

oversight program. FTA's Master Agreement specifies these requirements. FTA determines compliance through self-certification, oversight review and audits, and site visits. FTA annually completes an individual Grantee Oversight Assessment Questionnaire, which serves as baseline information for each grantee's capacity to comply, and the degree of the risk the grantee's program may represent for the Federal program. Based on this information, FTA makes decisions about which grantees will receive oversight reviews during the coming year. Regional staff uses the information to develop regional oversight plans and to allocate oversight resources within the region for the upcoming fiscal year, which may include oversight reviews, regional meetings, and/or regional site visits.

One commenter asked FTA to add its Job Access Reverse Commute (JARC) and New Freedom Programs to the list of programs covered by State Management Reviews. FTA only listed programs for which it is authorized to withhold a percentage for oversight activities. FTA retains the right to review any of its programs through State Management Reviews.

#### F. Chapter VI—Financial Management

Chapter VI discusses the proper use and management of Federal funds FTA expects from its grantees. Financial management is one of the most important practices in the management of Federal funds.

One commenter asked FTA to define the Cash Basis of Accounting and its permissible use. Definitions have been added.

Another commenter asked FTA to clarify whether a specific form is required for documenting internal controls. FTA notes that the form checklist provided in Circular 5010.1D is not mandatory. FTA has provided it to those transit properties that do not currently do their own testing. FTA has modified Circular 5010.1D to make clear that this form is a tool, not a requirement.

#### G. Appendices

One commenter noted that Appendix C, Guide for Preparing an Appraisal Scope of Work, is excellent guidance and asked FTA to include a review appraisal scope of work. FTA agrees with this comment and has indicated that the Guide for Preparing an Appraisal Scope of work can also be used for a review appraisal.

Appendix D, Fleet Status Report, has been renamed and revised so as to not be confused with the Fleet Status Report screen in TEAM. The new name is

Rolling Stock Status Report. The use of this report is limited to disposing of a vehicle that has met minimum useful life and fair market value is greater than \$5,000, disposing of a vehicle before it reaches minimum useful life, or requesting a budget revision affecting vehicles.

Issued in Washington, DC, this 22nd day of September, 2008.

**James S. Simpson,**

*Administrator.*

[FR Doc. E8-22891 Filed 9-29-08; 8:45 am]

**BILLING CODE 4910-57-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

[Docket No. FTA-2007-29125]

#### Third Party Contracting Guidance: Notice of Final Circular

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of Availability of Final Circular.

**SUMMARY:** The Federal Transit Administration (FTA) has issued FTA Circular 4220.1F, "Third Party Contracting Guidance" to provide comprehensive guidance to grantees and recipients of cooperative agreements (recipients) to implement third party contracting requirements that apply to FTA assisted procurements.

**DATES: Effective Date:** The effective date of this circular is November 1, 2008.

**ADDRESSES:** A copy of this circular and comments and material received from the public, as well as any documents indicated in the preamble as being available in the docket, are part of docket FTA-2007-29125 and are available for inspection or copying at the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE., West Building Ground Floor, Room W12-140, Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

You may retrieve the circular and comments online through the Federal Document Management System (FDMS) at Web site: <http://regulations.gov>. Enter the docket number FTA-2007-29125 in the search field. The FDMS is available 24 hours each day, 365 days each year. Electronic submission and retrieval help and guidelines are available under the help section of the Web site.

This notice does not include the final circular. An electronic version of the circular may be found on the docket: <http://regulations.gov>, docket number

FTA-2007-29125, or on the FTA Web site: <http://www.fta.dot.gov>. Paper copies of the circular may be obtained by contacting FTA's Administrative Services Help Desk, at 202-366-4865.

#### FOR FURTHER INFORMATION CONTACT:

James Harper, Director, Office of Procurement, Office of Administration, Federal Transit Administration, 1200 New Jersey Avenue, SE., East Building, Room E42-332, Washington, DC 20590, phone: 202-366-1127, fax: 202-366-3808, or e-mail [James.Harper@dot.gov](mailto:James.Harper@dot.gov) for issues regarding third party contracting procedures and practices; or Kerry L. Miller, Assistant Chief Counsel for General Law, Office of Chief Counsel, Federal Transit Administration, 1200 New Jersey Avenue, SE., East Building, Room E56-314, Washington, DC 20590, phone: 202-366-1936, fax: 202-366-3809, or e-mail, [Kerry.Miller@dot.gov](mailto:Kerry.Miller@dot.gov), for legal issues.

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#### I. Background

This notice provides a summary of FTA's Third Party Contracting Guidance final circular, and addresses comments received in response to the FTA's September 28, 2007, **Federal Register** notice (72 FR 55630). FTA's most recent enabling legislation, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Public Law 109-59, August 10, 2005, as amended by the SAFETEA-LU Technical Corrections Act, 2008, Public Law 110-244, June 6, 2008, added new third party contracting requirements for FTA recipients. Other Federal laws and regulations have also amended certain Federal requirements or added new Federal requirements affecting third party procurements

undertaken by FTA recipients. To address these changes, FTA is re-issuing FTA Circular 4220.1E, issued June 19, 2003, and last amended in February of 2004.

FTA published proposed FTA Circular 4220.1F in the Federal Document Management System (FDMS) at Web site: <http://regulations.gov>, and in the FTA Web site: <http://www.fta.dot.gov>. FTA published a notice of availability in the **Federal Register** (72 FR 55630) on September 28, 2007, seeking public comment on the proposed circular. FTA established a November 27, 2007, deadline for comments, but extended the comment period to February 15, 2008, as announced in the **Federal Register** on October 31, 2007 (72 FR 61708).

