Best Practices/Advisory Comments – BPPM § 6.5

#### REQUIREMENT

FTA Circular 4220.1E states:

8.b. Prohibition Against Geographic Preferences . . . 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.

9.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. § 1102 and 49 U.S.C. § 5325(b). Services subject to this requirement are program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services.<sup>1</sup>

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<sup>1</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(b).

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.<sup>2</sup>

9.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 9.e when the preponderance of the work to be performed is considered to be for architectural and engineering (A&E) services as defined in Section 9.e.

### **Corrective Action and Schedule**

CVTD should establish a policy and a procedure that will meet the guidance as contained in FTA Circular 4220.1F and the FTA Best Practices Procurement Manual, Chapter 6.5, when procuring Architect-Engineering services.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### **CVTD's Response**

CVTD shall establish procedures in the Procurement Policy to ensure compliance with all competitive requirements set forth by FTA rules, guidelines, and regulations.

CVTD has further developed draft checklists for acquisitions for the following price points: micro purchase, \$3K-\$100K, \$100K plus.

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<sup>2</sup> - If a project is jointly funded with FTA and FHWA grant funds, grantees should seek the advice of counsel since the FHWA and FTA statutes differ in when and how the Federal requirements defer to state laws.



The following steps shall be taken to ensure incorporation of CVTD Procurement Policy:

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

### **BMRA's Comments**

BMRA concurs with CVTD's response.

CVTD has submitted a draft Procurement Policy that addresses the FTA guidance when contracting for A&E requirements (see Sec. 1.3.8) and related services. When the draft Procurement Policy is approved and implemented that meets the guidance of FTA C4220.1F, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

### **Element (9) Unreasonable Qualification Requirements**

*The Common Grant Rules prohibit solicitation requirements that contain features that unduly restrict competition. FTA recipients are also prohibited by 49 U.S.C. Section 5325(h) from using FTA assistance to support an exclusionary or discriminatory specification. Some situations considered to be restrictive of competition include, but are not limited to, the following, all of which are identified in one or both Common Grant Rules:*

- (a) Excessive Qualifications. *Imposing unreasonable business requirements for bidders or offerors.*

(FTA C4220.1F, VI, 2.a.(4))

### **Discussion**

CVTD is deficient with respect to this element.

The Common Grant Rule for governmental recipients permits a recipient to prequalify people, firms, and property for procurement purposes as long as the prequalification list it uses is current, the list provides for maximum full and open competition, and the recipient permits potential bidding offerors to qualify during the solicitation period.

The following file did not indicate if contractors were or were not prequalified.

| <b>ID Number</b> | <b>Contractor</b> | <b>\$ Amount</b> |
|------------------|-------------------|------------------|
| (No Number)      | The Goodman Corp. | \$932,590.00     |

### **Best Practices/Advisory Comments – BPPM §2.4.2.1**

#### **2.4.2 Full and Open Competition**

##### **Full and Open Competition Principle**

###### **REQUIREMENT**

FTA Circular 4220.1E, Paragraph 8.a requires all procurements to be conducted in a manner providing full and open competition. This requirement finds its way into Paragraph 9.h of the Circular which limits the use of noncompetitive contract awards to those situations when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and at least one of several specifically named circumstances are present. Thus, contracts with a value of more than \$100,000 shall be awarded by sealed bid or competitive negotiation unless there is an explicit exception.

FTA Circular 4220.1E, Paragraph 8.a considers the following practices to be restrictive of competition:

- Unreasonable requirements placed on firms in order for them to qualify to do business;
- Unnecessary experience and excessive bonding requirements;
- Noncompetitive pricing practices between firms or between affiliated companies;
- Noncompetitive awards to any person or firm on retainer contracts;
- Restrictive use of brand names;
- Any arbitrary action in the procurement process; and
- Geographic preferences<sup>3</sup>

##### **Corrective Action and Schedule**

CVTD should develop and implement a procedure that documents the contract file that addresses features that restrict competition, per BPPM 2.4.2.1.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

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<sup>3</sup> - Geographic preference is permitted in certain narrow situations, including principally where part of a legal licensing requirement and for architects and engineers; FTA Circular 4220.1E § 8.b.

## CVTD's Response

CVTD has established a draft Procurement Policy to be presented to CVTD Executive Board to be incorporated as established procedures and guidelines. The following action plan has been established:

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

## BMRA's Comments

BMRA concurs with CVTD's response.

With the implementation of CVTD's draft Procurement Policy that prohibits the use of features that unduly restrict competition, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

## Element (10) Unnecessary Experience and Excessive Bonding

Example of situation restrictive of competition:

*Imposing unnecessary experience requirements for bidders and offerors.*

(FTA C4220.1F, VI, 2.(4))

*Excessive Bonding. To encourage greater contractor participation in FTA assisted projects, FTA does not require the recipient to impose bonding requirements on its third party contractors other than construction bonding specified by the Common Grant Rules and this circular for construction. FTA discourages unnecessary bonding because it increases the cost of the contract and restricts competition, particularly by disadvantaging business enterprises. Bond companies exercise their discretion and assure their profits primarily by declining to undertake excessive risks. Consequently many bidders have limited "bonding capacity." Unnecessary performance bonding requirements reduce a prospective bidder's or offeror's capability to bid or offer a proposal on bonded work. Small businesses with short histories may have particular difficulty obtaining bonds as may be specified.*

(FTA C4220.1F, VI, 2.a.(4)(e))

## Discussion

CVTD is deficient with respect to this element.

FTA believes that imposing unnecessary experience requirements for bidders or offerors restricts competition. FTA discourages unnecessary bonding because it increases the cost of the contract and also restricts competition.

The following file did not indicate CVTD was in compliance with the above requirement.

| ID Number   | Contractor        | \$ Amount    |
|-------------|-------------------|--------------|
| (No Number) | The Goodman Corp. | \$932,590.00 |

**Best Practices/Advisory Comments – see BPPM § 2.4.2.1**

### 2.4.2 Full and Open Competition

#### Full and Open Competition Principle

##### REQUIREMENT

FTA Circular 4220.1E, Paragraph 8.a requires all procurements to be conducted in a manner providing full and open competition. This requirement finds its way into Paragraph 9.h of the Circular which limits the use of noncompetitive contract awards to those situations when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and at least one of several specifically named circumstances are present. Thus, contracts with a value of more than \$100,000 shall be awarded by sealed bid or competitive negotiation unless there is an explicit exception.

FTA Circular 4220.1E, Paragraph 8.a considers the following practices to be restrictive of competition:

- Unreasonable requirements placed on firms in order for them to qualify to do business;
- Unnecessary experience and excessive bonding requirements;
- Noncompetitive pricing practices between firms or between affiliated companies;
- Noncompetitive awards to any person or firm on retainer contracts;
- Restrictive use of brand names;
- Any arbitrary action in the procurement process; and
- Geographic preferences<sup>4</sup>

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<sup>4</sup> - Geographic preference is permitted in certain narrow situations, including principally where part of a legal licensing requirement and for architects and engineers; FTA Circular 4220.1E § 8.b.

## Corrective Action and Schedule

CVTD should develop and implement a procedure that documents the contract file that addresses features that restrict competition, per BPPM 2.4.2.1.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

## CVTD's Response

CVTD has adopted FTA's proposed procurement plan and suggestions and shall be identified in CVTD Procurement Policy. The following action plan has been established:

CVTD has further developed draft checklists for acquisitions for the following price points: micro purchase, \$3K-\$100K, \$100K plus. The checklist also addresses bonding and guarantees IAW FTA guidelines and CVTD's draft Procurement Policy.

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

## BMRA's Comments

BMRA concurs with CVTD's response.

With the adoption and implementation of CVTD's draft Procurement Policy dealing with unnecessary experience and excessive bonding per the FTA C4220.1F, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

## Element (12) Arbitrary Action

Example of situation restrictive of competition:

*Taking any arbitrary action in the procurement process.*

(FTA C4220.1F, VI, 2.a.(4)(j))

## Discussion

CVTD is deficient with respect to this element.

An example of taking any arbitrary action (selected at random and without reason) in the procurement process is when award is made to other than the contractor who most satisfied all the recipient's requirements.

The following files did not indicate that CVTD was in compliance when awarding the contracts/purchase orders:

| ID Number      | Contractor | \$ Amount   |
|----------------|------------|-------------|
| IT TRN 120105A | Dell       | \$9,769.48  |
| IT TRN 120105B | Dell       | \$16,534.56 |

It appears that POs TRN 120105A (\$9,769.48) and B (\$16, 534.56) with Dell were split to stay under CVTD small purchase threshold.

### Corrective Action and Schedule

CVTD should include in its Procurement Manual a policy and procedure that no Arbitrary Action can be taken in the award of an FTA funded contract. The selection procedures should be clearly identified and followed to ensure that all bidders/offerors are treated fairly.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### CVTD's Response

CVTD has established a Procurement Office to ensure compliance with FTA guidelines, rules, and regulations. The following action plan has been established:

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

### BMRA's Comments

BMRA concurs with CVTD's response.

With the adoption and implementation of CVTD's draft Procurement Policy dealing with arbitrary action per the FTA C4220.1F, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

### Element (13) Brand Name Restrictions

All procurement transactions will be conducted in a manner providing full and open competition. One of the situations considered to be restrictive of competition is Specifying only a “brand name” product without allowing offers of “an equal” product, or allowing “an equal” product without listing the salient characteristics that the “equal” product must meet to be acceptable for award.

*When it is impractical or uneconomical to provide a clear and accurate description of the technical requirements of the property to be acquired, a “brand name or equal” description may be used to define the performance or other salient characteristics of a specific type of property. The recipient must identify the salient characteristics of the named brand that offerors must provide. When using a “brand name” specification, the recipient does not need to reverse-engineer a complicated part to identify precise measurements or specifications in order to describe its salient characteristics. FTA’s “Best Practices Procurement Manual,” (BPPM) contains additional information on preparation of specifications including examples with specific language.*

(FTA C 4220.1F, VI, 4.)

### Discussion

CVTD is deficient with respect to this element.

The Common Grant Rules prohibit solicitation requirements that contain features that unduly restrict competition. Specifying only a “brand name product without allowing offers of an “equal” product, or allowing an “equal” product without listing the salient characteristics that the equal product must meet to be acceptable for award is considered restrictive of competition.

The following contracts/purchase orders are in conflict with FTA C4220.1F, restriction on brand name purchases.

| ID Number      | Contractor             | \$ Amount      |
|----------------|------------------------|----------------|
| (No Number)    | Templeton Construction | \$3,133,596.00 |
| IT TRN 120105A | Dell                   | \$9,769.48     |
| IT TRN 120105B | Dell                   | \$16,534.56    |
| 12834          | Dell                   | \$3,153.80     |
| 72808          | National Bus Sales     | \$532,832.00   |

## **Best Practices/Advisory Comments – BPPM § 2.4.2.2.1 – Brand Names**

### **Purpose**

The restriction on brand names serves the central purpose of maximizing free and open competition to obtain the best buy. If you specify a brand name with no opportunity for substitution, the original supplier of the brand name has an effective monopoly. This results in exorbitant prices and cessation of innovation and product development. In complex equipment and construction contracts where a large number of components are specified, the use of brand names can be even more restrictive than in procurement of individual units because the proliferation of brand names discourages the prime contractor from considering substitutes which might contribute to a more cost-effective end product. Therefore, in the long run, you will get the best buy if you avoid the use of brand names as much as possible.

In procuring complex systems, however, such as rolling stock and electronic systems, where reliability or other performance standards are mission critical to your transit service, you and your customers may not be able to specify a component in terms of design or performance and still ensure that your lowest responsive and responsible bidder will offer you a satisfactory component. In these cases, some price and quality competition can be preserved by allowing the substitution of equal items with other brand names. If you are the one who will determine which brand names are equal to the one specified, then you have not sacrificed any control over the quality of the product. This competition by substitution is facilitated by listing the salient characteristics, such as you would use if you used a design or performance specification, (e.g., “10-year life under varying voltage conditions of transit bus electrical systems”), so that bidders will be able to judge which brands may be equal to the specified brand.

### **Best Practices**

Design and Performance Specifications - You can work with your customers to see if brand names can be removed from the specification by substituting design or performance specifications. Like many of the qualities of fully open and competitive procurement practices, this is an effort that may seem over-zealous under the time pressure of a specific procurement, but you can constantly seek to remove restrictions and improve the competitiveness of your procurement processes so that you generally achieve the best buy. If adequate design and performance specifications cannot be prepared, listing several acceptable brand names is far better than specifying just one.

“Or Approved Equal” - Whenever brand names are used, there are several ways you can clarify beyond a doubt that the brand name is used merely as a specification and not as a statement of a preference for the specific product specified. One way is to include a phrase such as “or equal,” “or approved equal,” or “similar in design, construction and performance” with the brand name. Many standard equipment and construction documents also contain a clause in the general provisions that states that even if the phrase “or approved equal” is inadvertently omitted, it is implied after any brand name. If you specify “or equal,” you shall clearly set forth those minimum essential characteristics and standards to which the material, product or service must conform if it is to satisfy its intended use.



Some of the onus of restriction is lifted for a large volume of transit procurements by the “Third Party Contracting Requirements” Circular's sanction for noncompetitive procurement of associated capital maintenance items from the original equipment manufacturer. The Circular states:

*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: (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 Circular requires, however, that “the recipient must first certify in writing to FTA; (a) that such manufacturer or supplier is the only source for such item; and (b) that the price of such item is no higher than the price paid for such item by like customers.”

Approval Process - If you have listed enough salient characteristics and the brand name is an insignificant factor in the overall procurement, you may simplify the procurement by not requiring approval. The contractor would then have the right to substitute a product. The ultimate determination of whether the substitute was equal to the brand specified, if contested, would be through the dispute resolution process culminating in the courts.

The better practice, however, is to provide an approval process, preferably prior to bid opening, so that bidders, in finalizing their bids will be confident about their right to substitute a brand they consider to be more cost-effective than the one specified. This will also give you confidence about the product or service you will receive. (Brand names may be used in competitive negotiation for complex systems, but the approval process need only require approval prior to award rather than at proposal submission. Approval of equal brands is usually simply a part of the discussions or negotiations.) You will want to avoid requiring bidders to wait until after award to obtain approval, because a disapproval at that time may place a bidder (now contractor) in financial jeopardy and may prompt litigation.

If you want to require pre-bid approval, the solicitation can specify a time and format for requesting approval of equal brands. Typically, this is the same time and format used for requesting other changes in the specifications.

Approve requests for substitution whenever you determine that the offered product is equal in all material respects to the products referenced. Offers need not be rejected because of minor differences in design, construction, or features, which do not affect the suitability of the product for its intended use.

Determinations typically identify, or incorporate by reference, identification of the specific products, which the contractor is to furnish. Such identification can include any brand name, make or model number, and descriptive material. You may want to issue your determination, particularly any approval, to all bidders by addendum or as your procedures provide. (In some competitive negotiations where early and open discussion of creative integration of substitute brands is important, issuance of approvals to competing proposers is considered to constitute leveling the playing field, which would discourage open negotiations. You can consider keeping

design innovations confidential but issuing approval of equal brand names to all proposers.) As with other substantive addenda to a solicitation, consider extending the bid period if the approvals are issued shortly before the scheduled bid opening, to allow all bidders to take advantage of the information prior to the bid opening.

Even if you have a pre-bid approval process, a contractor can normally request additional approvals after award. Consider clarifying in your solicitation that the contractor who waits until after award proceeds at its own risk.

### **Corrective Action and Schedule**

CVTD should develop policies and procedures that require all purchase requirements that contain a “brand name” permit an “or equal” substitution and define the salient physical and functional characteristics to ensure maximum competition.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### **CVTD’s Response**

CVTD has established a Procurement Office to ensure compliance with FTA guidelines, rules, and regulations. CVTD shall process all contractual vehicles through CVTD Business Manager to ensure compliance with CVTD Procurement Policy, CVCOG Director of Finance to ensure available funding, Procurement Manager prior to Executive Director signature (or designee). Further, the following action plan has been established:

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 July 13 completed   |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

### **BMRA’s Comments**

BMRA concurs with CVTD’s response.