Ten commenters responded to FTA's request for comments in response to that notice and the proposed circular. Commenters included four State departments of transportation, four regional transportation authorities, one trade association, and one private for-profit firm.

This notice does not include the final circular. An electronic version of the circular may be found on the docket: <http://regulations.gov>, docket number FTA-2007-29125, or on the FTA Web site: <http://www.fta.dot.gov>. Paper copies of the circular may be obtained by contacting FTA's Administrative Services Help Desk, at 202-366-4865.

## II. Overview of the Circular

We recognize that this edition "F" of FTA Circular 4220.1 is substantially different from the previous FTA Circular 4220.1E, "Third Party Contracting Requirements," 06-19-03. The final FTA Circular 4220.1F (the final circular) does contain much more information and guidance than was available in the previous circular, which focused mostly on Federal requirements. In part, this results from the SAFETEA-LU amendment to 49 U.S.C. Section 5334 adding a new subsection "(l)" requiring FTA to publish for notice and comment any "guidance document \* \* \* that \* \* \* imposes obligations, produces significant effects on private interests, or effects a significant change in existing policy." The final circular now describes many procedures and processes that will assist the recipient in complying with the many Federal statutory and regulatory requirements that can affect third party procurements.

Many commenters expressed the following views about the format and contents of the proposed circular as a whole:

### 1. Too Much Information and Complexity

Several commenters objected to the length and complexity of the proposed circular, expressing a preference for the "tight structure and focused approach" of the previous circular. We understand that a streamlined list of requirements can be desirable. Because we are required by law to present all matters that may have a significant effect on private interests for public comment, we have included as many subjects as possible that might directly or indirectly affect a specific FTA assisted procurement. FTA assisted procurements are subjected not only to many Federal procedural requirements, but also to many Federal requirements about the nature of property and services that may be acquired and the prospective contractors that might seek to provide them. FTA lacks authority to issue blanket waivers to those Federal requirements.

The circular's purpose is to provide guidance on how a recipient might comply with the many requirements affecting its procurements that accompany the use of Federal assistance awarded by FTA. If the recipient is prepared to forgo the use of FTA assistance to support a procurement, then the circular's guidance will not apply to that procurement. Nevertheless, we have attempted to reduce the circular's complexity and make it more user-friendly by consolidating related information in seven separate chapters. Chapter I describes the context in which the guidance takes place and FTA's role in third party contracting. Chapter II designates to whom and to what the circular applies. Chapter III outlines the recipient's general procurement responsibilities. Chapter IV describes the various Federal requirements that may affect the eligibility of prospective contractors to participate, the property and services to be acquired, the limitations imposed on the use of the property or services acquired, as well as the acquisition procedures to be used. Chapter V lists the various sources from which the recipient might acquire property and services. Chapter VI describes the procedural requirements that apply to the various procurement methods. Chapter VII closes by providing guidance on resolving contract difficulties that might emerge. Appendix A lists the various laws, regulations, executive orders, and directives referenced in the circular. Appendix B provides an updated list of FTA regional and metropolitan offices with contact information. A new

Appendix C adds checklists to remind the recipient of the many Federal requirements that might apply to its procurement, with references to the various sections, subsections, paragraphs, and subparagraphs of Chapters II through VI. A new Appendix D adds clause matrices. After a recipient gains a clear understanding of the meaning of the terms used in the circular, what FTA may do, and the types of acquisitions covered by the circular, the recipient can use the later chapters of the circular as reminders of the many Federal requirements that affect various acquisitions, alternatives to the open market that may provide the property and services that are sought, and the different procedures to be used for the various methods of procurement.

Specifically, we are concerned that the recipient remains aware of the many Federal requirements that could affect the contractor that may be selected and the nature of what is being required. If concentration is focused mainly on acquisition procedures, it can be easy to lose sight of other Federal requirements that may prove difficult or expensive to administer if considered too late. While these matters were briefly noted in former FTA third party contracting circulars, mostly by reference to the Master Agreement, we disagree that they are beyond the scope of a third party contracting procurement circular. For example, a prospective contractor should be aware of the implications of entering into contracts financed with FTA assistance, such as complying with our Buy America and Charter Service regulations, government-wide environmental protections, among others, before submitting a bid or proposal in response to a recipient's solicitation. Also, the recipient may wish to consider the various sources from which the property or services it seeks may be obtained.

One commenter complained that the proposed circular would no longer be useful as a training document because it is too complex. We disagree. We believe the final circular with its focus on consolidating topics, providing more guidance and information, coupled with checklists of requirements that might be overlooked if contract awards need to be expedited, will far better serve the individuals to be trained.

One commenter asked for review aids such as worksheets, clause and certifications matrices, and model clauses. We agree that these aids could be helpful, and have included a new Appendix C with checklists including references to specific parts of the circular. FTA has also prepared a new Appendix D with matrices identifying

the various clauses and contract provisions that might be required. For examples of model clauses, we refer you to the FTA's Best Practices Procurement Manual (BPPM), which we are planning to update in the near future. We caution, however, that while these checklists and matrices will be current on the day the final circular is issued, later enacted Federal laws and regulations may not be reflected in timely amendments to the circular. FTA will attempt to update the circular as necessary, but recommends that the recipient check the Master Agreement and the FTA Web site for information about any new Federal requirements.

## *2. Separate Requirements From Guidance*

One commenter asked whether the circular only provides guidance to FTA recipients or whether it intends to provide mandatory directions or requirements when financing third party contracts with Federal assistance. Several other commenters requested us to clearly identify distinctions between Federal requirements and guidance or recommendations or separate Federal third party procurement requirements from guidance.