With the adoption and implementation of CVTD’s draft Procurement Policy dealing with Brand Name Restrictions per the FTA C4220.1F, CVTD can be considered “not deficient” for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

## Element (16) Written Procurement Selection Procedures

*The Common Grant Rule for non-governmental recipients requires the recipient to have written procurement procedures, and by implication, the Common Grant Rule for governmental recipients requires written procurement procedures as a condition of self-certification*

(FTA C4220.1F, III, 3.a.)

*The solicitation and resulting contract must identify those Federal requirements that will affect contract scope and performance.*

(FTA C4220.1F, VI, 2.d.)

### Discussion

CVTD is deficient with respect to this element.

FTA C4220.1F requires recipients to have "written selection procedures for procurement transactions." As stated in the Circular, "all solicitations shall identify all requirements that offerors must fulfill and all other factors to be used in evaluating bids or proposals." This ensures procurements are worded in a fair and equitable manner.

CVTD's files did not indicate what selection procedures were used.

| ID Number   | Contractor         | \$ Amount    |
|-------------|--------------------|--------------|
| (No Number) | The Goodman Corp.  | \$932,590.00 |
| 72808       | National Bus Sales | \$532,832.00 |

The Goodman Corp. file did not contain any documents, including the solicitation, that would indicate what procurement selection procedures were used.

The National Bus Sales file contained confusing documents that mixed up selection procedures used for IFBs and RFPs. Selection procedures should clearly state if this was an Invitation for Bid or a Request for Proposal.

### Corrective Action and Schedule

CVTD should develop a policy and procedure that clearly identifies the selection procedure that will be used to make the contract award, i.e., Invitation for Bid (Formal Advertising) or Request for Proposal (Negotiated). The Procurement Manual should identify all the requirements and factors that must be met to receive an award. CVTD should provide training to all personnel involved in the procurement process.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

## CVTD's Response

CVTD has established a Procurement Office to ensure compliance with FTA guidelines, rules, and regulations. CVTD shall process all contractual vehicles through CVTD Business Manager to ensure compliance with CVTD Procurement Policy, CVCOG Director of Finance to ensure available funding, Procurement Manager prior to Executive Director signature (or designee). Further, the following action plan has been established:

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

## BMRA's Comments

BMRA concurs with CVTD's response.

With the adoption and implementation of CVTD's draft Procurement Policy dealing with Written Procurement Selection Procedures per the FTA C4220.1F, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

## Element (17) Solicitation Prequalification Criteria

*Prequalification. Prequalification lists are most commonly used in procurements of property involving lengthy evaluations needed to determine whether it satisfies the recipient's standards. The Common Grant Rule for governmental recipients permits a recipient to prequalify people, firms, and property for procurement purposes if:*

- (1) Lists. The recipient ensures that all prequalification lists it uses are current.*
- (2) Sources. The recipient ensures that all prequalification lists it uses include enough qualified sources to provide maximum full and open competition.*
- (3) Qualification Periods. The recipient permits potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date). FTA, however, does not require a recipient to hold a particular solicitation open to accommodate a potential supplier that submits property for approval before or during that solicitation. Nor must a recipient expedite or shorten prequalification evaluations of bidders, offerors, or property presented for review during the solicitation period.*

*Prequalification should not be confused with reviews of technical qualifications-that are an essential process in two-step procurements and qualifications-based procurements, as discussed further in subsections 3.e and 3.f of this Chapter, respectively.*

(FTA C4220.1F, VI, 1.c.)

## Discussion

CVTD is deficient with respect to this element.

Prequalification lists are most commonly used in procurements of property involving lengthy evaluations needed to determine whether it satisfies the recipient's standards. The recipient must ensure that all prequalification lists it uses are current, and include enough qualified sources to provide maximum full and open competition. Also, the recipient must permit potential bidders or offerors to qualify during the solicitation period, until closing date.

The following file did not indicate whether or not prequalification was conducted:

| ID Number   | Contractor        | \$ Amount    |
|-------------|-------------------|--------------|
| (No Number) | The Goodman Corp. | \$932,590.00 |

## Corrective Action and Schedule

CVTD should develop and implement a written policy that addresses the applicability of any prequalification criteria that will be utilized in the contract selection process.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

## CVTD's Response

CVTD has established a Procurement Office to ensure compliance with FTA guidelines, rules, and regulations. CVTD shall process all contractual vehicles through CVTD Business Manager to ensure compliance with CVTD Procurement Policy, CVCOG Director of Finance to ensure available funding, Procurement Manager prior to Executive Director signature (or designee). Further, the following action plan has been established:

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

## BMRA's Comments

BMRA concurs with CVTD's response.

With the adoption and implementation of CVTD's draft Procurement Policy dealing with solicitation prequalification criteria per the FTA C4220.1F, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

### **Element (18) Award to Responsible Contractors**

*In addition to the Common Grant Rules that require contract awards be made only to responsible contractors, Federal transit law at 49 U.S.C. Section 5325(j) limits third party contractor awards to those contractors capable of successfully performing under the terms and conditions of the proposed contract. Before selecting a contractor for award, the recipient must consider such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. Moreover, SAFETEA-LU now requires a recipient entering into a fixed guideway project contract to consider the contractor's past performance, including information reported in FTA's required Contractor Performance Assessment Reports, 49 U.S.C. Section 5325(j)(2)(C).*

(FTA C4220.1F, IV, 2.a.1.)

### **Discussion**

CVTD is deficient with respect to this element.

Federal Transit Law at 49 U.S.C., Section 5325 (j) limits third party contractor awards to those contractors capable of successfully performing under the terms and conditions of the proposed contract. Before selecting a contractor for award, the recipient must consider such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

The review team did not find a documented responsibility determination in the contract file for the following contracts:

| <b>ID Number</b> | <b>Contractor</b>    | <b>\$ Amount</b> |
|------------------|----------------------|------------------|
| (No Number)      | The Goodman Corp.    | \$932,590.00     |
| 72808            | National Bus Sales   | \$532,832.00     |
| 10653            | Lindamood Demolition | \$85,284.00      |

## Best Practices/Advisory Comments – BPPM § 5.1 – Responsibility of Contractor

### DEFINITION

**Responsible** - If the lowest responsive bidder possesses, at the time of contract award, the ability to perform successfully and a willingness to comply with the terms and conditions of a proposed contract, the bidder is considered responsible.

### DISCUSSION

Responsibility is a procurement issue determined after receipt of bids or proposals and prior to the time of contract award. The contractor must be considered responsible to be awarded a contract, regardless of the procurement method used to select that contractor (sealed bidding, competitive proposal, or sole source). For example, suppose your procurement procedures allow for award of a contract to a sole source, provided there is sufficient justification. As it turns out, the sole source chosen has been debarred by the Department of the Army. If Federal funds are involved, a contract cannot be awarded to the sole source because the contractor is not considered responsible.<sup>5</sup> Your analysis of the factors involved in making a determination of responsibility involves a great deal of subjectivity -- after all, you are grading a firm's "ability" to do a job.

You may have a procurement where it is necessary to determine the responsibility of a critical subcontractor in order for you to make a positive determination about the prime contractor's responsibility.<sup>6</sup> If that is necessary, you may use the same standards in determining the responsibility of the subcontractor as you would in determining the responsibility of the prime contractor.

#### **5.1.1 General Standards of Responsibility**

To be determined responsible, a prospective contractor must meet all of the following requirements:

- (a) Financial resources adequate to perform the contract, or the ability to obtain them.
- (b) Ability to meet the required delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments.
- (c) A satisfactory performance record;

---

<sup>5</sup> - If Federal funds are not involved check local and state laws to determine whether a contractor that has been debarred by an agency of the Federal government may be considered "responsible."

<sup>6</sup> - Normally, the prime contractor is responsible for determining the responsibility of its subcontractors. However, as indicated in FAR □ 9.104-4, it may be necessary for you as the procurement official to determine a prospective subcontractor's responsibility such as when the prospective contract involves urgent requirements or substantial subcontracting.

- (d) A satisfactory record of integrity and business ethics;
- (e) The necessary organization, experience, accounting, and operational controls, and technical skills, or the ability to obtain them;
- (f) Compliance with applicable licensing and tax laws and regulations;
- (g) The necessary production, construction, and technical equipment and facilities, or the ability to obtain them;
- (h) Compliance with Affirmative Action and Disadvantaged Business Program requirements; and
- (i) Other qualifications and eligibility criteria necessary to receive an award under applicable laws and regulations.

**Corrective Action and Schedule**

CVTD should develop a procedure that would ensure that the contract file contains a written documentation that the contract award is being made to a responsible contractor. For guidance, CVTD should refer to the FTA Best Practices Procurement Manual, Chapter 5.1.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

**CVTD's Response**

CVTD has established a Procurement Office to ensure compliance with FTA guidelines, rules, and regulations. CVTD shall process all contractual vehicles through CVTD Business Manager to ensure compliance with CVTD Procurement Policy, CVCOG Director of Finance to ensure available funding, Procurement Manager prior to Executive Director signature (or designee). Further, the following action plan has been established:

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

**BMRA's Comments**

BMRA concurs with CVTD's response.

With the adoption and implementation of CVTD's draft Procurement Policy dealing with award to responsible contractors per the FTA C4220.1F, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.



This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

### **Element (19) Sound and Complete Agreement**

*Adequate Third Party Contract Provisions. The Common Grant Rules require that all third party contracts include provisions adequate to form a sound and complete agreement. Compliance with Federal laws and regulations will necessarily result in the addition of many other provisions to ensure compliance with those laws and regulations.*

(FTA C4220.1F, III, 3.a.(1)b.)

### **Discussion**

CVTD is deficient with respect to this element.

The Common Grant Rules require that all third party contracts include provisions adequate to form a sound and complete agreement. In addition, termination for cause and termination for convenience provisions must be included in contracts exceeding \$10,000.

| <b>ID Number</b> | <b>Contractor</b>      | <b>\$ Amount</b> |
|------------------|------------------------|------------------|
| (No Number)      | Templeton Construction | \$3,133,596.00   |
| 72808            | National Bus Sales     | \$532,832.00     |
| No number        | The Goodman Corp.      | \$932,590.00     |
| 11982            | Angelo Tire & Align.   | \$3,926.13       |
| 13022            | Angelo Tire & Align.   | \$14,053.23      |
| 12725            | Angelo Tire & Align.   | \$5,318.91       |
| 12044            | Angelo Tire & Align.   | \$3,392.74       |
| 12864            | Angelo Tire & Align.   | \$10,363.02      |
| 10653            | Lindamood Demolition   | \$85,284.00      |

The Templeton construction contract file did not contain an acceptable termination clause. It allowed either party to terminate the contract.

The National Bus Sales contract file did not contain a remedy for Breach of Contract or termination clauses or Pre-Award/Post Delivery Buy America requirements.

### **Corrective Action and Schedule**

CVTD should develop a matrix that can be used as a reference document that identifies the applicable Federal clauses and the required dollar thresholds that are applicable to each clause. This matrix should be distributed to all personnel involved in the procurement process to identify Federally required clauses when using FTA funds.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### **CVTD's Response**

CVTD has established a Procurement Office to ensure compliance with FTA guidelines, rules and regulations. CVTD shall process all contractual vehicles through CVTD Business Manager to ensure compliance with CVTD Procurement Policy, CVCOG Director of Finance to ensure available funding, Procurement Manager prior to Executive Director signature (or designee). Further, the following action plan has been established.

Additionally, CVTD Procurement Office shall use the FAR Matrix to ensure compliance with Federal rules, regulations, guidance and laws. The following action plan has been established.

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

### **BMRA's Comments**

BMRA concurs with CVTD's response.

With the adoption and implementation of CVTD's draft Procurement Policy dealing with sound and complete agreement per the FTA C4220.1F, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

### **Element (21) Fair and Reasonable Price Determination (Micro-purchase)**

*Micro-Purchases. Consistent with the Federal Acquisition Regulation (FAR), FTA considers micro-purchases to be those purchases of \$3,000 or less.*

- (1) When Appropriate. *If permitted by State and local law, the recipient may acquire property and services valued at \$3,000 or less without obtaining competitive quotations. These purchases are exempt from FTA's Buy America requirements. Davis-Bacon prevailing wage requirements, however, will apply to construction contracts exceeding \$2,000, even though the recipient uses micro-purchase procurement procedures. FTA does not intend to imply that the recipient must treat any purchase of \$3,000 or less as a micro-purchase. The recipient may set lower thresholds for micro-purchases in compliance with State and local law, or otherwise as it considers appropriate.*
- (2) Procedures. *The following procedures apply to micro-purchases:*
  - (a) Competition. *The recipient should distribute micro-purchases equitably among qualified suppliers.*
  - (b) Prohibited Divisions. *The recipient may not divide or reduce the size of its procurement merely to come within the micro-purchase limit.*
  - (c) Documentation. *FTA's only documentation requirement for micro-purchases is a determination that the price is fair and reasonable and a description of how the recipient made its determination. FTA does not require the recipient to provide its rationale for the procurement method used, selection of contract type, or reasons for contractor selection or rejection.*

(FTA C4220.1F, VI, 3.a.)

## Discussion

CVTD is deficient with respect to this element.

FTA C4220.1F requires that the purchasing file contains documentation that the price paid is fair and reasonable and illustrates how this determination was derived. This is the only requirement for micro--purchase documentation.

The review team did not find adequate documentation in the following micro-purchase files to assure compliance with this requirement of FTA C4220.1F.

| ID Number      | Contractor             | \$ Amount  |
|----------------|------------------------|------------|
| (No Number)    | CalTech                | \$63.00    |
| IT TRN 120229A | CalTech                | \$2,727.00 |
| No PR Number   | CalTech                | \$2,727.00 |
| 12821          | West TX. Extinguishers | \$155.92   |
| 12771          | The Solutions Group    | \$2,000.00 |

| ID Number | Contractor            | \$ Amount  |
|-----------|-----------------------|------------|
| 12844     | Texas Com., Inc.      | \$1,622.68 |
| 12839     | Power Wash Solutions  | \$330.00   |
| 13070     | O'Reilly's Auto Parts | \$301.14   |
| 13101     | Jim Bass Ford, Inc.   | \$493.26   |
| 12091     | Home Motors, Inc.     | \$600.00   |
| 13056     | Clark's Auto Parts    | \$285.00   |
| 13065     | Home Motors, Inc.     | \$1,195.00 |
| 13046     | United Diesel Service | \$1,135.04 |
| 13013     | Sparta Chem           | \$697.50   |
| 12017     | SKG Engineering       | \$1,709.00 |

**Best Practices/Advisory Comments – BPPM § 4.1 – Micro-Purchases**

If permitted by state and local requirements, purchases which do not exceed \$3,000 no longer require more than one price to satisfy Federal requirements, as long as you determine that the price paid is fair and reasonable. You can include a “fair and reasonable price” determination in your forms used for micro-purchases. Rotating through a list of the suppliers is one method to equitably distribute the micro-purchases among qualified suppliers. Micro-purchases are exempt from the Buy America requirements. However, the requirements of the Davis-Bacon Act apply to construction contracts between \$2,000 and \$3,000. Minimal documentation is required: a determination that the price is fair and reasonable, and how this determination was derived.

How do you document your determination that the price is fair and reasonable and the basis for that determination? You may want to prepare some “boilerplate” determinations for signature that address specific ways you buy products or services. You may want to say that based upon a telephone quote from John Doe company a widget costs “x” amount. Additionally, when comparing John Doe Company’s price with a price paid six months ago for the same widget the price appears to be fair and reasonable. Assuming that this were the case you would then fill in the blanks on your form, sign it and file it in the procurement file.

Alternatively, you may use an existing form such as a buyer’s tabulation that is filed. You may want to have another form that indicates the procurement is being made from an existing Blanket Purchase Agreement for which competition was obtained. You may want to prepare a form that addresses sales items – you are buying this widget from X company based upon an advertisement that the widget normally sells for \$35 each and is on sale for \$29.50 and this is fair and reasonable. Finally, you may want to have a form that simply addresses a standard

commercial item – the price is fair and reasonable because it is standard commercial item sold in the open marketplace.

### **Corrective Action and Schedule**

CVTD should develop a policy and procedure that will ensure that a fair and reasonable price determination be made and included in the contract file documentation for all purchases, including micro purchases. This determination shall explain how the fair and reasonable determination was arrived at.

For micro purchases, this may be accomplished by preparing a pre-printed form that will identify the basis for the fair and reasonable price determination.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### **CVTD's Response**

CVTD has established a Procurement Office to ensure compliance with FTA guidelines, rules and regulations. CVTD shall process all contractual vehicles through CVTD Business Manager to ensure compliance with CVTD Procurement Policy, CVCOG Director of Finance to ensure available funding, Procurement Manager prior to Executive Director signature (or designee). Further, the following action plan has been established.

A standard form for this purpose has been established to be incorporated into the electronic file.

CVTD has further developed draft checklists for acquisitions for the following price points; Micropurchase, \$3k-\$100K, \$100K plus

The following action plan has been established.

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

### **BMRA's Comments**

CVTD has included in its draft Procurement Policy Manual a determination form that the price paid is fair and reasonable and how this determination was derived. When this draft Procurement Policy is approved and implemented that meets the guidance of FTA C4220.1F, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action is completed.

**Element (23) Price Quotations (Small Purchase)**

Procedures. When using small purchase procedures:

- (a) *Competition.* The recipient must obtain price or rate quotations from an adequate number of qualified sources.
- (b) *Prohibited Divisions.* The recipient may not divide or reduce the size of its procurement to avoid the additional procurement requirements applicable to larger acquisitions.

(FTA C4220.1F, VI, 3.b.(2))

**Discussion**

CVTD is deficient with respect to this element.

FTA C4220.1F requires that when using small purchase procedures, the recipient must obtain price or rate quotations from an adequate number of qualified sources and may not divide or reduce the size of its procurement to avoid the additional procurement requirements applicable to larger acquisitions.

CVTD is deficient with respect to this element in the following purchase orders:

| ID Number                                                                                                 | Contractor           | \$ Amount   |
|-----------------------------------------------------------------------------------------------------------|----------------------|-------------|
| IT TRN 123101A                                                                                            | Dell                 | \$8,489.62  |
| 12864                                                                                                     | Angelo Tire & Align. | \$10,363.02 |
| 12044                                                                                                     | Angelo Tire & Align. | \$3,392.74  |
| 12725                                                                                                     | Angelo Tire & Align. | \$5,318.91  |
| 13022                                                                                                     | Angelo Tire & Align. | \$14,053.23 |
| 11982                                                                                                     | Angelo Tire & Align. | \$3,926.13  |
| 11935                                                                                                     | SKG Engineering      | \$3,548.00  |
| It appears the following purchase orders were split to stay under CVTD's small purchase limit of \$25,000 |                      |             |
| IT TRN 120105A                                                                                            | Dell                 | \$9,769.48  |
| IT TRN 120105B                                                                                            | Dell                 | \$16,534.56 |

## Best Practices/Advisory Comments – BPPM § 4.2 – Small Purchases

**Documentation** – How much documentation of the procurement process do I need to keep?

One standard that you may find useful is to what extent would a third party (an auditor) be satisfied that you have complied with your agency’s policies and procedures and that the price you are paying is “reasonable”. This will typically include the requisition (or purchase request), what specification was used (if any), who were quotations requested from, when and what quotations were received, and from whom (a simple abstract of quotes received), and a copy of the purchase order. Much of the documentation for small purchases can be accomplished on pre-printed forms or completed online, if your computer systems will allow for that type of input. Remember, it is supposed to be simple, but never forget that we must make an audit trail that can be followed. The clearer and more complete the trail is, the better.

### Corrective Action and Schedule

CVTD should establish a policy and procedure to ensure that when purchases are made under small purchases procedures, price quotations are obtained from an adequate number of sources and files are documented to reflect actions taken.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### CVTD’s Response

CVTD has adopted FTA’s proposed procurement policy and suggestions and shall be identified in CVTD Procurement Policy. The following Action plan has been established.

CVTD has further developed draft checklists for acquisitions for the following price points: micro purchase, \$3K-\$100K, \$100K plus. The checklist calls for or identifies the need for specifications by the requiring activity/department.

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

### BMRA’s Comments

BMRA concurs with CVTD’s response.

With the adoption and implementation of CVTD’s draft Procurement Policy dealing with price quotations (small purchase) per the FTA C4220.1F, CVTD can be considered “not deficient” for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

**Element (24) Clear, Accurate, and Complete Specification**

*The solicitation and the contract awarded thereunder must include a clear and accurate description of the recipient’s technical requirements for the property or services to be acquired in a manner that provides for full and open competition.*

- (1) What to Include. The description may include a statement of the qualitative nature of the property or services to be acquired. When practicable, the recipient should describe its requirements in terms of functions to be performed or level of performance required, including the range of acceptable characteristics or minimum acceptable standards. The Common Grant Rules for governmental recipients states that “Detailed product specifications should be avoided if at all possible.” Both Common Grant Rules express a preference for performance or functional specifications, but do not prohibit the use of detailed technical specifications when appropriate.*
  
- (2) Quantities Limited to the Recipient’s Actual Needs. FTA limits Federal assistance to the amount necessary to support the quantity of property or extent of services the recipient actually needs at the time of acquisition. The recipient may not add quantities or options to contracts solely to allow them to assign these quantities or options at a later date. FTA will not knowingly support the additional cost of contract rights to property or services excess to the recipient’s immediate needs, even though the recipient may assign its excess contract rights to others.*

(FTA 4220.1F, VI, 2.a.)

**Discussion**

CVTD is deficient with respect to this element.

FTA C4220.1F states that the solicitation and contract awarded thereunder must include a clear and accurate description of the recipient’s technical requirements for the property or services to be acquired in a manner that provides for full and open competition.

The following purchase orders did not contain adequate descriptions of the work required; therefore, they were not in compliance with the above requirements:

| <b>ID Number</b> | <b>Contractor</b>    | <b>\$ Amount</b> |
|------------------|----------------------|------------------|
| 12864            | Angelo tire & Align. | \$10,363.02      |
| 12044            | Angelo Tire & Align  | \$3,392.74       |



| ID Number | Contractor           | \$ Amount   |
|-----------|----------------------|-------------|
| 12725     | Angelo Tire & Align. | \$5,318.91  |
| 13022     | Angelo Tire & Align. | \$14,053.23 |
| 11982     | Angelo Tire & Align. | \$3,926.13  |
| 12834     | Dell                 | \$3,153.80  |
| 11935     | SKG Engineering      | \$3,548.00  |

### Best Practices/Advisory Comments – BPPM § 3.0 - Specifications

§ 8.c (1) of FTA Circular 4220.1E requires that 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 special features of the named brand which must be met by offerors shall be clearly stated.

§ 15 of the Master Agreement states that:

d. Exclusionary or Discriminatory Specifications. Apart from inconsistent requirements imposed by Federal statute or regulations, the Recipient agrees to comply with the requirements of 49 U.S.C. § 5323(h)(2) by refraining from using any Federal assistance awarded by FTA to support procurements using exclusionary or discriminatory specifications.

e. Bus Seat Specifications. A State or local government recipient may use specifications conforming with the requirements of 49 U.S.C. § 5323(e) to acquire bus seats.

### Corrective Action and Schedule

CVTD should include in its procurement policies that a clear, accurate, and complete specification must be included in every contract/purchase order. This will provide a clear understanding between the parties of what is being purchased.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

## CVTD's Response

**Response:** CVTD has adopted FTAs proposed procurement policy suggestions and shall be identified in CVTD Procurement Policy. Further, CVTD shall utilize FTA Best Practices and 4220.1F to support and ensure clear, accurate and complete specifications for all CVTD contractual vehicles. The following action plan has been established.

- |                                                     |                        |
|-----------------------------------------------------|------------------------|
| 1. Draft Procurement Policy                         | 25 Jul 13 completed    |
| 2. Present to Executive Director                    | 9 Aug 13 completed     |
| 3. Submit to draft to CVTD Board of directors       | TBD                    |
| 4. Submit Procurement Policy to FTA                 | 15 Aug 13 met deadline |
| 5. Present final of Procurement Policy to CVTD/BofD | TBD                    |

## BMRA's Comments

BMRA concurs with CVTD's response.

With the adoption and implementation of CVTD Procurement Policy that addresses the guidance as contained in FTA Circular 4220.1F and FTA's Best Practices Procurement Manual dealing with the writing of a clear, accurate, and complete specification and to include that specification in every contract/purchase order, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

## Element (29) Advertised/Publicized (Sealed Bid) (RFP)

If this procurement method is used, ...*the invitation for bids is publicly advertised*

(FTA C4220.1F, VI, 3.c.(2)(a))

If this procurement method is used the following requirements apply: *The request for proposals is publicly advertised.*

(FTA C4220.1F, VI, 3.d.(2)(a))

## Discussion

CVTD is deficient with respect to this element.

FTA C4220.1F requires that when using the sealed bids or competitive proposals method of procurement, the recipient should publicly advertise the requirement. The recipient will normally advertise in a publication of general circulation, trade journals, and State on-line procurement information sites.

The following contract file did not indicate CVTD adequately publicized the following contract:

| <b>ID Number</b> | <b>Contractor</b> | <b>\$ Amount</b> |
|------------------|-------------------|------------------|
| (No Number)      | The Goodman Corp  | \$932,590.00     |

### **Best Practices/Advisory Comments – BPPM § 4.3.2.1 – Advertising and Publicizing Solicitation**

The requirement for advertising requires a notice inviting bids be published at least once in at least one newspaper of general circulation in the state.

#### **Corrective Action and Schedule**

CVTD should develop a procedure to ensure that, when the Invitation for Bids/Request for Proposals (IFB/RFP) method of procurement is utilized for Federal procurements, the requirements of FTA Circular 4220.1F are followed, including that of advertising and publicizing each IFB/RFP.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

#### **CVTD's Response**

CVTD has established a Procurement Office to ensure compliance with FTA guidelines, rules, and regulations. T

CVTD has further developed draft checklists for acquisitions for the following price points: micro purchase, \$3K-\$100K, \$100K plus. The checklist at each price point along with the draft policy identifies the need for advertising.

The following action plan has been established:

- |                                      |                        |
|--------------------------------------|------------------------|
| 1. Draft Procurement Policy          | 25 Jul 13 completed    |
| 2. Present to Executive Director     | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors | TBD                    |
| 4. Submit Procurement Policy to FTA  | 15 Aug 13 met deadline |

#### **BMRA's Comments**

BMRA concurs with CVTD's response.

With the adoption and implementation of CVTD's draft Procurement Policy dealing with advertising and publicizing per the FTA C4220.1F, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

**Element (30) Adequate Number of Sources Solicited (Sealed Bid) (RFP)**

*Adequate Sources. Two or more responsible bidders are willing and able to compete effectively for the business.*

(FTA C4220.1F, VI, 3.c.(1)(b))

*Adequate Sources. Proposals are solicited from an adequate number of qualified sources.*

(FTA C4220.1F, VI, 3.d.(2)(c))

**Discussion**

CVTD is deficient with respect to this element.

FTA expects the recipient to solicit bids and proposals from an adequate number of sources based upon the size and complexity of the requirement. If an adequate number of sources do not respond to the solicitation, the recipient should determine and document the reason for inadequate competition in the contract file.

The following contract file did not indicate CVTD properly followed the above procedures when awarding the following contract:

| ID Number   | Contractor        | \$ Amount    |
|-------------|-------------------|--------------|
| (No Number) | The Goodman Corp. | \$932,590.00 |

**Best Practices/Advisory Comments – BPPM § 2.4.2.1.**

**Full and Open Competition Principle**

FTA Circular 4220.1E, Paragraph 8.a requires all procurements to be conducted in a manner providing full and open competition. This requirement finds its way into Paragraph 9.h of the Circular which limits the use of noncompetitive contract awards to those situations when the award of a contract is infeasible under small purchase procedures, sealed bids, or competitive proposals and at least one of several specifically named circumstances are present. Thus, contracts with a value of more than \$100,000 shall be awarded by sealed bid or competitive negotiation unless there is an explicit exception.

FTA Circular 4220.1E, Paragraph 8.a considers the following practices to be restrictive of competition:

- Unreasonable requirements placed on firms in order for them to qualify to do business;

- Unnecessary experience and excessive bonding requirements;
- Noncompetitive pricing practices between firms or between affiliated companies;
- Noncompetitive awards to any person or firm on retainer contracts;
- Restrictive use of brand names;
- Any arbitrary action in the procurement process; and
- Geographic preferences<sup>7</sup>

### **Corrective Action and Schedule**

CVTD should develop a procedure that requires CVTD personnel involved in the procurement process to document the file as to the extent of competition received from the solicitation. If no competition was received, the file should be documented as to why no competition was received.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### **CVTD's Response**

CVTD has established a Procurement Office to ensure compliance with FTA guidelines, rules, and regulations.

CVTD has further developed draft checklists for acquisitions for the following price points: micro purchase, \$3K-\$100K, \$100K plus. The checklists identify the requirements for competition at each price point. The following action plan has been established:

- |                                                     |                        |
|-----------------------------------------------------|------------------------|
| 1. Draft Procurement Policy                         | 25 Jul 13 completed    |
| 2. Present to Executive Director                    | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors                | TBD                    |
| 4. Submit Procurement Policy to FTA                 | 15 Aug 13 met deadline |
| 5. Present final of Procurement Policy to CVTD/BofD | TBD                    |

### **BMRA's Comments**

BMRA concurs with CVTD's response.

With the adoption and implementation of CVTD's draft Procurement Policy dealing with adequate number of sources solicited ("Sealed Bid) (RFP) per the FTA C4220.1F, CVTD can be considered "not deficient" for this element.

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<sup>7</sup> - Geographic preference is permitted in certain narrow situations, including principally where part of a legal licensing requirement and for architects and engineers; FTA Circular 4220.1E § 8.b.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

### **Element (36) Evaluation (RFP)**

*Evaluation Factors. All evaluation factors and their relative importance are specified in the solicitation; but numerical or percentage ratings or weights need not be disclosed.*

(FTA C4220.1F, VI, 3.d.(2)(b))

*Evaluation Method. A specific method is established and used to conduct technical evaluations of the proposals received and to determine the most qualified offeror.*

(FTA C4220.1F, VI, 3.d.(2)(d))

### **Discussion**

CVTD is deficient with respect to this element.

FTA C4220.1F requires the recipient to include all evaluation factors and their relative importance in the solicitation. A specific method must be established and used to conduct technical evaluations of the proposals received and to determine the most qualified offeror.

The following file did not demonstrate that the RFP was properly evaluated:

| <b>ID Number</b> | <b>Contractor</b> | <b>\$ Amount</b> |
|------------------|-------------------|------------------|
| (No Number)      | The Goodman Corp. | \$932,590.00     |

### **Best Practices/Advisory Comments – BPPM § 4.5**

RFPs shall identify all evaluation factors along with their relative importance.<sup>8</sup>

Proposals will be solicited from an adequate number of qualified sources.<sup>9</sup> You shall make award only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed agreement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.<sup>10</sup>

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<sup>8</sup> - FTA Circular 4220.1E § 9.d.(1).

<sup>9</sup> - FTA Circular 4220.1E § 9.d.(2).

<sup>10</sup> - FTA Circular 4220.1E § 7.h.

Awards will be made to the responsible firm whose proposal is most advantageous to the grantee's program with price and other factors considered.<sup>11</sup>

In architectural and engineering services procurements, grantees shall use competitive proposal procedures based on the Brooks Act, which requires selection based on qualifications and excludes price as an evaluation factor provided the price is fair and reasonable. (See Section 6.5 – *Architect-Engineering Services*.)<sup>12</sup>

## DISCUSSION

A request for proposals typically includes all of the elements of an invitation for bids, and in addition shall contain the evaluation factors and their relative importance, e.g., by stating that the factors are listed in declining order of importance. The request can specify the information needed to perform the evaluation, and may require that cost/price information be physically separated so that the technical evaluation can be performed separately from price evaluation. RFPs are typically publicized in newspapers and/or trade journals, and are issued to qualified mailing lists maintained in a manner similar to IFB lists. (See Section 4.3.2.2, "Solicitation Mailing List")

### Purpose

The required feature that principally distinguishes an RFP from an IFB is the listing of evaluation factors. These factors typically include not only responsibility factors (such as financial, human, and physical capacity to perform), but also technical factors (such as the degree to which the proposer is expected, based on information submitted and available, to achieve the performance objectives, to provide the quality expected, and on the relative qualifications of the proposer's personnel). Many RFPs go beyond listing these factors in order of importance, and also describe the evaluation process in detail, listing weights for each factor, illustrating the scoring method, and specifying the procedure for weighing price into the selection.