FTA considers this circular to be FTA's official guidance for implementing Federal requirements. This guidance consists of FTA's recommendations for achieving compliance with the various Federal requirements that might apply to a recipient or its procurement. The actual Federal requirements are contained in the provisions of Federal statutes or in promulgated Federal regulations, and in many cases impose binding requirements on participants in FTA assisted procurements. Appendix A contains a list of many of those laws and regulations applicable to FTA assisted procurements. Executive Orders, directives, and similar publications are binding on the Executive Branch of the U.S. Government, which must implement them. While the Executive Orders and other directives to Federal agencies do not apply directly to parties or individuals outside the Federal Government, some provisions of those Orders or directives require the cooperation of parties that are not part of the Executive Branch of the U.S. Government. Consequently, FTA must gain the consent of the relevant parties to ensure compliance with the Executive Orders and Federal directives. FTA does this through the provisions of its Master Agreement incorporated by reference in each FTA grant agreement and FTA cooperative agreement. To determine what is required of the

various participants in an FTA assisted project, we suggest that you review those documents.

Because this circular consists of a broad range of guidance to FTA recipients, some of that guidance will simply re-state a Federal law or regulation, while other guidance will provide one or more methods of complying with an underlying Federal law or regulation, focusing on the terms of the FTA law or regulation to clarify what is needed for compliance. Doing so will result in "blurring of lines between legal and regulatory requirements, guidance, and commentary," as noted by one commenter. Throughout the final circular, however, FTA has attempted to identify those provisions that constitute Federal statutory or regulatory requirements. Information not designated as a Federal statutory or regulatory requirement in nearly all cases will be compliance guidance.

FTA is willing to give serious consideration to alternative ways a recipient may comply with the Federal laws and regulations that apply to FTA programs. In some situations, FTA is familiar with only one method of achieving compliance, and then only that method is listed in the final circular. Other situations lend themselves to various methods of compliance. In summary, an FTA recipient should review the Federal laws and regulations cited in connection with each subject of concern to learn what requirements apply to it and to other participants in its project. To determine what is required of FTA that might affect third party procurement, the recipient may also review any Executive orders and other Federal directives referred to in connection with each subject of concern as well as the relevant Federal laws and regulations. FTA's BPPM, while not official FTA guidance, includes more extensive examples of procedures, processes, or ways in which compliance with specific Federal requirements might be achieved.

A recipient seeking methods of complying with a Federal requirement other than those described in the final circular or in the BPPM should contact FTA employees and officials in its region, particularly because FTA is not authorized to provide Federal assistance for third party procurements that do not comply with Federal requirements. While many recipient actions do not expressly require approval under Federal law or regulation, if FTA finds that a third party procurement fails to comply with Federal requirements, then FTA may need to withdraw funding, obtain a refund, or offset future Federal

assistance that would have been provided to the recipient. In summary, the recipient is ultimately responsible for compliance with Federal requirements. If the recipient chooses to take an action that is later determined to violate Federal law or regulations, then it can expect that the Federal Government will take remedial action.

## *3. Links to Relevant Documents Needed*

One commenter requested us to add links to essential documents referenced in the proposed circular. We are unable to do so at this time, although we have included on-line addresses of certain resources that may be difficult to find. Be aware, however, that these addresses may change as Web sites change.

In summary, we recognize that implementing FTA's third party contracting guidance can be complicated, and that many disparate Federal requirements will apply. We expect to continue to learn from your experience in administering the many Federal requirements that apply to third party contracting. We will be monitoring the usefulness of this guidance, and we continue to be open to comments and suggestions. We value input from our recipients and others, and we urge you to communicate with FTA staff at our headquarters and regional offices regarding questions and concerns you may have and successes you experience.

## *4. Notification of Changes to the Final Circular*

One commenter recommended that FTA provide notice and comment about all amendments or updates to the final circular, even if FTA later amends or updates the final circular because of revisions to other FTA or other Federal regulations or guidance that has undergone notice and comment.

FTA disagrees. When the revision of a circular or regulation requires the Federal Government to provide an opportunity for notice and comment, there is no need to satisfy that requirement again just to update a reference to that revised document. FTA is required by 49 U.S.C. 5334(l) to provide notice and comment and otherwise follow applicable Federal rulemaking procedures about any change that "grants rights, imposes obligations, produces significant effects on private interests, or effects a significant change in existing policy." FTA, however, need not provide notice and comment when making minor technical corrections, such as updating legal citations and ensuring conformity of its circulars with the latest Federal regulations or guidance that has

undergone notice and comment. FTA will notify the public of those changes as they occur.

FTA will also post updates on its Web site: <http://www.fta.dot.gov>. The recipient should register for notifications when FTA issues **Federal Register** notices or new guidance. To register for notifications, go to the FTA public Web site: <http://www.fta.dot.gov>. In the middle of the page will be a box with the following message:

Sign up for e-mail updates

The Federal Transit Administration now offers e-mail updates on various topics including **Federal Register** notices, SAFETEA-LU and others. Please click on the link above to begin the sign-up process.

### 5. Editorial Comments

A few commenters recommended brief descriptions of citations, and noted editorial discrepancies and typographical errors. We agree with most of their recommendations and have made appropriate changes in the final circular.

### III. Chapter-by-Chapter Analysis

This section briefly describes the contents of each chapter of the final circular and addresses public comments received in response to its September 28, 2007, and October 31, 2007, notices.

#### A. Chapter I—Introduction and Background

Chapter I is an introductory chapter with general information about FTA and how to contact us. It also provides a brief review of FTA's authorizing legislation, along with information about Grants.gov. It includes definitions applicable to third party contracting, and describes FTA's role in third party procurements. While contact information about FTA officials is identified in the various chapters of the final circular, if you have a question and an FTA official is not identified as a contact source, you should contact the Regional Administrator for the region in which the project is administered or the Associate Administrator for the Program under which a headquarters project is administered.