The purposes for disclosing of the evaluation process are so that:

- offerors can more accurately respond to your needs rather than solely rely on the technical specifications alone;
- proposers will be able to clearly present the information you need to conduct your evaluation; and
- the appearance of favoritism or unethical practice in offeror selection will be diminished.

The competitive proposal process involves a subjective evaluation process and discussions that are typically confidential. Public acceptance and acceptance by disappointed offerors might be

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<sup>11</sup> - FTA Circular 4220.1E § 9.d.(4).

<sup>12</sup> - FTA Circular 4220.1E § 9.e.

less than in the case of sealed bids, if the evaluation and selection process is not well documented and disclosed in advance.

## Best Practices

Evaluation and Award - The following is a listing of elements commonly found in the competitive proposal method of procurement.

- Both a technical and cost proposal are requested so that they may be evaluated, frequently by separate staff. Where the appearance of technical objectivity is important, it is a better practice to initially evaluate the technical proposals without knowledge of costs, so that an objective and impartial evaluation can be obtained.
- The evaluation factors to be considered in the award are identified in the RFP along with the relative importance of each. While this requires only the ranking of the factors without quantifying the importance or describing the process for applying the factors to proposals, some agencies disclose their selection process in detail.
- Disclosure Disadvantages. Disclosing the specific weights and scoring processes may encourage proposers to distort their proposals, and may strengthen the disappointed proposer's attack on the agency decision;
- Disclosure Advantages. The full description of the process guides proposers in understanding your needs, bolsters the objectivity of your evaluation team, encourages candor from the proposers during negotiations, and encourages competition through the perception of fair treatment.

## Corrective Action and Schedule

CVTD should include a section in its Procurement Manual on the evaluation process for Request for Proposals. At a minimum, the new section should cover the four requirements as identified in the FTA C4220.1F ¶ 9.d.(1)(2)(3)(4).

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

## CVTD's Response

CVTD has established a Procurement Office to ensure compliance with FTA guidelines, rules, and regulations.

CVTD has further developed draft checklists for acquisitions for the following price points: micro purchase, \$3K-\$100K, \$100K plus. The checklists shall be part of the contract file or process.

The following action plan has been established:

- |                                  |                     |
|----------------------------------|---------------------|
| 1. Draft Procurement Policy      | 25 Jul 13 completed |
| 2. Present to Executive Director | 9 Aug 13 completed  |



- |                                                     |                        |
|-----------------------------------------------------|------------------------|
| 3. Submit to CVTD Board of Directors                | TBD                    |
| 4. Submit Procurement Policy to FTA                 | 15 Aug 13 met deadline |
| 5. Present final of Procurement Policy to CVTD/BofD | TBD                    |

### BMRA's Comments

BMRA concurs with CVTD's response.

With the adoption and implementation of CVTD's draft Procurement Policy dealing with evaluation (RFP) per the FTA C4220.1F, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

### Element (37) Price and Other Factors (RFP)

If this procurement method is used the following requirements apply:

*An award is made to the responsible offeror whose proposal is most advantageous to the recipient's program with price and other factors considered.*

(FTA C4220.1F, VI, 3.d.(2)(e))

### Discussion

CVTD is deficient with respect to this element.

An award is made to the responsible offeror whose proposal is most advantageous to the recipient's program with price and other factors considered. Adequate documentation of the analysis should be retained in the contract file.

The following contract file did not contain documentation as required :

| ID Number   | Contractor       | \$ Amount    |
|-------------|------------------|--------------|
| (No Number) | The Goodman Corp | \$932,590.00 |

### Corrective Action and Schedule

CVTD should include a policy and a procedure in its Procurement Manual that will ensure that the contract file contains adequate documentation of the analysis conducted to support the award of a contract to the firm that is most advantageous to CVTD's program. Procurement training should be conducted for all personnel involved in the procurement process.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### CVTD's Response

**Response:** CVTD has adopted FTAs proposed procurement policy suggestions and shall be identified in CVTD Procurement Policy. CVTD shall further utilize FTAs Best Practices, 4220.1F and the Federal Acquisition Regulation as guidance in evaluating price and other factors. Further, all CVTD RFPs shall be evaluated by CVTD Business Manager, CVCOG Director of Finance and Procurement Manager as oversight for the Executive Director (or designee). The following action plan has been established.

- |                                                     |                        |
|-----------------------------------------------------|------------------------|
| 1. Draft Procurement Policy                         | 25 Jul 13 completed    |
| 2. Present to Executive Director                    | 9 Aug 13 completed     |
| 3. Submit to draft to CVTD Board of directors       | TBD                    |
| 4. Submit Procurement Policy to FTA                 | 15 Aug 13 met deadline |
| 5. Present final of Procurement Policy to CVTD/BofD | TBD                    |

### BMRA's Comments

BMRA concurs with CVTD's response.

With the adoption and implementation of CVTD's Procurement Policy of awarding procurements to responsible offerors whose proposals are most advantageous to the recipient's program, CVTD can be considered "not deficient" for this element. This policy must conform to the guidance as contained in FTA Circular 4220.1F and FTA Best Practices Procurement Manual. The Federal Acquisition Regulations will also be used for guidance when needed to determine a reasonable price along with other factors (RFP). In addition, additional reviews by higher level officials will be required to determine that the price along with other factors will be considered in making an award. Procurement training should be conducted for all personnel involved in the procurement process.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

**Element (41) Cost or Price Analysis**

*Recipient to perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis depends on the facts and circumstances surrounding each procurement...*

(FTA C4220. 1F, VI, 6.)

**Discussion**

CVTD is deficient with respect to this element.

FTA C4220.1F requires the recipient to perform either a cost analysis, with associated profit negotiations, or a price analysis, and document same in the procurement file.

The following procurement files did not contain the required documentation:

| <b>ID Number</b> | <b>Contractor</b>    | <b>\$ Amount</b> |
|------------------|----------------------|------------------|
| (No Number)      | The Goodman Corp     | \$932,590.00     |
| IT TRN 123101 A  | Hewlett Packard      | \$8,489.62       |
| IT TRN 120105 A  | Dell                 | \$9,769.48       |
| 12834            | Dell                 | \$3,153.80       |
| IT TRN 120105B   | Dell                 | \$16,534.56      |
| 12864            | Angelo Tire & Align. | \$10,363.02      |
| 12044            | Angelo Tire & Align. | \$3,392.74       |
| 12725            | Angelo Tire & Align. | \$5,318.91       |
| 13022            | Angelo Tire & Align. | \$14,053.23      |
| 11982            | Angelo Tire & Align. | \$3,926.13       |
| 11935            | SKG Engineering      | \$3,548.00       |

**Best Practices/Advisory Comments BPPM 5.2 – Cost and Price Analysis**

In general, the purpose of cost or price analysis is to ensure that you do not pay unreasonably high prices. However, prices that are unreasonably low can also be detrimental to your agency's program if they prove to be an indication that the offeror has made a mistake or doesn't understand the work to be performed.

Before issuing a solicitation, develop an independent estimate of the proper price level for the supplies or services to be purchased. The estimate can range from a simple budgetary estimate to a complex estimate based on inspection of the product itself and review of such items as drawings, specifications, and prior data (such as cost data from prior procurements). The estimate can then assist in a determination of reasonableness or unreasonableness of price.

Some common price analysis techniques consist of the following:

- Comparison of proposed prices received in response to the solicitation;
- Comparison with competitive, published price lists, published market price of commodities, similar indexes, and discount or rebate arrangements;
- Comparison of proposed prices with the cost estimate performed prior to the solicitation, although this alone is seldom adequate to warrant a determination that the price is reasonable; and
- Comparison of prices received with prior procurement actions for the same or similar end items. Prior price comparisons may be affected by:
  - Changes in economic conditions between the times of the two procurements;
  - Differences in quantities;
  - Inclusion of nonrecurring cost in the prices, such as design, capital equipment, production facilities, etc. To make a fair comparison, nonrecurring costs can be removed from both prices.

Cost analysis entails reviewing each element of cost 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 *but the costs must be consistent with Federal cost principles found in FAR Part 31*. Some common cost analysis techniques consist of the following:

- Verification of cost or pricing data and evaluation of cost elements, examining the following:
  - Necessity for and reasonableness of proposed costs, including allowances for contingencies;
  - Projection of offeror's cost trends on the basis of current and historical cost or pricing data;
  - Technical appraisal of estimated labor, material, tooling, facilities requirements and reasonableness of scrap and spoilage factors; and
  - Application of audited or negotiated indirect cost rates, labor rates, etc.
- Evaluation of the effect of the offeror's current practices on future costs. This ensures that the effects of inefficient or uneconomical past practices are not projected into the future.
- Comparison of the individual cost elements proposed with the following:
  - Actual costs previously incurred by the same offeror;

- Previous cost estimates from the offeror or other offerors for the same or similar items;
- Other cost estimates received in response to the recipient's request;
- Elements of the independent cost estimates by recipients' technical personnel;
- Verification that the offeror's cost elements are in accordance with Federal cost principles and procedures as found in FAR 31.
- Analysis of the results of any make-or-buy program reviews, so as to establish the most economical approach to the acquisition of components needed by the contractor.
- 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.

### **Corrective Action and Schedule**

CVTD should develop a policy and procedure to ensure that cost or price analysis is performed in connection with every procurement action, including contract modifications. CVTD should identify steps that will be taken to implement this recommendation.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### **CVTD's Response**

CVTD has established a Procurement Office to ensure compliance with FTA guidelines, rules, and regulations.

CVTD has further developed draft checklists for acquisitions for the following price points: micro purchase, 3K-\$100K, \$100K plus. The checklists shall be required for each applicable price point; the checklist further calls for checks and balances to ensure review of procurement policy.

The following action plan has been established:

- |                                                     |                        |
|-----------------------------------------------------|------------------------|
| 1. Draft Procurement Policy                         | 25 Jul 13 completed    |
| 2. Present to Executive Director                    | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors                | TBD                    |
| 4. Submit Procurement Policy to FTA                 | 15 Aug 13 met deadline |
| 5. Present final of Procurement Policy to CVTD/BofD | TBD                    |

### **BMRA's Comments**

BMRA concurs with CVTD's response.

With the adoption and implementation of CVTD's draft Procurement Policy dealing with cost or price analysis per the FTA C4220.1F, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

## **Element (42) Written Record of Procurement History**

*Record Keeping. The Common Grant Rules require the recipient to prepare and maintain adequate and readily accessible project performance and financial records, covering procurement transactions as well as other aspects of project implementation. The Common Grant Rules require the recipient to maintain these records for three years after the recipient and subrecipients, if any, have made final payment and all other pending matters are closed. The recipient must also prepare, maintain, and distribute the following documents as necessary:*

- (1) Procurement History. The Common Grant Rules require the recipient to maintain and make available to FTA written records detailing the history of each procurement, as follows:
  - (a) Procurement Method. A governmental recipient must (and a non-governmental recipient should) provide its rationale for the method of procurement it used for each contract, including a sole source justification for any acquisition that does not qualify as competitive, while a non-governmental recipient need only provide a justification for lack of competition when it does not obtain competitive bids or proposals for contracts exceeding the simplified acquisition threshold;*
  - (b) Contract Type. A governmental recipient must (and a non-governmental recipient should) state the reasons for selecting the contract type it used (fixed price, cost reimbursement, and so forth);*
  - (c) Contractor Selection. A governmental recipient must state its reasons for contractor selection or rejection. For procurements exceeding the small purchase threshold, a non-governmental recipient must state its reasons for contractor selection, but need not state its reasons for contractor rejection. Each recipient should include a written responsibility determination for the successful contractor; and*
  - (d) Cost or Price. Each recipient must evaluate and state its justification for the contract cost or price.**

(e) Reasonable Documentation. *The extent of documentation should be reasonable. Documents included in a procurement history should be commensurate with the size and complexity of the procurement itself. FTA recognizes that these written records will vary greatly for different procurements. For example, a receipt or bill accompanying a \$100 credit card purchase might contain all of the required information to support that procurement. Procurements that are more substantial may require extensive documentation.*

(FTA C 4220.1F, III, 3.d.)

**Discussion**

CVTD is deficient with respect to this element.

The Common Grant Rule requires the recipient to maintain and make available a written record detailing the history of each procurement. The extent of documentation should be reasonable and commensurate it with the size and complexity of the procurement itself.

Adequate documentation was lacking in the following purchase orders/contracts:

| <b>ID Number</b> | <b>Contractor</b>    | <b>\$ Amount</b> |
|------------------|----------------------|------------------|
| IT TRN 123101A   | Hewlett Packard      | \$8,489.62       |
| IT TRN 120105A   | Dell                 | \$9,769.48       |
| IT TRN 120105B   | Dell                 | \$16,534.56      |
| (No Number)      | The Goodman Corp.    | \$932,590.00     |
| 12864            | Angelo Tire & Align. | \$10,363.02      |
| 12044            | Angelo Tire & Align. | \$3,392.74       |
| 12725            | Angelo Tire & Align. | \$5,318.91       |
| 13022            | Angelo Tire & Align. | \$14,053.23      |
| 11982            | Angelo Tire & Align. | \$3,926.13       |
| 12834            | Dell Marketing       | \$3,153.80       |
| 10694 NH         | National Bus Sales   | \$249,052.00     |
| 10695 NH         | National Bus Sales   | \$185,721.00     |
| 11935            | SKG Engineering      | \$3,548.00       |
| 10653            | Lindamood Demolition | \$85,284.00      |

## **Best Practices/Advisory Comments BPPM § 2.4.1 and Appendix B.12**

Where appropriate, the procurement documentation file should contain:

- Purchase request, acquisition planning information, other presolicitation documents,
- Evidence of availability of funds,
- Rationale for the method of procurement (negotiations, formal advertising),
- List of sources solicited,
- Independent Cost Estimate,
- Statement of Work/ Scope of services,
- Copies of published notices of proposed contract action,
- Copy of the solicitation, all addenda, and all amendments,
- Liquidated damages determination,
- An abstract of each offer or quote,
- Contractor's contingent fee representations and other certifications and representations,
- Source selection documentation, if applicable,
- Contracting Officer's determination of contractor responsiveness and responsibility,
- Cost or pricing data,
- Determination that price is fair and reasonable, including an analysis of the cost and pricing data,
- Required internal approvals for award,
- Notice of award,
- Notice to unsuccessful quoters or offerors and record of any debriefing,
- Record of any protest,
- Bid, Performance, Payment, or other bond documents, and notices to sureties,
- Required insurance documents, if any,
- Notice to proceed, and
- Negotiation Memorandum.

Purchase order forms (electronic or manual) and standard files for small purchases can be designed to automate the recording of most of the relevant data for small purchases. Bid and proposal files, particularly for sealed bids under \$100,000, also can be standardized to facilitate recording appropriate data. For larger procurements, there are often memoranda or correspondence that, if assembled into the file, address many of the key issues.



The procurement and the contract administration files can be coordinated by standard practice so that nothing is omitted between bid opening (or proposal receipt) and notice of award.

Where the price was established based on an evaluation of cost elements and fee in the offeror's proposal, the negotiation memorandum should clearly set forth the various amounts, as they were proposed, evaluated and negotiated.

### **Corrective Action and Schedule**

CVTD should develop and implement a policy and procedure in its Procurement Manual to ensure that the contract file contains a written record of the procurement history and that the procedures identify the minimum data that must be included in the file sufficient to meet the FTA guidance.

Although FTA Circular 4220.1F only identifies the minimum requirements for proper documentation, the Best Practices Procurement Manual identifies a more detailed listing of documentation that should be contained in the contract file.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### **CVTD's Response**

CVTD has adopted FTA's proposed procurement plan and suggestions and shall be identified in CVTD Procurement Policy.

CVTD has further developed draft checklists for acquisitions for the following price points: micro purchase, \$3K-\$100K, \$100K plus. Procurement History is identified in the checklists.

The following action plan has been established.

- |                                                     |   |                        |
|-----------------------------------------------------|---|------------------------|
| 1. Draft Procurement Policy                         |   | 25 Jul 13 completed    |
| 2. Present to Executive Director                    | 9 | Aug 13 completed       |
| 3. Submit draft to CVTD Board of Directors          |   | TBD                    |
| 4. Submit Procurement Policy to FTA                 |   | 15 Aug 12 met deadline |
| 5. Present final of Procurement Policy to CVTD/BofD |   | TBD                    |

### **BMRA's Comments**

BMRA concurs with CVTD's response.

CVTD has included guidelines in its draft Procurement Policy Manual that when implemented will meet the FTA guidelines that address the history of the procurement (see 4.2 of the draft Procurement Manual). When this draft Procurement Manual is approved and implemented, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

### **Element (49) Liquidated Damages Provisions**

*FTA has determined that a recipient may use liquidated damages if the recipient reasonably expects to suffer damages through delayed contract completion, or if weight requirements are exceeded, and the extent or amount of such damages are uncertain and would be difficult or impossible to determine. The rate and measurement standards must be calculated to reasonably reflect the recipient's costs should the standards not be met, and must be specified in the solicitation and contract. The assessment for damages is often established at a specific rate per day for each day beyond the contract's delivery date or performance period. A measurement other than a day or another period of time, however, may be established if that measurement is appropriate, such as weight requirements in a rolling stock purchase. The procurement file should include a record of the calculation and rationale for the amount of damages established. Any liquidated damages recovered must be credited to the project account involved unless FTA permits otherwise.*

(FTA C 4220.1F, IV, 2.b.(6)(b)1)

### **Discussion**

CVTD is deficient with respect to this element.

The Common Grant Rule for governmental recipients authorizes FTA to require remedies. One of these remedies is liquidated damages (LD). In order to properly assess LDs, the recipient must reasonably expect to suffer damages through delayed contract completion. The assessment for damages is often established at a specific rate per day or another period of time. The LD assessment must be addressed in the solicitation and resulting contract. The procurement file should include a record of this calculation and rationale for the amount of damages established.

The following contract files lacked documentation of rationale as required:

| <b>ID Number</b> | <b>Contractor</b>      | <b>\$ Amount</b> |
|------------------|------------------------|------------------|
| (No Number)      | Templeton Construction | \$3,133,596.00   |
| 10653            | Lindamood Demolition   | \$85,284.00      |

### **Best Practices/Advisory Comments BPPM § 8.2.3.**

Liquidated Damages - Liquidated damages are a specific sum (or a sum readily determinable) of money stipulated by the contracting parties as the amount to be recovered for each day of delay in delivery of the product or completion of the contract. They do not represent actual damages but are established in the initial contract as a substitute for actual damages. They should

represent, however, the most realistic forecast possible of what the actual damages are likely to be.

## DISCUSSION

Liquidated damages are a widely used method of ensuring contractors perform timely. These provisions are regularly used in construction contracts and sometimes in supply and service contracts.

Liquidated damages clauses are most appropriately used when:

- The time of delivery or performance is of particular importance and you may reasonably expect to suffer damage if the delivery or performance is delinquent; and
- The extent or amount of such damage would be difficult to prove.

When determining whether to use a liquidated damages clause, you will wish to consider such factors as:

- The probable effect on pricing and competition; and
- The costs and difficulties of contract administration.

Liquidated damages may be used for supplies, services and construction.

### Best Practices

**Rate Determination** - The rate of liquidated damages must be a reasonable estimate to compensate for possible damages and not be so large as to be construed as a penalty. If it is construed as a penalty it will be held unenforceable. The most prudent approach is to formulate the liquidated damages on a case-by-case basis. You will find it useful to briefly document the calculation of the rate of damages each time you use liquidated damages in a contract and keep the documentation on file. Appendix B.3 is an example of a *Liquidated Damages Checklist* being used by a Transit Authority.<sup>13</sup> Once liquidated damages are included in a contract, you will be unable to recover actual damages in many jurisdictions.

**Application** - When it is determined that a liquidated damages clause will be included in the contract, the applicable clause and appropriate rate(s) must be contained in the solicitation. For construction contracts, the rate to be assessed can be for each day of delay, and the rate typically, at a minimum, covers the estimated cost of inspection and superintendence for each day of delay in completion. If you will suffer other specific losses due to failure of timely completion, the rate can also include an amount for these items (for example, the cost of substitute facilities or the rental of buildings or equipment). The contract may include an overall maximum dollar amount

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<sup>13</sup> - Bay Area Rapid Transit District (BART) Procurement Manual, Rev 4, July 20, 1994, Attachment Y.

or period of time, or both, during which liquidated damages may be assessed. This will help ensure that there is not an unreasonable assessment of damages.

*It is important to note, that in your establishment of liquidated damages, you may use whatever consequential damages may result from a failure to deliver or perform, even damages for items which are not within the scope of the grant. However, it must be understood that all liquidated damages collected from the contractor must be credited to the grant and treated as a reduction to the allowable costs of the grant, in accordance with § 13 of FTA Circular 4220.1E. This will have the effect of making the funds collected (or the contract price reduction taken) available to the grantee for other activities/costs which are within the scope of the grant. In other words, while you may use the incurred cost of activities which are not within the scope of the grant to estimate and establish liquidated damages amounts, you will not be able to directly apply the collected damages to those impacted activities unless they are within the scope of the grant. The funds returning to the grantee must be credited to the grant where they become available for other activities which are within the scope of the grant.*

### **Corrective Action and Schedule**

CVTD should update its Procurement Manual to include the proper use and documentation of the liquidated damages provision. CVTD should also develop and implement a procedure along with training to all personnel in the procurement process that will ensure the proper use of this provision.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### **CVTD's Response**

CVTD has adopted FTA's proposed procurement plan and suggestions and shall be identified in CVTD Procurement Policy. The following action plan has been established.

- |                                                     |                        |
|-----------------------------------------------------|------------------------|
| 1. Draft Procurement Policy                         | 25 Jul 13 completed    |
| 2. Present to Executive Director                    | 9 Aug 13 completed     |
| 3. Submit draft to CVTD Board of Directors          | TBD                    |
| 4. Submit Procurement Policy to FTA                 | 15 Aug 13 met deadline |
| 5. Present final of Procurement Policy to CVTD/BofD | TBD                    |

### **BMRA's Comments**

CVTD has included guidelines in its draft Procurement Policy Manual that when implemented will ensure that CVTD will meet the FTA guidance when including liquidated damages in its contracts. When the draft Procurement Policy is approved and implemented that meets the guidance of FTA C4220.1F, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

### **Element (50) Piggybacking**

- (2) Assignment of Contract Rights. *FTA expects the recipient to limit its procurements to the amount of property and services required to meet its reasonably expected needs without adding excess capacity simply for the purpose of assigning contract rights to others at a later date. FTA expects the recipient to be able to justify the quantities it procures. Having written statements of its anticipated material requirements in the recipient's contract files may prove helpful.*

*For example, if the supplies or services were solicited, competed, and awarded through the use of an indefinite-delivery-indefinite-quantity (IDIQ) contract, the solicitation and also the contract award are expected to contain both a minimum and maximum quantity that represent the recipient's reasonably foreseeable needs. The establishment of State or local government purchasing schedules intended to be available for future use as discussed in section 4 of this Chapter, however, are not usually financed with FTA assistance. FTA assistance would be used to acquire property or services listed on such a contract only to the extent needed for public transportation purposes.*

*Nevertheless, a recipient may find that it has inadvertently acquired contract rights in excess of its needs. The recipient may assign those contract rights to other recipients if the original contract contains an assignability provision that permits the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions. Some refer to this process as "piggybacking."*

- (a) Acquisition Through Assigned Contract Rights. *Although FTA does not encourage the practice, a recipient may find it useful to acquire contract rights through assignment by another recipient. A recipient that obtains contractual rights through assignment may use them after first determining the contract price remains fair and reasonable, and the contract provisions are adequate for compliance with all Federal requirements. The recipient need not perform a second price analysis if a price analysis was performed for the original contract. However, FTA expects the recipient to determine whether the contract price or prices originally established are still fair and reasonable before using those rights. See, FTA's "Best Practices Procurement Manual" for further information about procurements through assignment of another's contract rights. The recipient using assigned contract rights is responsible for ensuring the contractor's compliance with FTA's Buy America requirements and execution of all the required preaward and post delivery Buy America review certifications. For further details, please refer to FTA's Pre-Award and Post-Delivery Handbooks for buses and rail cars, which contain copies of those certifications. The recipient seeking to use assigned contract rights will not usually be able to determine whether the assigning recipient originally procured unreasonably large quantities. Before proceeding with the assignment, however, FTA does expect the recipient seeking the assignment to review the original contract to be sure that the quantities the assigning recipient acquired, coupled*

*with the quantities the acquiring recipient seeks, do not exceed the amounts available under the assigning recipient's contract. .*

(FTA C4220.1F, V, 7.a.(2))

### Discussion

CVTD is deficient with respect to this element.

Although FTA does not encourage "piggybacking," the recipient may find it useful to acquire contract rights through assignment by another recipient. A recipient that obtains contractual rights must first determine that the original contract was in full compliance with all Federal requirements, and the contract price remains fair and reasonable. The recipient's contract file should be documented showing the above was accomplished. (See BPPM Appendix 16 for guidance).

The following contract files lacked the necessary documentation:

| ID Number | Contractor         | \$ Amount    |
|-----------|--------------------|--------------|
| 10694 NH  | National Bus Sales | \$249,052.00 |
| 10695     | National Bus Sales | \$185,721.00 |

### Corrective Action and Schedule

CVTD should update its policies and procedures to provide guidance to staff on proper use and documentation required when using the piggybacking method of contracting.

When piggybacking another contract, use as guidance the piggybacking worksheet (Appendix B.16) as contained in the FTA's Best Practices Procurement Manual.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### CVTD's Response

CVTD has established a Procurement Office to ensure compliance with FTA guidelines, rules, and regulations.

CVTD has further developed draft checklists for acquisitions for the following price points: micro purchase, \$3K-\$100K, \$100K plus.

The following action plan has been established:

- |                                                     |                        |
|-----------------------------------------------------|------------------------|
| 1. Draft Procurement Policy                         | 25 Jul 13 completed    |
| 2. Present to Executive Director                    | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors                | TBD                    |
| 4. Submit Procurement Policy to FTA                 | 15 Aug 13 met deadline |
| 5. Present final of Procurement Policy to CVTD/BofD | TBD                    |

## **BMRA's Comments**

BMRA concurs with CVTD's response.

With the adoption and implementation of CVTD's draft Procurement Policy using the guidance identified in the piggybacking worksheet (Appendix B.16) as contained in the FTA Best Practices Procurement Manual, CVTD can be considered "not deficient" for this element.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

## **Element (56) Clauses**

2. **FEDERAL REQUIREMENTS THAT MAY AFFECT A RECIPIENT'S ACQUISITIONS.** *Before a recipient may use FTA assistance to support the acquisition of property or services, it must comply with all applicable Federal laws and regulations, whether or not addressed in the Common Grant Rules. Some of those laws and regulations will affect the third party contractor providing the property or services or even determine which entities may qualify as a third party contractor. Other laws and regulations will affect the nature of the property or services to be acquired or the terms under which the property or services must be acquired. A recipient may not use FTA assistance to support acquisitions that do not comply with all applicable Federal requirements.*

*FTA's Master Agreement contains a current, but not all-inclusive, description of statutory and regulatory requirements that may affect a recipient's procurement (such as Disadvantaged Business Enterprise (DBE) and Clean Air requirements). The Master Agreement states that applicable Federal requirements will apply to project participants to the lowest tier necessary to ensure compliance with those requirements. A recipient will also need to include applicable Federal requirements in each subagreement, lease, third party contract, or other document as necessary. For specific guidance on cross-cutting requirements administered by other Federal agencies, FTA recommends that the recipient contact those agencies.*

*The recipient may also use the checklists in Appendix C of this circular as a reminder of Federal requirements, and the matrices in Appendix D of this circular for a list of clauses and provisions required by Federal laws and regulations. The recipient may also refer to the Model Clauses in FTA's "Best Practices Procurement Manual" but cautions the recipient also to check the latest edition of FTA's Master Agreement to determine which provisions have been added, changed, or rescinded.*

(FTA C4220.1F, VI, 2.)

**Discussion**

CVTD is deficient with respect to this element.

The Common Grant Rule requires the recipient to determine the applicability of the clauses addressed in FTA C4220.1F and the Master Agreement. FTA C4220.1F, Appendix D can be used to determine applicability of the specific language of a clause that a recipient may use.

The following procurements did not contain all of the required clauses:

| <b>ID Number</b> | <b>Contractor</b>      | <b>\$ Amount</b> |
|------------------|------------------------|------------------|
| (No Number)      | Templeton Construction | \$3,133,596.00   |
| (No Number)      | The Goodman Corp.      | \$932,590.00     |
| IT TRN 123101A   | Hewlett Packard        | \$8,489.62       |
| ITTRN 120105 A   | Dell                   | \$9,769.48       |
| IT TRN 120105 B  | Dell                   | \$16,534.56      |
| 12864            | Angelo Tire & Align.   | \$10,363.02      |
| 12044            | Angelo Tire & Align.   | \$3,392.74       |
| 12725            | Angelo Tire & Align.   | \$5,318.91       |
| 13022            | Angelo Tire & Align.   | \$14,053.23      |
| 11982            | Angelo Tire & Align.   | \$3,926.13       |
| 12834            | Dell                   | \$3,153.30       |
| 72808            | National Bus Sales     | \$532,832.00     |
| 11935            | SKG Engineering        | \$3,548.00       |

**Best Practices/Advisory Comments BPPM § 8.1.1.**

**DISCUSSION**

FTA grantees recognize that the most significant of the strings attached to the receipt of federal funds is the requirement to comply with federal statutes and regulations applicable to their project or particular contract.

You will want to be able to determine exactly which clauses are required for a specific procurement because the incorporation of unnecessary or loosely drafted clauses can:



- discourage competitors,
- cause confusion for anyone involved with the contract, and
- ultimately result in additional costs for your agency.

Appendix A.1 of this manual discusses each of the most generally applicable clauses. Knowing that a particular law must be complied with and that appropriate language must be included in a third party contract, still leaves the Grantee trying to draft or incorporate a clause that meets those requirements. The clause-by-clause discussions in Appendix A.1 have been developed by FTA to assist you.

### **Best Practices**

Appendix A.1 of this Manual contains thirty model contract clauses that are either federally required or are suggested model clauses that you may include in contracts. The clauses contained in this Appendix include the following common elements which will be helpful to grantees in deciding if a specific clause is required in a particular procurement:

Applicability to Contracts - discusses the types of contracts for which the clause is applicable.

Flow Down - discusses to which prime contractors and which level of subcontractors the clauses apply.

Mandatory Clause/Language - includes the model clause, identified by FTA as either a required (specified) clause or a suggested-language clause.

The narratives provided with the individual clauses in the Appendix indicate the source of the clause, if required. Many of the required clauses come directly from requirements in various sections of the Code of Federal Regulations (CFR) which is published by various executive departments of the federal government. The most common requirements for FTA grantees come from various parts of Title 49 of the CFR, published by the Department of Transportation. Requirements of the Department of Labor (such as Davis-Bacon Act clauses) originate as specific language in Title 29 of the CFR. Where clauses are not mandated by an executive department, they are frequently modeled after clauses in the Federal Acquisition Regulations (FAR) which are applicable to those executive departments.

Even though the FAR does not apply to grantee procurements, one advantage of using FAR clauses in the absence of a specific requirement imposed upon your Agency is that a body of federal law has been developed which interprets those clauses.<sup>14</sup>

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<sup>14</sup> - Although the relevance of that law will vary from state to state, most individual states will not have interpreted federal statutes and clauses and will frequently look to the federal common law, as interpreted by the Comptroller General of the United States and the various boards and courts, for guidance in interpreting that law and those clauses.