Sections 1 Through 4—Description of FTA, Its Authorizing Legislation, Contact Information, and General Background

We have edited the first four sections of Chapter I, but they otherwise remain substantially similar to those of the proposed circular provided in connection with FTA's September 27, 2007, **Federal Register** notice.

#### Section 5—Definitions

The fifth section of Chapter I contains definitions of various terms used in the final circular. Several commenters submitted recommendations, including requests for changes in some of the proposed definitions and requests for additional definitions.

From FTA Circular 4220.1E, we have retained the definitions of "Best Value," "FTA," "State," and "Third Party Contract," modified to accommodate comments we received.

From the "Definitions" subsection of the proposed circular, we have retained definitions of "Approval, Authorization, Concurrence, Waiver," "Common Grant Rules," "Cooperative Agreement," "Design-Bid-Build Project," "Design-Build Project," "Grant," "Master Agreement," "Non-Governmental Recipient," "Electronic Commerce (E-Commerce)," "Property," "Recipient," and "Revenue Contract," modified to accommodate comments we received. We have separated the definitions of "State," "Local Government" and "Indian Tribal Government" from the definition of "Governmental Recipient" without changing the meaning of those terms.

We have also added definitions of "Cardinal Change," "Change Order," "Constructive Change," "Force Account," "Full and Open Competition," "Joint Procurement," "Project Labor Agreement (PLA)," "Public Transportation," "State or Local Government Purchasing Schedule or Purchasing Contract," "Unsolicited Proposal," and "Value Engineering," to preclude misunderstanding of those subjects as they are discussed in the final circular.

As stated in the preamble to the proposed circular, we have substituted a definition of "Recipient" for the definition of "Grantee" to encompass both recipients of Federal grants and recipients of cooperative agreements. We transferred the term "Piggybacking" included in previous FTA Circular 4220.1E from the Definitions section of Chapter I to the Chapter V discussion of "Assignment of Contract Rights." We also transferred the term "tag-on" included in previous FTA Circular 4220.1E from the Definitions section of Chapter I to the Chapter V discussion of "Cardinal Changes."

#### Subsection 5.a—Approval, Authorization, Concurrence, Waiver

In the definition of "Approval, Authorization, Concurrence, Waiver," appearing for the first time in the proposed circular, one commenter objected to the term "conscious written

statement," and recommended that it be replaced with "written sanction \* \* \* by." FTA disagrees with this recommendation because not every "approval, authorization, concurrence, [or] waiver" constitutes a sanction. We have, however, replaced the word "conscious" with "deliberate."

#### Subsection 5.b—Best Value

Commenters submitted four recommendations for revisions to the definition of "Best Value." We have accepted those recommendations and have redrafted the definition to emphasize that best value is one type of competitive, negotiated procurement process with award determined on the basis of other factors important to the recipient in addition to cost or price factors. In this subsection, we have replaced terms used in connection with sealed bid procurements, which implicitly require award to the low bidder, with terms suitable for negotiated procurements. We have also included a statement that the evaluation factors for a specific procurement should reflect the subject matter and the elements that are most important to the recipient, and a clarification that our list of evaluation factors appearing in the proposed circular are not an exhaustive list of acceptable evaluation factors.

#### Subsection 5.c—Cardinal Change

One commenter sought clarification of terms pertaining to "changes." To remedy misunderstandings, we have added a definition of "Cardinal Change."

#### Subsection 5.d—Change Order

To remedy misunderstandings, we have also added a definition of "Change Order."

#### Subsection 5.f—Constructive Change

We have also revised the definition of "Constructive Change" in view of the same request for clarification.

#### Subsection 5.h—Design-Bid-Build Project

Another commenter requested that we remove the term "at risk" in the definition of "Design-Bid-Build Project" when referring to contracting for the construction portion of the project. We agree, and have made that change.

#### Subsection 5.i—Design-Build Project

The same commenter also requested us to broaden the definition of "Design-Build Project" to include projects other than transportation systems or operable segments. We agree, and have made the change.

**Subsection 5.k—Force Account**

One commenter's statements about our involvement in a recipient's decision to use its workforce to perform project work prompted us to add a definition of "Force Account."

**Subsection 5.m—Full and Open Competition**

One commenter's statements prompted us to add a definition of "Full and Open Competition."

**Subsection 5.p—Indian Tribal Government**

We separated the definition of "Indian Tribal Government" from the definition of "Governmental Recipient."

**Subsection 5.q—Joint Procurement**

We have added a definition of "Joint Procurement" to differentiate it from "State or Local Purchasing Schedule or Purchasing Contract."

**Subsection 5.r—Local Government**

We separated the definition of "Local Government" from the definition of "Governmental Recipient."

**Subsection 5.s—Master Agreement**

One commenter recommended that we change the definition of "Master Agreement" to conform to our explanation in the FTA Master Agreement. We agree, and have made that change.

**Subsection 5.t—Non-Governmental Recipient**

One recipient noted that the definition of "non-governmental recipient" excludes private businesses except at FTA's discretion, but does not add a definition of private business. We have used the term "non-governmental recipient" to mean "recipient" as defined in Department of Transportation (DOT) regulations, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," 49 CFR Part 19. That definition includes the term "commercial organizations," which we interpret to mean "private businesses." Thus we have not defined "private business" for purposes of the final circular. FTA intends to inform recipients that it will reserve the right to apply the provisions of 49 CFR Part 19 to all recipients not covered by 49 CFR Part 18. As provided in those regulations, the Federal Acquisition Regulation (FAR) cost principles applicable to for-profit organizations will apply to commercial organizations.

**Subsection 5.u—Project Labor Agreement (PLA)**

We have added a definition of "Project Labor Agreement" consistent with the General Services Administration's (GSA) definition of that term.

**Subsection 5.v—Property**

We have amended our definition of "Property" to replace "real property" with "land and buildings, structures, or appurtenances on land."

**Subsection 5.w—Public Transportation**

We have added a definition of "Public Transportation" in view of the amendment to the SAFETEA-LU Technical Corrections Act, which expressly restores the exclusion of "sightseeing service" from the definition of "public transportation" for purposes of 49 U.S.C. Chapter 53.

**Subsection 5.x—Recipient**

Another commenter requested us to include an explanation in our definition of "Recipient" that a "Recipient" does not include a third party contractor or third party subcontractor. We agree, and have made the addition requested.

**Subsection 5.y—Revenue Contract**

One commenter requested us to reconcile the meanings of "Revenue Contract" as used throughout the proposed circular. We agree, and have revised the definition for consistency with the meaning of the term as used in Chapter II, subparagraph 2.b(4).

**Subsection 5.aa—State or Local Government Purchasing Schedule or Purchasing Contract**

We have added a definition of "State or Local Government Purchasing Schedule or Purchasing Contract" to differentiate it from "Joint Procurement."

**Subsection 5.bb—Third Party Contract**

One commenter requested that the definition of "Third Party Contract" be amended specifically to include purchase orders and credit card purchases. We agree, and have made the change.

**Subsection 5.cc—Unsolicited Proposal**

We have added a definition of "Unsolicited Proposal" consistent with FAR standards.

**Subsection 5.dd—Value Engineering**

One commenter's statements prompted us to add a definition of "Value Engineering."

**Section 6—FTA's Role**

The sixth section discusses FTA's role and responsibilities with regard to third party procurements. The subsections hereunder addressing third party contract reviews, procurement system reviews, and training and technical assistance continue to be substantially similar to those of FTA Circular 4220.1E.

**Subsection 6.a—Reliance on the Recipient's Self-Certification**

For consistency with the Common Grant Rules, the final circular retains the proposed circular's discussion of self-certification. Specifically, the DOT's Common Grant Rule for governmental recipients, 49 CFR Part 18, permits governmental recipients to request self-certification, but does not require them to do so, nor does that Common Grant Rule permit FTA to require self-certification. The DOT's Common Grant Rule for non-governmental recipients, 49 CFR Part 19, has no provisions addressing self-certification.

**Subsection 6.f—Master Agreement**

Two commenters requested changes to our discussions of FTA's Master Agreement. In this subsection, we are not merely defining the Master Agreement, but are providing more information about it and how it can best be used.

**Subsection 6.g—"Best Practices Procurement Manual (BPPM)"**

One recipient asked us to clarify the purpose of the BPPM. We have revised this subsection that describes the BPPM to emphasize that the BPPM is not official FTA guidance applicable to the recipient, but instead is a compilation of suggested procedures, methods, and examples the recipient may use as it sees fit. Another commenter requested us to update the BPPM so that it will be a reliable resource. We are planning to update the BPPM, but are uncertain whether we will be able to maintain it so that it will always reflect accurate recommendations.

**Subsection 6.h—Third Party Contracting Helpline**

We have included a better Web address for FTA's Third Party Contracting Helpline.

**Subsection 6.i—"Frequently Asked Questions"**

We have included a reference to the FTA Web site for "Frequently Asked Questions" about third party contracting.

### B. Chapter II—Applicability

We have restructured Chapter II to consolidate provisions pertaining to the various categories of recipients and their projects. We expanded the chapter to include additional paragraphs to respond to unanticipated comments to the proposed circular. As a result, we have transferred some provisions of the proposed circular to this chapter.

Much of this chapter retains provisions substantially similar to their counterpart provisions within FTA Circular 4220.1E or its footnotes, with important exceptions discussed below:

#### Section 1—Legal Effect of the Circular

After reading many of those comments, we have become aware that many of our recipients misunderstand the legal implications of FTA's circulars. As a result, we included a new section at the beginning of Chapter II to explain that the final circular, although official FTA guidance, is not a Federal mandate comparable to a Federal law or regulation.

#### Section 2—Applicability of the Circular

##### Subsection 2.a—Participants in FTA Assisted Procurements

##### Paragraph 2.a(1)—Recipients of FTA Grants and Cooperative Agreements

##### Subparagraph 2.a(1)(a)—States

As stated in the preamble to proposed FTA Circular 4220.1F, the previous FTA Circular 4220.1E inadvertently misstated FTA's long-standing practice in administering its State managed programs when it took the position that only States and State instrumentalities could use State procedures when undertaking procurements financed with FTA's funding for State managed programs. We have retained the new language of the proposed circular, which correctly states OMB's decision that FTA governmental subrecipients of States may use State procurement procedures, but non-governmental recipients of States must use the procurement procedures of the Common Grant Rule for non-governmental recipients.

##### Paragraph 2.a(3)—Recipients of Both Federal Assistance Awarded by FTA and Funds Provided by Another Federal Agency

While there is a general understanding that FTA requirements apply to FTA assisted procurements, one commenter asked what Federal requirements would apply if another Federal agency were also providing funding for the project. Our response is that the requirements of each agency's

laws and regulations would apply to the project, and the recipient would need to take actions that would meet the requirements of all participating agencies.

##### Paragraph 2.a(5)—Third Party Contractors and Subcontractors

##### Subparagraph 2.a(5)(b)—Effect of Federal Requirements

One commenter appears to question whether federally required contract clauses must flow down to third party contractors and subcontractors because the circular does not apply directly to them. We have included a new paragraph addressing the status of third party contractors and subcontractors and have informed recipients that some Federal laws and regulations will, in effect, require the compliance of their third party contractors and subcontractors as well as the recipient. In those cases, the recipient must include adequate provisions in their solicitation documents and third party contracts.