Your State, local jurisdiction, or transit Agency may have enacted a procurement code or body of regulations that actually establishes specific clauses which you must use. In that case, you will be obligated to use what has been established for you. Many of the recent enactments of those codes or regulations are adaptations of the American Bar Association's *Model Procurement Code for State and Local Governments*.<sup>15</sup>

You may have the ability to incorporate clauses by reference (such as, title, date and where it can be found) in your contracts. To the extent clauses you want to incorporate are published in a Federal, State, or local statute, code, or ordinance, or in an official regulation such as the CFR, you should be able to incorporate those provisions directly into your contractual document by reference only. You can check with your supporting legal counsel on what clauses you can and cannot incorporate by reference and the manner in which they may be incorporated. It is doubtful you would ever be able to incorporate by reference a clause that was only published in an FTA Circular, because of the way FTA Circulars are published (i.e. they are not officially published in the *Federal Register*).

### **Corrective Action and Schedule**

CVTD should develop and implement a procedure to assure all future contracts have the appropriate Federal clauses. (See discussion above.) CVTD should modify its open contracts that do not contain all of the required Federal clauses.

CVTD should submit a corrective action plan and schedule for this item within 30 days of receipt of the draft final report.

### **CVTD's Response**

CVTD has established a Procurement Office to ensure compliance with FTA guidelines, rules, and regulations. The following action plan has been established:

- |                                                     |                        |
|-----------------------------------------------------|------------------------|
| 1. Draft Procurement Policy                         | 25 Jul 13 completed    |
| 2. Present to Executive Director                    | 9 Aug 13 completed     |
| 3. Submit to CVTD Board of Directors                | TBD                    |
| 4. Submit Procurement Policy to FTA                 | 15 Aug 13 met deadline |
| 5. Present final of Procurement Policy to CVTD/BofD | TBD                    |

### **BMRA's Comments**

BMRA concurs with CVTD's response.

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<sup>15</sup> - The Model Procurement Code and recommended Regulations may be available in your local public library or may be purchased from the American Bar Association. It is recommended that you contact the following for further information: Member Services, P.O. Box 10892, Chicago, Illinois 60612-0892.

With the implementation of the guidance as contained in FTA C4220.1F, Appendix D, CVTD can be considered “not deficient” for this element. Appendix D identifies the appropriate clauses to be used for the different types of contracts.

The FTA reserves the right on all future FTA oversight reviews to access the results of this corrective action.

This corrective action was scheduled to be completed by August 15, 2013.

CVTD should notify the FTA Region VI Office when this corrective action has been completed.

## **PRE-AWARD POST-DELIVERY RULE**

The pre-award review is intended to help the recipient ensure that the proposed buses (rail cars) will meet the (1) Buy America regulations, (2) recipient's needs and specifications and (3) Federal Motor Vehicle Safety Standards (FMVSS) regulations.

### **Discussion**

#### **Buy America/Pre-Award/Post Delivery**

The CVTD participated in four vehicle procurement actions over the past five (5) years. One was issued by CVTD for four 30' buses. Three were piggyback actions on a Houston/Galveston procurement for vans. A random sample of the paratransit vehicles and 30' buses had the required FMVSS stickers attached.

The balance of the Pre-Award/Post Delivery documents requirements has not been located.

On all four procurements the review team saw no evidence that the Pre-Award/Post delivery requirements were met.

### **OTHER MATTERS:**

#### **Lack of Documentation**

The majority of the deficient elements resulted from CVTD's inability to provide the review team with documented evidence that all FTA C4220.1F required actions were taken. Therefore, the review team is obligated to report those elements deficient.

#### **DBE Report**

The review team understands CVTD has submitted the required DBE report to the FTA as required.

#### **Training**

It is highly recommended that the Concho Valley Transit District staff involved in the acquisition process attend the National Transit Institute Acquisition Program or similar training.

#### **Staffing**

It is highly recommended that the Concho Valley Transit District establish an acquisition staff. Currently, the CVTD Transit Director performs this function with ad hoc help from the Council of Government staff.

### ***CVTD's Response***

CVTD has recruited and staffed a CVTD Procurement person dedicated to the establishment and administration of CVTD contracts and agreements. CVTD shall further ensure the Procurement person attend Acquisition Training for the National Transit Institute.

### **Kudos**

The review team would like to express our appreciation to the people of Concho Valley Transit District/Council of Government that we came into contact with this week. All were cordial and extremely helpful.

A special appreciation to Sean Scott, Transit Director; without his help we could not have accomplished our goal of completing this FTA sponsored review.

**Appendix A:**  
**List of Individuals Attending  
Entrance or Exit  
Conferences**

**FTA Region**

| <i>Name/Title</i> | <i>Phone Number</i> | <i>Email Address</i> |
|-------------------|---------------------|----------------------|
| Abel Ayala        | (817) 978-0560      | Abel.ayala@dot.gov   |

**FTA Headquarters**

|            |                |                  |
|------------|----------------|------------------|
| James Muir | (202) 366-2507 | Jim.muir@dot.gov |
|------------|----------------|------------------|

**CVTD**

| <i>Name/Title</i>                                              | <i>Phone Number</i> | <i>Email Address</i>      |
|----------------------------------------------------------------|---------------------|---------------------------|
| Sean Scott<br>Director of Transportation                       | (325) 944-9666      | sean@cvcog.org            |
| Jeffrey Sutton<br>Executive Director                           | (325) 944-9666      | jsutton@cvcog.org         |
| Marc Mata<br>Human Resources Director                          | (325) 944-9666      | marcos@cvcog.org          |
| Nancy Pahira<br>Director of Finance                            | (325) 944-9666      | nancy@cvcog.org           |
| Delma Childress<br>Public Transportation<br>Coordinator, TxDOT | (325) 947-9335      | Delma.childress@txdot.gov |
| Tracy Ogle<br>Executive Assistant                              | (325) 944-9666      | Tracy.ogle@cvcog.org      |

**Business Management Research Associates, Inc.**

| <i>Name/Title</i>              | <i>Phone Number</i> | <i>Email Address</i>  |
|--------------------------------|---------------------|-----------------------|
| Tom Mara<br>Program Manager    | 703-691-0868        | tmara@bmra.com        |
| Phil Hanley<br>Senior Reviewer | 703-691-0868        | hanleybp@aol.com      |
| James Battie<br>Reviewer       | 703-691-0868        | Jeml38402@hotmail.com |

### Appendix B: Report Summary Table

| REPORT SUMMARY TABLE |                                                              |                                  |    |    |    |     |                                                                                                                                                                                                                                                                                     |
|----------------------|--------------------------------------------------------------|----------------------------------|----|----|----|-----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| No.                  | Element                                                      | Basic Requirement                | ND | D  | NA | Tot | Corrective Action                                                                                                                                                                                                                                                                   |
| 1)                   | Written Standards of Conduct                                 | FTA C4220.1F, III, 1. a., b., c. | 1  | 0  | 0  | 1   |                                                                                                                                                                                                                                                                                     |
| 2)                   | Contract Administration System                               | FTA C4220.1F, III, 3.            | 0  | 1  | 0  | 1   | Develop and document a contract administration system that will ensure both CVTD and its third party contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.                                                        |
| 3)                   | Written Protest Procedures                                   | FTA C4220.1F, VII, 1.a.b.        | 0  | 1  | 0  | 1   | Update current protest process to include the notification requirements to keep the FTA informed and the current status of any existing protest per the current C4220.1F guidance.                                                                                                  |
| 4)                   | Prequalification System                                      | FTA 4220.1F, 1.c.                | 0  | 1  | 0  | 1   | Establish necessary prequalification policies and procedures to ensure that potential bidders are not precluded from participating in the qualification process during the solicitation period.                                                                                     |
| 5)                   | Procedures for Ensuring Most Efficient and Economic Purchase | FTA C4220.1F, IV, 1.             | 0  | 1  | 0  | 1   | Update Procurement Manual to include the requirements and procedure for a system for ensuring most efficient and economic purchase.                                                                                                                                                 |
| 6)                   | Procurement Policies and Procedures                          | FTA C4220.1F, III, 3.a.          | 0  | 1  | 0  | 1   | Revise Procurement Manual to include guidance as contained in FTA Circular 4220.1F on the above-listed items. Some of the items cited are currently contained in the purchasing manual; however, no procedures are included to explain how the above areas would meet FTA guidance. |
| 7)                   | Independent Cost Estimate                                    | FTA C4220.1F, VI, 6.             | 2  | 18 | 0  | 20  | Develop and implement policies and procedures that require an independent cost estimate before receiving bids or proposals.                                                                                                                                                         |
| 8)                   | A&E Geographic Preference                                    | FTA C4220.1F, VI, 2.a.(4)(g)(1)  | 0  | 1  | 6  | 7   | Establish a policy and a procedure that will meet the guidance as contained in FTA Circular 4220.1F and the FTA Best Practices Procurement Manual, Chapter 6.5, when procuring Architect-Engineering services.                                                                      |

| REPORT SUMMARY TABLE |                                              |                                                         |    |   |    |     |                                                                                                                                                                                                                                                                                                                                                                                                       |
|----------------------|----------------------------------------------|---------------------------------------------------------|----|---|----|-----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| No.                  | Element                                      | Basic Requirement                                       | ND | D | NA | Tot | Corrective Action                                                                                                                                                                                                                                                                                                                                                                                     |
| 9)                   | Unreasonable Qualification Requirements      | FTA C4220.1F, VI, 2.a.(4)                               | 16 | 1 | 2  | 19  | Develop and implement a procedure that documents the contract file that addresses features that restrict competition, per BPPM 2.4.2.1.                                                                                                                                                                                                                                                               |
| 10)                  | Unnecessary Experience and Excessive Bonding | FTA C4220.1F, VI, 2.(4)); FTA C4220.1F, VI, 2.a.(4)(e)) | 7  | 1 | 2  | 10  | Develop and implement a procedure that documents the contract file that addresses features that restrict competition, per BPPM 2.4.2.1.                                                                                                                                                                                                                                                               |
| 11)                  | Organizational Conflict of Interest          | FTA C4220.1F, VI, 2.a.(4)(h) 1., 2.                     | 2  | 0 | 8  | 10  |                                                                                                                                                                                                                                                                                                                                                                                                       |
| 12)                  | Arbitrary Action                             | FTA C4220.1F, VI, 2.a.(4)(j)                            | 13 | 4 | 4  | 21  | Include in Procurement Manual a policy and procedure that no Arbitrary Action can be taken in the award of an FTA funded contract. The selection procedures should be clearly identified and followed to ensure that all bidders/offerors are treated fairly.                                                                                                                                         |
| 13)                  | Brand Name Restrictions                      | FTA C 4220.1F., VI, 4.                                  | 2  | 2 | 15 | 19  | Develop policies and procedures that require all purchase requirements that contain a "brand name" permit an "or equal" substitution and define the salient physical and functional characteristics to ensure maximum competition.                                                                                                                                                                    |
| 14)                  | Geographic Preferences                       | FTA C 4220.1F, VI, 2.(4)(g)                             | 19 | 0 | 1  | 20  |                                                                                                                                                                                                                                                                                                                                                                                                       |
| 15)                  | Contract Term Limitation                     | FTA C4220.1F, IV, 2.e.(10)                              | 10 | 0 | 0  | 10  |                                                                                                                                                                                                                                                                                                                                                                                                       |
| 16)                  | Written Procurement Selection Procedures     | FTA C4220.1F, III, 3.a.; FTA C4220.1F, VI, 2.d.         | 4  | 2 | 4  | 10  | Develop a policy and procedure that clearly identifies the selection procedure that will be used to make the contract award, i.e., Invitation for Bid (Formal Advertising) or Request for Proposal (Negotiated). The Procurement Manual should identify all the requirements and factors that must be met to receive an award. Provide training to all personnel involved in the procurement process. |



| REPORT SUMMARY TABLE |                                                          |                              |    |    |    |     |                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
|----------------------|----------------------------------------------------------|------------------------------|----|----|----|-----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| No.                  | Element                                                  | Basic Requirement            | ND | D  | NA | Tot | Corrective Action                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 17)                  | Solicitation Prequalification Criteria                   | FTA C4220.1F, VI, 1.c.       | 6  | 1  | 3  | 10  | Develop and implement a written policy that addresses the applicability of any prequalification criteria that will be utilized in the contract selection process.                                                                                                                                                                                                                                                                                           |
| 18)                  | Award to Responsible Contractors                         | FTA C4220.1F, IV, 2.a.1.     | 7  | 3  | 0  | 10  | Develop a procedure that would ensure that the contract file contains a written documentation that the contract award is being made to a responsible contractor. For guidance, CVTD should refer to the FTA Best Practices Procurement Manual, Chapter 5.1.                                                                                                                                                                                                 |
| 19)                  | Sound and Complete Agreement                             | FTA C4220.1F, III, 3.a.(1)b. | 3  | 12 | 0  | 15  | Develop a matrix that can be used as a reference document that identifies the applicable Federal clauses and the required dollar thresholds that are applicable to each clause. This matrix should be distributed to all personnel involved in the procurement process to identify Federally required clauses when using FTA funds.                                                                                                                         |
| 20)                  | No Splitting (Micro-purchase)                            | FTA C4220.1F, VI, 3.a.(2)    | 18 | 0  | 0  | 18  |                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 21)                  | Fair and Reasonable Price Determination (Micro-purchase) | FTA C4220.1F, VI, 3.a.       | 3  | 12 | 3  | 18  | Develop a policy and procedure that will ensure that a fair and reasonable price determination be made and included in the contract file documentation for all purchases, including micro purchases. This determination shall explain how the fair and reasonable determination was arrived at. For micro purchases, this may be accomplished by preparing a pre-printed form that will identify the basis for the fair and reasonable price determination. |
| 22)                  | Micro-purchase Davis-Bacon                               | FTA C4220.1F, VI, 3.a.(1)    | 0  | 0  | 18 | 18  |                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| 23)                  | Price Quotations (Small Purchase)                        | FTA C4220.1F, VI, 3.b.(2)    | 2  | 10 | 2  | 14  | Establish a policy and procedure to ensure that when purchases are made under small purchases procedures, price quotations are obtained from an adequate number of sources and files are documented to reflect actions taken.                                                                                                                                                                                                                               |

| REPORT SUMMARY TABLE |                                                         |                                                             |    |   |    |     |                                                                                                                                                                                                                                                                                 |
|----------------------|---------------------------------------------------------|-------------------------------------------------------------|----|---|----|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| No.                  | Element                                                 | Basic Requirement                                           | ND | D | NA | Tot | Corrective Action                                                                                                                                                                                                                                                               |
| 24)                  | Clear, Accurate, and Complete Specification             | FTA 4220.1F, VI, 2.a.                                       | 13 | 7 | 0  | 20  | Include in procurement policies that a clear, accurate, and complete specification must be included in every contract/purchase order. This will provide a clear understanding between the parties of what is being purchased.                                                   |
| 25)                  | Adequate Competition – Two or More Competitors          | FTA C4220.1F, VI, 3.c.(1)(b); FTA C4220.1F, VI, 3.d.2(c)    | 9  | 0 | 0  | 9   |                                                                                                                                                                                                                                                                                 |
| 26)                  | Firm Fixed Price (Sealed Bid)                           | FTA C4220.1F, VI, 3.c.(1)(c)                                | 4  | 0 | 0  | 4   |                                                                                                                                                                                                                                                                                 |
| 27)                  | Selection on Price (Sealed Bid)                         | FTA C4220.1F, VI, 3.c.(d)                                   | 4  | 0 | 0  | 4   |                                                                                                                                                                                                                                                                                 |
| 28)                  | Discussions Unnecessary (Sealed Bid)                    | FTA C4220.1F, VI, 3.c.(1)(e)                                | 4  | 0 | 0  | 4   |                                                                                                                                                                                                                                                                                 |
| 29)                  | Advertised/Publicized (Sealed Bid) (RFP)                | FTA C4220.1F, VI, 3, c.(2)(a); FTA C4220.1F, VI, 3.d.(2)(a) | 6  | 1 | 0  | 7   | Develop a procedure to ensure that, when the Invitation for Bids/Request for Proposals (IFB/RFP) method of procurement is utilized for Federal procurements, the requirements of FTA Circular 4220.1F are followed, including that of advertising and publicizing each IFB/RFP. |
| 30)                  | Adequate Number of Sources Solicited (Sealed Bid) (RFP) | FTA C4220.1F, VI, 3.c.(1)(b); FTA C4220.1F, VI, 3.d.(2)(c)  | 6  | 1 | 0  | 7   | Develop a procedure that requires CVTD personnel involved in the procurement process to document the file as to the extent of competition received from the solicitation. If no competition was received, the file should be documented as to why no competition was received.  |
| 31)                  | Sufficient Bid Time (Sealed Bid)                        | FTA C4220.1F, VI, 3.c.(2)(d)                                | 4  | 0 | 0  | 4   |                                                                                                                                                                                                                                                                                 |
| 32)                  | Bid Opening (Sealed Bid)                                | FTA C4220.1F, VI, 3.c.(2)(e)                                | 4  | 0 | 0  | 4   |                                                                                                                                                                                                                                                                                 |
| 33)                  | Responsiveness (Sealed Bid)                             | FTA C4220.1F, VI, 3.c.(2)(f)                                | 4  | 0 | 0  | 4   |                                                                                                                                                                                                                                                                                 |
| 34)                  | Lowest Price (Sealed Bid)                               | FTA C4220.1F, VI, 3.c.(2)(f)                                | 4  | 0 | 0  | 4   |                                                                                                                                                                                                                                                                                 |