##### Subsection 2.b—Third Party Contracts

##### Paragraph 2.b(1)—Capital Contracts

##### Subparagraph 2.b(1)(b)—Art

One commenter asked us to update the procurement requirements in FTA Circular 9400.1A, "Federal Transit Administration Design and Art in Transit Projects," dated 06-09-95. FTA intends to do so after the end of Fiscal Year 2008.

##### Subparagraph 2.b(1)(c)—Over-the-Road Bus Accessibility Program

One commenter asked whether the exemption from the proposed circular's provisions applies only to FTA's Over-the-Road Bus Accessibility Program or whether all over-the-road bus procurements are also exempted. We have revised the proposed circular to clarify that the exemption applies only to the Over-the-Road-Bus Accessibility Program and does not include over-the-road buses acquired through other FTA programs.

##### Subparagraph 2.b(1)(d)—Real Property

Four commenters pointed out apparent inconsistencies pertaining to the application of the proposed circular to real property. While we have left the definition of "Property" to include "real property," we agree that clarifications are needed and have revised the paragraph pertaining to real property to emphasize that the final circular does not apply to the purchase of land and existing facilities, but does apply to construction of new buildings and facilities on the land acquired for the

project, and applies to alterations or repairs to buildings and facilities on the land when it was acquired or made available for project use.

##### Paragraph 2.b(2)—Operations Contracts

##### Subparagraph 2.b(2)(b)—Operations Contracts Financed Entirely Without FTA Assistance

As stated in the notice of availability of proposed FTA Circular 4220.1F, FTA has been considering whether and to what the extent its third party contracting provisions should apply to an FTA recipient's acquisitions financed entirely without FTA assistance.

For many years, FTA has taken the position that "one dollar taints all," a policy in which FTA required a recipient to apply FTA requirements to all its other operations contracts, including those contracts financed entirely without Federal assistance, if the recipient uses any part of its FTA formula assistance to support any operation contract. Because recipients in large urbanized areas have not been authorized to use Urbanized Area Formula assistance for operations, operations contracts they can demonstrate were financed entirely without FTA assistance have not been required to comply with FTA requirements. In contrast, recipients in smaller urbanized areas currently must apply FTA requirements to all their operations procurements, whether or not they are financed with FTA assistance, if they use any of their Urbanized Area Formula assistance or Nonurbanized Area Formula assistance to support even one operations contract.

FTA did make exceptions for Congestion Mitigation and Air Quality (CMAQ) and Job Access/Reverse Commute (JARC) assistance used for operations, determining that if a recipient could demonstrate which operations contracts CMAQ or JARC assistance supported, then the recipient's other entirely privately financed operations contracts need not comply with FTA requirements. Now that SAFETEA-LU changed the JARC program from a discretionary program to a formula program, FTA must determine whether to impose its procurement requirements on a recipient's operations contracts not financed with Federal assistance if the recipient uses its formula JARC funds for operations.

FTA also provided an exception for recipients in large urbanized areas to exempt all their operations contracts from FTA requirements provided they are able to trace their use of preventive maintenance funding to specific contracts. If, however, they are unable to

do so, and use FTA assistance for general support of preventive maintenance contracts, then FTA requirements will apply to all their operations contracts.

At the same time, FTA has been reviewing its policies pertaining to its recipients' use of other FTA assistance that finances operations contracts in connection with other project activities. Among other programs in which FTA supports the costs of project-related operations are the New Freedom Program, 49 U.S.C. 5317, the Elderly Individuals and Individuals with Disabilities Program, 49 U.S.C. 5310, the Elderly Individuals and Individuals with Disabilities Pilot Program, 49 U.S.C. 5310 note, and the National Research Program, 49 U.S.C. 5312(a), all of which involve some recipients or subrecipients that receive only a small portion of their financial expenses from FTA.

FTA expressly sought comments about the extent to which FTA requirements should be applied to a recipient or subrecipient's operations contracts financed entirely without Federal assistance. FTA also sought comments on the extent of agency operating expenses that are not related to public transportation but must comply with FTA procurement requirements under the concept that one dollar of FTA operating assistance brings an agency's entire operating budget under the FTA requirements. Specifically, FTA requested comments on the rationale for excluding other operating contracts from the applicability of FTA requirements. Those that commented overwhelmingly urged FTA to exempt all acquisition financed without any Federal assistance from Federal requirements. Most commenters believe imposing Federal requirements on acquisitions not financed with Federal assistance to be overbroad, if not unauthorized.

FTA also asked for examples of how operating expenses could be tracked and managed so that FTA assisted expenses could be segregated from other operating costs. One commenter explained that many accounting and bookkeeping systems are generally capable of identifying cost allocations sufficiently thoroughly so that the funding sources of each contract can be readily identified. Because a variety of accounting systems can identify funding sources, the commenter asked FTA not to impose a uniform accounting system that might be expensive to implement. The commenter also pointed out that FTA could monitor that process by asking recipients to state whether or not they are segregating federally assisted

acquisitions, including operations acquisitions, from acquisitions financed entirely without FTA assistance, and then ask those recipients that are segregating their acquisitions to describe the methods by which they are tracking sources of funding. FTA could reserve the right to disallow the practice if the recipient's recordkeeping methods are deficient. States could monitor those practices for compliance by their recipients that qualify to use State procedures.

In considering its proposal to remove FTA's procurement requirements from operations contracts financed with FTA formula assistance, FTA is aware that doing so might diminish contracting opportunities for some disadvantaged business enterprises (DBE). To preclude that result, FTA has emphasized its position that a recipient required by DOT regulations, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs," 49 CFR Part 26, to have a DBE program may not structure its operations expenditures (or other expenditures) in a manner that removes an unreasonable proportion of contracts that could have been performed by DBEs from its DBE program. Accordingly, we expressly sought comments estimating the impacts on DBE participation that might accompany FTA's proposed policy change that would permit all recipients to separate their FTA assisted operations contracts from their other operations contracts receiving no FTA assistance. However, we did not receive any comments directly addressing prospective adverse impacts on DBE participation that might result from that change.

One commenter advised that applying DBE requirements broadly to all procurements might well invalidate the entire DBE program. FTA does not intend to require each FTA assisted procurement to be included in a recipient's DBE program. Nevertheless, a recipient that enters into a third party contracts for operations or planning must comply with the requirements of the DBE regulations. Therefore, FTA maintains that a recipient required to have a DBE program may not structure its operations expenditures (or other expenditures) in a way so that an unreasonable proportion of contracts that could be performed by DBEs are removed from its DBE program.

After considering the comments we received, FTA has determined not to require any FTA recipient to apply FTA statutory and regulatory requirements to acquisitions that the recipient can demonstrate conclusively it has been

financed entirely without FTA assistance. In exempting the recipient from FTA requirements that have in the past affected its procurements, however, we caution the recipient that FTA cannot exempt a recipient from other Federal requirements that may apply irrespective of whether or not the acquisition were financed with Federal assistance. An example would be Federal requirements for accessibility for individuals with disabilities that would apply to a recipient irrespective of whether or not Federal assistance were made available for an activity undertaken by the recipient. FTA assisted procurements, however, must comply with all applicable Federal requirements.

#### Paragraph 2.b(3)—Preventive Maintenance Contracts

In the paragraph pertaining to the application of FTA requirements to preventive maintenance contracts, one commenter asked us to identify "discrete." Rather than defining "discrete," we have substituted the term "separate and distinct" in the final circular.

#### Paragraph 2.b(4)—Revenue Contracts

One commenter objected to an FTA requirement that revenue contracts be awarded "utilizing competitive procedures and principles," asking instead that we reinstate the distinction between situations that offer unrestricted access to similar users and situations that can provide only limited access to similar users. We agree, and have made that change in the final circular.

#### Paragraph 2.b(6)—Public-Private Partnerships

One commenter asked us to describe or define the contract delivery arrangements or project delivery systems listed in the proposed circular in connection with public-private partnerships (PPPs). Because we did not want to duplicate information previously published, we have included a reference to the FTA "Notice of establishment of Public-Private Partnership Pilot Program; solicitation of applications," 72 FR 2583-2591, January 19, 2007, which includes a description of the various contract delivery arrangements or project delivery systems in the context of PPPs.

One commenter proposed that we designate as PPPs only those partnerships that include both project delivery and operations. FTA disagrees. Structured in multiple forms, PPPs can vary greatly according to the scope of responsibility and degree of risk

assumed by the private partner for project activities. The same commenter pointed out that design-build (with or without a warranty) and construction manager at risk are variations on the design-bid-build method of project delivery. We agree that design-build (with or without a warranty) and construction manager at risk are project delivery systems but consider that projects with those attributes can constitute a PPP because the private partner or partners undertake the recipient's function of selecting the construction firm, and assume the risk of delivering the entire project.

In all eight categories of PPPs we have identified, the private partner undertakes in part the duties usually performed by the recipient and assumes some of the recipient's financial risk. Moreover, FTA's "Notice of establishment of Public-Private Partnership Pilot Program; solicitation of applications," 72 FR 2583-2591, January 19, 2007, expressly acknowledges all eight types of PPPs listed in the proposed circular.

Two commenters objected to our discussion of PPPs and joint development as too intrusive. One commenter complained that having to craft individual arrangements with FTA for each project would be unduly time-consuming, recommending that FTA establish objective principles for our participation in those projects. We agree that objective FTA principles for PPP participation would be helpful. As a result of our experience with joint development projects, we have excerpted parts of our "Notice of Final Agency Guidance on the Eligibility of Joint Development Improvements under Federal Transit Law," 72 FR 5788, February 7, 2007, which contains third party contracting guidance we have found useful. As we gain more experience with joint development projects and other PPPs, we will issue further guidance as appropriate.

#### Paragraph 2.b(7)—Transactions Involving Complex Financial Arrangements

Two commenters offered recommendations about the role of an "arranger" or facilitator in complicated financial transactions involving FTA assisted property. One commenter pointed out that the arranger is usually paid with the proceeds of the transaction resulting from the use of FTA assisted property, and indicated that the arranger should be selected using competitive procedures. Because FTA is not sure that arrangers are always paid in part with FTA assistance or the proceeds derived from the use of

FTA assisted property, we have not imposed that mandate. However, when an arranger is compensated with proceeds derived from the use of FTA assisted property, we have stated our expectation that the recipient would use competitive procedures to select its arranger. In addition, one commenter recommended that FTA strengthen conflict of interest procedures applicable to arrangers to ensure that an arranger does not personally benefit by using his or her company or other companies in which he or she has a financial interest. In this matter, FTA believes it appropriate to rely on the recipient's conflict of interest requirements and procedures to prevent unfair dealing.

#### Paragraph 2.b(8)—Force Account

One commenter recommended that we clarify that the final circular does not apply to a recipient's force account work. We agree, and have added a paragraph stating that the final circular's third party contracting guidance does not apply to force account work.