| REPORT SUMMARY TABLE |                                          |                                                            |    |    |    |     |                                                                                                                                                                                                                                                                                                                                                      |
|----------------------|------------------------------------------|------------------------------------------------------------|----|----|----|-----|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| No.                  | Element                                  | Basic Requirement                                          | ND | D  | NA | Tot | Corrective Action                                                                                                                                                                                                                                                                                                                                    |
| 35)                  | Rejecting Bids (Sealed Bid)              | FTA C4220.1F, VI, 3.(a)(2)(g)                              | 3  | 0  | 1  | 4   |                                                                                                                                                                                                                                                                                                                                                      |
| 36)                  | Evaluation (RFP)                         | FTA C4220.1F, VI, 3.d.(2)(b); FTA C4220.1F, VI, 3.d.(2)(d) | 2  | 1  | 0  | 3   | Include a section Procurement Manual on the evaluation process for Request for Proposals. At a minimum, the new section should cover the four requirements as identified in the FTA C4220.1F ¶ 9.d.(1)(2)(3)(4).                                                                                                                                     |
| 37)                  | Price and Other Factors (RFP)            | FTA C4220.1F, VI, 3.d.(2)(e)                               | 2  | 1  | 0  | 3   | Include a policy and a procedure in Procurement Manual that will ensure that the contract file contains adequate documentation of the analysis conducted to support the award of a contract to the firm that is most advantageous to CVTD's program. Procurement training should be conducted for all personnel involved in the procurement process. |
| 38)                  | Sole Source if Other Award is Infeasible | FTA C4220.1F, VI, 3.i.                                     | 0  | 0  | 0  | 0   |                                                                                                                                                                                                                                                                                                                                                      |
| 39)                  | Cost Analysis Required (Sole Source)     | FTA C4220.1F, VI, 6.a.                                     | 0  | 0  | 0  | 0   |                                                                                                                                                                                                                                                                                                                                                      |
| 40)                  | Evaluation of Options                    | FTA C4220.1F, VI, 7.b.(1)                                  | 0  | 0  | 4  | 4   |                                                                                                                                                                                                                                                                                                                                                      |
| 41)                  | Cost or Price Analysis                   | FTA C4220. 1F, VI, 6.                                      | 5  | 11 | 0  | 16  | Develop a policy and procedure to ensure that cost or price analysis is performed in connection with every procurement action, including contract modifications. Identify steps that will be taken to implement this recommendation.                                                                                                                 |
| 42)                  | Written Record of Procurement History    | FTA C 4220.1F, III, 3.d.                                   | 3  | 17 | 0  | 20  | Develop and implement a policy and procedure in Procurement Manual to ensure that the contract file contains a written record of the procurement history and that the procedures identify the minimum data that must be included in the file sufficient to meet the FTA guidance.                                                                    |
| 43)                  | Exercise of Options                      | FTA C4220.1F, IV, 1.d.; FTA C4220.1F, V, 7.a.(1)           | 0  | 0  | 7  | 7   |                                                                                                                                                                                                                                                                                                                                                      |
| 44)                  | Out of Scope Changes                     | FTA C4220.1F, VI, 3.i.(1)(b)                               | 3  | 0  | 4  | 7   |                                                                                                                                                                                                                                                                                                                                                      |

| REPORT SUMMARY TABLE |                                                       |                                                                     |    |    |    |     |                                                                                                                                                                                                                                                                                                                     |
|----------------------|-------------------------------------------------------|---------------------------------------------------------------------|----|----|----|-----|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| No.                  | Element                                               | Basic Requirement                                                   | ND | D  | NA | Tot | Corrective Action                                                                                                                                                                                                                                                                                                   |
| 45)                  | Advance Payments                                      | FTA C4220.1F, IV, 2.b.(5)(b).1.2.; FTA C4220.1F, III, 3.d.(1)(c)(d) | 6  | 0  | 1  | 7   |                                                                                                                                                                                                                                                                                                                     |
| 46)                  | Progress Payments                                     | FTA C4220.1F, IV, 2.b.(5)(c)                                        | 2  | 0  | 6  | 8   |                                                                                                                                                                                                                                                                                                                     |
| 47)                  | Time and Materials Contracts                          | FTA C4220.1F, VI, 2.c.(2)(b)                                        | 0  | 0  | 10 | 10  |                                                                                                                                                                                                                                                                                                                     |
| 48)                  | Cost Plus Percentage of Cost                          | FTA C4220.1F, VI, 2.c.(2)(a)                                        | 10 | 0  | 0  | 10  |                                                                                                                                                                                                                                                                                                                     |
| 49)                  | Liquidated Damages Provisions                         | FTA C 4220.1F, IV, 2.b.(6)(b)1                                      | 0  | 2  | 1  | 3   | Update Procurement Manual to include the proper use and documentation of the liquidated damages provision. Develop and implement a procedure along with training to all personnel in the procurement process that will ensure the proper use of this provision.                                                     |
| 50)                  | Piggybacking                                          | FTA C4220.1F, V, 7.a.(2)                                            | 0  | 2  | 3  | 5   | Update policies and procedures to provide guidance to staff on proper use and documentation required when using the piggybacking method of contracting. When piggybacking another contract, use as guidance the piggybacking worksheet (Appendix B.16) as contained in the FTA's Best Practices Procurement Manual. |
| 51)                  | Qualifications Exclude Price (A&E and Other Services) | FTA C4220.1F, VI, 3.f.(1)                                           | 0  | 0  | 1  | 1   |                                                                                                                                                                                                                                                                                                                     |
| 52)                  | Serial Price Negotiations (A&E and Other Services)    | FTA C4220.1F, VI, 3.f.(3)                                           | 0  | 0  | 0  | 0   |                                                                                                                                                                                                                                                                                                                     |
| 53)                  | Bid Security (Construction over \$100,000)            | FTA C4220.1F, IV, 2.h.(1)(a)                                        | 0  | 0  | 0  | 0   |                                                                                                                                                                                                                                                                                                                     |
| 54)                  | Performance Security (Construction over \$100,000)    | FTA C4220.1F, IV, 2.h.(1)b.                                         | 0  | 0  | 0  | 0   |                                                                                                                                                                                                                                                                                                                     |
| 55)                  | Payment Security (Construction over \$100,000)        | FTA C4220.1F, IV, 2.h.(1)(c)                                        | 0  | 0  | 0  | 0   |                                                                                                                                                                                                                                                                                                                     |
| 56)                  | Clauses                                               | FTA C4220.1F, VI, 2.                                                | 6  | 13 | 0  | 19  | Develop and implement a procedure to assure all future contracts have the appropriate Federal clauses. (See discussion above.) Modify open contracts that do not contain all of the required Federal clauses.                                                                                                       |

## Appendix C:

### Procurement Elements for which the Recipient is Not Deficient

#### SYSTEMWIDE ELEMENTS

##### 01) Written Standards of Conduct

(1) *The Common Grant Rules require each recipient to maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts.*

(a) *Personal Conflicts of Interest. As provided in the Common Grant Rules and the Federal Transit Administration (FTA) Master Agreement, no employee, officer, agent, or board member, or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing may participate in the selection, award, or administration of a contract supported with FTA assistance if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when any of those previously listed has a financial or other interest in the firm selected for award.*

(b) *Gifts. The recipient's officers, employees, agents, or board members may neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from contractors, potential contractors, or parties to subagreements. The recipient may set minimum rules when the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.*

(c) *Violations. 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 recipient's officers, employees, agents, board members, or by contractors or subrecipients or their agents.*

(FTA C4220.1F, III, 1. a., b., c.)

#### INDIVIDUAL PROCUREMENT ELEMENTS

##### 11) Organizational Conflict of Interest

Example of situation restrictive of competition:

1. *Occurrence. An organizational conflict of interest occurs when any of the following circumstances arise:*

- a. Lack of Impartiality or Impaired Objectivity. When the contractor is unable, or potentially unable, to provide impartial and objective assistance or advice to the recipient due to other activities, relationships, contracts, or circumstances.
  - b. Unequal Access to Information. The contractor has an unfair competitive advantage through obtaining access to nonpublic information during the performance of an earlier contract.
  - c. Biased Ground Rules. During the conduct of an earlier procurement, the contractor has established the ground rules for a future procurement by developing specifications, evaluation factors, or similar documents.
2. Remedies. FTA expects the recipient to analyze each planned acquisition in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible, and avoid, neutralize, or mitigate potential conflicts before contract award.

(FTA C4220.1F, VI, 2.a.(4)(h) 1., 2.)

named brand that offerors must provide. When using a “brand name” specification, the recipient does not need to reverse-engineer a complicated part to identify precise measurements or specifications in order to describe its salient characteristics. FTA’s “Best Practices Procurement Manual,” (BPPM) contains additional information on preparation of specifications including examples with specific language.

(FTA C 4220.1F., VI, 4.)

#### 14) Geographic Preferences

(g) In-State or Local Geographic Restrictions. Specifying in-State or local geographical preferences, or evaluating bids or proposals in light of in-State or local geographic preferences, even if those preferences are imposed by State or local laws or regulations. In particular, 49 U.S.C. Section 5325(i) prohibits an FTA recipient from limiting its bus purchases to in-State dealers. Exceptions expressly mandated or encouraged by Federal law include the following:

- 1 Architectural Engineering (A&E) Services. Geographic location may be a selection criterion if an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project.
- 2 Licensing. A State may enforce its licensing requirements, provided that those State requirements do not conflict with Federal law.
- 3 Major Disaster or Emergency Relief. Federal assistance awarded under the Stafford Act, 42 U.S.C. Section 5150, to support contracts and agreements for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities permits a preference, to the extent

*feasible and practicable, for organizations, firms, and individuals residing or doing business primarily in the area affected by a major disaster or emergency.*

(FTA C 4220.1F, VI, 2.(4)(g))

### **15) Contract Term Limitation**

*Five-Year Limitation. A recipient may enter into a multi-year contract to buy rolling stock with an option not exceeding five (5) years to buy additional rolling stock or replacement parts, 49 U.S.C. Section 5325(e)(1). The recipient may not exercise that option later than five (5) years after the date of its original contract.*

*FTA interprets this five-year period as covering the recipient's "material requirements" for rolling stock and replacement needs from the first day when the contract becomes effective to its "material requirements" at the end of the fifth year. In the case of rolling stock, which frequently cannot be delivered expeditiously, FTA recognizes that a recipient's "material requirements" for rolling stock will necessarily precede its actual need to put that rolling stock to use in public transportation service. This means that the contract may not have options for more rolling stock and replacement parts than a recipient's material requirements for a five-year period. The five-year rule does not mean the recipient must obtain delivery, acceptance, or even fabrication in five years. Instead it means only that FTA limits a contract to purchasing no more than the recipient's material requirements for rolling stock or replacement parts for five years based on the effective date of the contract.*

(FTA C4220.1F, IV, 2.e.(10))

*FTA expects the recipient to use sound business judgment and be judicious in establishing and extending a contract's period of performance.*

(FTA C4220.1F, IV, 2.e.(10))

### **20) No Splitting (Micro-purchase)**

*Prohibited Divisions. The recipient may not divide or reduce the size of its procurement merely to come within the micro-purchase limit.*

(FTA C4220.1F, VI, 3.a.(2))

### **25) Adequate Competition – Two or More Competitors**

In order for sealed bidding to be appropriate:

*Two or more responsible bidders are willing and able to compete effectively for the business.*

(FTA C4220.1F, VI, 3.c.(1)(b))

In order for competitive proposal procedures to be appropriate:

*Proposals are solicited from an adequate number of qualified sources.*

(FTA C4220.1F, VI, 3.d.2(c))

**26) Firm Fixed Price (Sealed Bid)**

*The procurement generally lends itself to a firm fixed price contract.*

(FTA C4220.1F, VI, 3.c.(1)(c))

**27) Selection on Price (Sealed Bid)**

*The successful bidder can be selected on the basis of price and those price-related factors listed in the solicitation including, but not limited to, transportation costs, life cycle costs, and discounts expected to be taken.*

(FTA C4220.1F, VI, 3.c.(d))

**28) Discussions Unnecessary (Sealed Bid)**

*Discussions with one or more bidders after bids have been submitted are expected to be unnecessary as award of the contract will be made based on price and price-related factors alone.*

(FTA C4220.1F, VI, 3.c.(1)(e))

**31) Sufficient Bid Time (Sealed Bid)**

Sufficient Time. *Bidders are allowed sufficient time to prepare bids before the date of bid opening.*

(FTA C4220.1F, VI, 3.c.(2)(d))

**32) Bid Opening (Sealed Bid)**

*If this procurement methods is used, ...all bids are publicly opened at the time and place prescribed in the invitation for bids.*

(FTA C4220.1F, VI, 3.c.(2)(e))

**33) Responsiveness (Sealed Bid)**

If this procurement method is used:

*A firm fixed price contract is usually awarded in writing to the lowest responsive and responsible bidder, but a fixed price incentive contract or inclusion of an economic price adjustment provision can sometimes be appropriate. When specified in the bidding documents, factors such as transportation costs and life cycle costs affect the determination of the lowest bid; payment discounts are used to determine*



*the low bid only when prior experience indicates that such discounts are typically taken.*

(FTA C4220.1F, VI, 3.c.(2)(f))

### **34) Lowest Price (Sealed Bid)**

If this procurement method is used:

*A firm fixed price contract is usually awarded in writing to the lowest responsive and responsible bidder, but a fixed price incentive contract or inclusion of an economic price adjustment provision can sometimes be appropriate. When specified in the bidding documents, factors such as transportation costs and life cycle costs affect the determination of the lowest bid; payment discounts are used to determine the low bid only when prior experience indicates that such discounts are typically taken.*

(FTA C4220.1F, VI, 3.c.(2)(f))

### **35) Rejecting Bids (Sealed Bid)**

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

(FTA C4220.1F, VI, 3.(a)(2)(g))

*Evaluation Method. A specific method is established and used to conduct technical evaluations of the proposals received and to determine the most qualified offeror.*

(FTA C4220.1F, VI, 3.d.(2)(d))

### **38) Sole Source if Other Award is Infeasible**

*Other Than Full and Open Competition. Normally, the recipient must provide for full and open competition when soliciting bids or proposals. The Common Grant Rule for governmental recipients, however, acknowledges that under certain circumstances, a recipient may conduct procurements without providing for full and open competition.*

(1) *When Appropriate. A recipient may use noncompetitive proposals only when the procurement is inappropriate for small purchase procedures, sealed bids, or competitive proposals, and at least one of the following circumstances are present:*

(a) *Competition Adequacy. After soliciting several sources, FTA expects the recipient to review its specifications to determine if they are unduly restrictive or if changes can be made to encourage submission of more bids or proposals. After the recipient determines that the specifications are not unduly restrictive and changes cannot be made to encourage greater competition, the*

*recipient may determine the competition adequate. A cost analysis must be performed in lieu of a price analysis when this situation occurs.*

*(b) Sole Source. When the recipient requires supplies or services available from only one responsible source, and no other supplies or services will satisfy its requirements, the recipient may make a sole source award. When the recipient requires an existing contractor to make a change to its contract that is beyond the scope of that contract, the recipient has made a sole source award that must be justified.*

*1 Unique Capability or Availability. The property or services are available from one source if one of the conditions described below is present:*

*a Unique or Innovative Concept. The offeror demonstrates a unique or innovative concept or capability not available from another source. Unique or innovative concept means a new, novel, or changed concept, approach, or method that is the product of original thinking, the details of which are kept confidential or are patented or copyrighted, and is available to the recipient only from one source and has not in the past been available to the recipient from another source.*

*b Patents or Restricted Data Rights. Patent or data rights restrictions preclude competition.*

*c Substantial Duplication Costs. In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in substantial duplication of costs that are not expected to be recovered through competition.*

*d Unacceptable Delay. In the case of a follow-on contract for the continued development or production of a highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in unacceptable delays in fulfilling the recipient's needs.*

*2 Single Bid or Proposal. Upon receiving a single bid or proposal in response to a solicitation, the recipient should determine if competition was adequate. This should include a review of the specifications for undue restrictiveness and might include a survey of potential sources that chose not to submit a bid or proposal.*

*a Adequate Competition. FTA acknowledges competition to be adequate when the reasons for few responses were caused by conditions beyond the recipient's control. Many unrelated factors beyond the recipient's control might cause potential sources not to submit a bid or proposal. If the competition can be determined adequate, FTA's competition*

*requirements will be fulfilled, and the procurement will qualify as a valid sole source.*

- b Inadequate Competition. FTA acknowledges competition to be inadequate when, caused by conditions within the recipient's control. For example, if the specifications used were within the recipient's control and those specifications were unduly restrictive, competition will be inadequate.*
- (c) Unusual and Compelling Urgency. The Common Grant Rule for governmental recipients permits the recipient to limit the number of sources from which it solicits bids or proposals when a recipient has such an unusual and urgent need for the property or services that the recipient would be seriously injured unless it were permitted to limit the solicitation. The recipient may also limit the solicitation when the public exigency or emergency will not permit a delay resulting from competitive solicitation for the property or services.*
- (d) Associated Capital Maintenance Item Exception Repealed. SAFETEA-LU repealed the special procurement preference previously authorized for associated capital maintenance items. Thus, any sole source procurement of associated capital maintenance items must qualify for an exception under the same standards that would apply to other sole source acquisitions.*
- (e) Authorized by FTA. The Common Grant Rules provide Federal agencies authority to permit a recipient to use noncompetitive proposals. Under this authority, FTA has made the following determinations:*
  - 1 Consortium, Joint Venture, Team, Partnership. With some exceptions, when FTA awards a grant agreement or enters into a cooperative agreement with a consortium, joint venture, team, or partnership, or provides FTA assistance for a research project in which FTA has approved the participation of a particular firm or combination of firms in the project work, the grant agreement or cooperative agreement constitutes approval of those arrangements. In such cases, FTA expects the recipient to use competition, as feasible, to select other participants in the project.*
  - 2 FAR Standards. To ensure that the recipient has flexibility equal to that of Federal contracting officers, FTA authorizes procurement by noncompetitive proposals in all of the circumstances authorized by FAR Part 6.3. In addition to circumstances discussed in the Common Grant Rules, the FAR authorizes less than full and open competitive procurements in one or more of the following circumstances:*

- a Statutory Authorization or Requirement. To comply with Department of Transportation (DOT) appropriations laws that include specific statutory requirements, with the result that only a single contractor can perform certain project work.
- b National Emergency. To maintain a facility, producer, manufacturer, or other supplier available to provide supplies or services in the event of a national emergency or to achieve industrial mobilization.
- c Research. To establish or maintain an educational or other non-profit institution or a federally funded research and development center that has or will have an essential engineering, research, or development capability.
- d Protests, Disputes, Claims, Litigation. To acquire the services of an expert or neutral person for any current or anticipated protest, dispute, claim, or litigation.
- e International Arrangements. When precluded by the terms of an international agreement or a treaty between the United States and a foreign government or international organization, or when prohibited by the written directions of a foreign government reimbursing the recipient for the cost of the acquisition of the supplies or services for that government.
- f National Security. When the disclosure of the recipient's needs would compromise the national security.
- g Public Interest. When the recipient determines that full and open competition in connection with a particular acquisition is not in the public interest.

(2) When Prohibited. Less than full and open competition is not justified based on:

- (a) Failure to Plan. The recipient's lack of advance planning, or
- (b) Limited Availability of Federal Assistance. Concerns about the amount of Federal assistance available to support the procurement (for example, expiration of Federal assistance previously available for award).

(3) Procurement Procedures. When less than full and open competition is available to the recipient, the Common Grant Rule for governmental recipients directs the recipient to:

- (a) Potential Sources. Solicit offers from as many potential sources as is practicable under the circumstances.

- (b) Sole Source Justification. If the recipient decides to solicit an offer from only one source, the recipient must justify its decision adequately in light of the standards of subparagraph 3.i(1)(b) of this Chapter. FTA expects this sole source justification to be in writing.
- (c) Cost Analysis. Prepare or obtain a cost analysis verifying the proposed cost data, the projections of the data, and the evaluation of the costs and profits.
- (d) Preaward Review. Submit the proposed procurement to FTA for preaward review if FTA so requests.

(FTA C4220.1F, VI, 3.i.)

### 39) Cost Analysis Required (Sole Source)

Cost Analysis. The recipient must obtain a cost analysis when a price analysis will not provide sufficient information to determine the reasonableness of the contract cost. The recipient must obtain a cost analysis when the offeror submits elements (that is, labor hours, overhead, materials, and so forth) of the estimated cost, (such as professional consulting and A&E contracts, and so forth). The recipient is also expected to obtain a cost analysis when price competition is inadequate, when only a sole source is available, even if the procurement is a contract modification, or in the event of a change order. The recipient, however, need not obtain a cost analysis if it can justify price reasonableness of the proposed contract based on a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation.

(FTA C4220.1F, VI, 6.a.)

### 44) Out of Scope Changes

When the recipient requires an existing contractor to make a change to its contract that is beyond the scope of that contract, the recipient has made a sole source award that must be justified.

(FTA C4220.1F, VI, 3.i.(1)(b))

#### 45) Advance Payments

*Advance payments are payments made to a contractor before the contractor incurs costs in the performance of the contract. The following principles and restrictions apply:*

*Use of FTA Assistance Prohibited. The recipient may not use FTA assistance to make payments to a third party contractor before the contractor has incurred the costs for which the payments would be attributable... A recipient that seeks to use FTA assistance to support advance payments should contact the regional office administering its project to obtain FTA concurrence.*

(FTA C4220.1F, IV, 2.b.(5)(b).1.2.)

*Contract Type. A governmental recipient must (and a non-governmental recipient should) state the reasons for selecting the contract type it used (fixed price, cost reimbursement, and so forth);*

*Contractor Selection. A governmental recipient must state its reasons for contractor selection or rejection. For procurements exceeding the small purchase threshold, a non-governmental recipient must state its reasons for contractor selection, but need not state its reasons for contractor rejection. Each recipient should include a written responsibility determination for the successful contractor; and*

*Cost or Price. Each recipient must evaluate and state its justification for the contract cost or price.*

(FTA C4220.1F, III, 3.d.(1)(c)(d))

#### 46) Progress Payments

*(c) Progress Payments. Progress payments are payments for contract work that has not been completed. The recipient may use FTA assistance to support progress payments provided the recipient obtains adequate security for those payments and has sufficient written documentation to substantiate the work for which payment is requested.*

*1 Adequate Security for Progress Payments. Adequate security for progress payments may include taking title or obtaining a letter of credit or taking equivalent measures to protect the recipient's financial interest in the progress payment. Adequate security should reflect the practical realities of different procurement scenarios and factual circumstances. FTA acknowledges the practical reality that taking title to work in progress may not be desirable in some circumstances. The recipient should always consider the costs associated with providing security (for example, the recipient may need to acquire bonds or letters of credit in the commercial marketplace) and the impact of those costs on the contract price, as well as the consequences of incomplete performance.*

- 2 Adequate Documentation. Sufficient documentation is required to demonstrate completion of the amount of work for which progress payments are made.
- 3 Percentage of Completion Method. The Common Grant Rules require that any progress payments for construction contracts be made on a percentage of completion method described therein. The recipient, however, may not make progress payments for other than construction contracts based on this percentage method.

(FTA C4220.1F, IV, 2.b.(5)(c))

#### **48) Cost Plus Percentage of Cost**

*The Common Grant Rules expressly prohibit the use of the cost plus a percentage of cost and cost plus a percentage of construction cost methods of contracting.*

(FTA C4220.1F, VI, 2.c.(2)(a))

#### **52) Serial Price Negotiations (A&E and Other Services)**

Qualifications-Based Procurement Procedures. The following procedures apply to qualifications-based procurements:

- (a) Qualifications. Unlike other two-step procurement procedures in which price is an evaluation factor, an offeror's qualifications are evaluated to determine contract award.
- (b) Price. Price is excluded as an evaluation factor.
- (c) Most Qualified. Negotiations are first conducted with only the most qualified offeror.
- (d) Next Most Qualified. Only after failing to agree on a fair and reasonable price may negotiations be conducted with the next most qualified offeror. Then, if necessary, negotiations with successive offerors in descending order may be conducted until contract award can be made to the offeror whose price the recipient believes is fair and reasonable.

(FTA C4220.1F, VI, 3.f.(3))

#### **53) Bid Security (Construction Over \$100,000)**

*The Common Grant Rules require bonds for all construction contracts exceeding the simplified acquisition threshold unless FTA determines that other arrangements adequately protect the Federal interest. FTA's bonding policies are as follows:*

- (a) Bid Guarantee. Both FTA and the Common Grant Rules generally require each bidder to provide a bid guarantee equivalent to 5 percent of its bid price. The "bid guarantee"

*must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid to ensure that the bidder will honor its bid upon acceptance.*

(FTA C4220.1F, IV,2.h.(1)(a))

#### **54) Performance Security (Construction Over \$100,000)**

*The Common Grant Rules require bonds for all construction contracts exceeding the simplified acquisition threshold unless FTA determines that other arrangements adequately protect the Federal interest. FTA's bonding policies are as follows:*

*Performance Bond. Both FTA and the Common Grant Rules generally require the third party contractor to obtain a performance bond for 100 percent of the contract price. A "performance bond" is obtained to ensure completion of the obligations under the third party contract.*

(FTA C4220.1F, IV, 2.h.(1)b.)

#### **55) Payment Security (Construction Over \$100,000)**

*Bonding. The Common Grant rules require bonds for all construction contracts exceeding the simplified acquisition threshold unless FTA determines that other arrangements adequately protect the Federal interest. FTA's bonding policies are as follows:*

*Payment Bond. The Common Grant Rules generally require the third party contractor to obtain a standard payment bond for 100 percent of the contract price. A "payment bond" is obtained to ensure that the contractor will pay all people supplying labor and material for the third party contract as required by law. FTA, however, has determined that payment bonds in the following amounts are adequate to protect FTA's interest and will accept a local bonding policy that meets the following minimums:*

- 1 Less Than \$1 Million. Fifty percent of the contract price if the contract price is not more than \$1 million,*
- 2 More Than \$1 Million but Less Than \$5 Million. Forty percent of the contract price if the contract price is more than \$1 million but not more than \$5 million, or*
- 3 More Than \$5 Million. Two and one half million dollars if the contract price is more than \$5 million.*

*Acceptable Sureties. The Common Grant Rule for non-governmental recipients requires the non-governmental recipient to obtain construction bonds from companies holding certificates of authority as acceptable sureties under Department of the Treasury regulations, "Surety Companies Doing Business with*



*the United States,” 31 CFR Part 223. For a current list of approved sureties, see Department of the Treasury’s Listing of Approved Sureties (Department Circular 570), <http://fms.treas.gov/c570/c570.html>. FTA encourages each governmental recipient to require similarly acceptable sureties.*

*Reduced Bonding. FTA recognizes that bonding costs can be expensive. FTA will accept a local bonding policy that conforms to the minimums described in this subparagraph 2.h(1) of this Chapter. FTA reserves the right to approve bonding amounts that do not conform to these minimums if the local bonding policy adequately protects the Federal interest. A recipient that wishes to adopt less stringent bonding requirements, for a specific class of projects, or for a particular project should submit its policy and rationale to the Regional Administrator for the region administering the project.*

*Excessive Bonding. Compliance with State and local bonding policies that are greater than FTA’s bonding requirements do not require FTA approval. FTA recognizes that in some situations bond requirements can be useful if the recipient has a material risk of loss because of a failure of the prospective contractor. This is particularly so if the risk results from the likelihood of the contractor’s bankruptcy or financial failure at the time of partially completed work. Nevertheless, if the recipient’s “excessive bonding” requirements would violate the Common Grant Rules as restrictive of competition, FTA will not provide Federal assistance for procurements encumbered by those requirements. Consequently, if the recipient’s bonding policies far exceed those described in this subsection, FTA reminds the recipient that it may find it useful to submit its policy and rationale to the Regional Administrator for the region administering the project.*

(FTA C4220.1F, IV, 2.h.(1)(c))

## **Appendix D:**

### **Procurement Elements Determined to be Not Applicable**

#### **22) Micro-Purchase Davis-Bacon**

*Davis-Bacon prevailing wage requirements, however, will apply to construction contracts exceeding \$2,000, even though the recipient uses micro-purchase procurement procedures.*

(FTA C4220.1F, VI, 3.a.(1))

#### **40) Evaluation of Options**

Options. *In awarding the contract that will include options, the following standards apply:*

- (1) Evaluation Required. *In general, FTA expects the recipient to evaluate bids or offers for any option quantities or periods contained in a solicitation if it intends to exercise those options after the contract is awarded.*
- (2) Evaluation Not Required. *The recipient need not evaluate bids or offers for any option quantities when the recipient determines that evaluation would not be in its best interests. An example of a circumstance that may support a determination not to evaluate bids or offers for option quantities is when the recipient is reasonably that funds will not be available to permit it to exercise the option.*

(FTA C4220.1F, VI, 7.b.(1))

#### **43) Exercise of Options**

Options. *The recipient's contracts may include options to ensure the future availability of property or services, so long as the recipient is able to justify them as needed for its public transportation or project purposes. An option is a unilateral right in a contract by which, for a specified time, a recipient may acquire additional equipment, supplies, or services than originally procured. An option may also extend the term of the contract. Chapter VI of this circular contains procedures for evaluating options.*

(FTA C4220.1F, IV, 1.d.)

- (1) Exercise of Options. *A recipient may use contract options held by another recipient with the following limitations:*
  - (a) Consistency with the Underlying Contract. *FTA expects the recipient to ensure that the terms and conditions of the option it seeks to exercise are substantially*

*similar to the terms and conditions of the option as stated in the original contract at the time it was awarded.*

*(b) Price. The recipient may not exercise an option unless it has determined that the option price is better than prices available in the market, or that when it intends to exercise the option, the option is more advantageous.*

*(c) Awards Treated as Sole Source Procurements. The following actions constitute sole source awards:*

- 1 Failure to Evaluate Options Before Awarding the Underlying Contract. If a contract has one or more options and those options were not evaluated as part of the original contract award, exercising those options after contract award will result in a sole source award.*
- 2 Negotiating a Lower Option Price. Exercising an option after the recipient has negotiated a lower or higher price will also result in a sole source award unless that price can be reasonably determined from the terms of the original contract, or that price results from Federal actions that can be reliably measured, such as changes in Federal prevailing labor rates, for example.*

(FTA C4220.1F, V, 7.a.(1))

#### **47) Time and Materials Contracts**

*The Common Grant Rule for government recipients permits the use of time and material contracts only:*

- 1. When to Use. After determining that no other contract type is suitable; and*
- 2. Firm Ceiling Price. If the contract specifies a ceiling price that the contractor may not exceed except at its own risk. FTA strongly encourages non-governmental recipients to use similar procedures.*

(FTA C4220.1F, VI, 2.c.(2)(b))

#### **51) Qualifications Exclude Price (A&E and Other Services)**

*Qualifications-Based Procurement Procedures Required. The recipient must use qualifications-based procurement procedures not only when contracting for A&E services, but also for other services listed in 49 U.S.C. Section 5325(b)(1) that are directly in support of, directly connected to, directly related to, or lead to construction, alteration, or repair of real property. For example, a contractor performing program management, project design, construction management, or engineering services in which that contractor would select the finished products to be acquired for an FTA assisted construction project must be selected through qualifications-based procurement procedures*

(FTA C4220.1F, VI, 3.f.(1))