#### Section 3—Federal Laws and Regulations

##### Subsection 3.c—Other Federal Requirements

##### Paragraph 3.c(1)—Compilation in the Master Agreement

We received two comments about the significance of the Master Agreement. One commenter suggested we add a paragraph discussing the Master Agreement in much greater detail. We have included a reference to the discussion of the Master Agreement in Chapter I, subsection 6.f of the final circular, instead of repeating that information in Chapter II. Because the purpose of discussing the Master Agreement here is to identify it as a resource identifying Federal requirements, among other things, we have revised the heading of that paragraph in the final circular. Another commenter complained that the Master Agreement is not a useful means of communicating procurement requirements to recipients. Although we agree that the Master Agreement does not provide explicit procurement guidance to recipients, we have found that the Master Agreement is one of the most useful means of providing recipients a reasonably current compilation of the many Federal requirements that apply to FTA assisted projects.

##### Paragraph 3.c(2)—Conflicting Federal Requirements

One commenter asked which FTA official or officials should be notified of conflicting Federal laws and regulations when more than one Federal agency provides support for an FTA assisted project. The final circular advises the recipient to notify the FTA Chief Counsel in writing.

#### Section 4—State and Local Laws and Regulations

##### Subsection 4.b—Conflicts Between Federal Requirements and State or Local Requirements

The same commenter also asked who should be notified when conflicting Federal and State requirements apply to a project. Our response is that the recipient should notify the Regional Counsel for the region in which the project is being administered or the Assistant Chief Counsel for General Law for those projects administered by FTA headquarters staff.

The proposed circular noted that in the case of a conflict between State and local laws, it might be necessary for FTA to terminate the project if no resolution were available. One commenter sought an explanation of how this might occur. Since the inception of the FTA program, FTA has required recipients to comply with Federal requirements. In a relatively few instances, recipients have needed to persuade their State legislatures to enact special legislation that would permit the recipient to comply with Federal laws and regulations to permit its project to continue. For that reason, the recipient should notify FTA in writing as soon as possible when conflicts between Federal and State laws or regulations occur. FTA is willing to work with the recipient in seeking and implementing an equitable resolution.

Two other commenters opposed the proposed circular's termination provisions, claiming among other reasons that the recipient's counsel, not FTA, should be authorized to determine what requirements apply, and that FTA enforcement of Federal laws inconsistent with State laws would effectively pre-empt State or local laws. First of all, FTA makes every effort to avoid the need to terminate Federal assistance for a project due to conflicting Federal and State or local laws or regulations. When such situations arise, occasionally they have been resolved by efforts the recipient has made to persuade its State legislature to amend the conflicting law, at least to the degree necessary to permit FTA assistance to be used. FTA is not



authorized to waive Federal requirements except to the extent permitted by the underlying Federal laws and regulations. If a Federal law or regulation contains a requirement that FTA may not waive, FTA has no choice but to insist on the recipient's compliance as a condition of FTA assistance. If the Federal Government terminates Federal assistance for a project based on the recipient's failure or inability to comply with Federal law or regulations, FTA's position is that the termination would not be a Federal pre-emption of State or local law. The decision of whether a Federal agency will provide or continue Federal assistance for a specific project is separate and distinct from a Federal decision to pre-empt State or local law.

### *C. Chapter III—The Recipient's Responsibilities*

Apart from specific procurement procedures discussed at length in Chapter VI, this chapter consolidates the recipient's procurement responsibilities. We have retained much of the information included in FTA Circular 4220.1E, but we have also added information about Common Grant Rule provisions not discussed in that circular.

#### Section 1—Written Standards of Conduct

##### Subsection 1.a—Personal Conflicts of Interest

Three commenters objected to the personal conflict of interest prohibitions as written in the proposed circular. The Common Grant Rules and FTA Circular 4220.1E prohibit personal conflicts of interest by prohibiting contract activities that "would" result in a real or apparent conflict of interest, while the proposed circular would prohibit personal conflicts of interest by prohibiting contract activities that "could" result in a real or apparent conflict of interest. We agree with the commenter who pointed out that changing "would" to "could" broadens the standard from predictable to speculative. In drafting the proposed circular, FTA did not intend to deviate from Common Grant Rules standards or otherwise amend FTA's current standards. Accordingly, we have revised this provision by substituting "would" for "could," consistent with Common Grant Rules standards.

#### Section 2—Self-Certification

We received no comments on self-certification, except in the context of some commenters' objections to statements recommending FTA review of particular matters before the recipient

takes action. Those commenters argued that FTA reviews of prospective actions diminish prerogatives they should have due to their self-certification. They apparently believe that by acknowledging their self-certification, FTA is endorsing the correctness of a self-certified recipient's procurement decisions. Our response is that certain FTA reviews and approvals are required by Federal laws and regulations irrespective of self-certification. Other reviews FTA recommends are intended to preserve the recipient's ability to use FTA assistance to support the procurement by helping the recipient avoid an inadvertent violation of Federal laws or regulations, some of which can be complex.

#### Section 3—Third Party Contracting Capacity

Section 3 contains discussions of the requirements for third party contracting capacity, adequate contract provisions, and an adequate procurement history that are substantially similar to their FTA Circular 4220.1E counterparts. We have added other subsections to the final circular, such as recordkeeping, that were omitted from FTA Circular 4220.1E but addressed in the Common Grant Rules.

Two commenters objected to the provision in Section 3 stating that contractors providing procurement expertise or support to the recipient "should be unrelated to and independent of any potential bidder or offeror." The commenter explained that prospective bidders or offerors frequently know others with necessary procurement expertise, and forbidding the use of those sources would unnecessarily reduce the availability of expertise a recipient might need. We agree with that commenter and have changed the standard to one that calls for preventing or ameliorating organizational conflicts of interest that would result in conflicting roles that might bias a contractor's judgment or result in an unfair competitive advantage.

#### Subsection 3.c—Industry Contracts

One commenter noted that our caution about using industry contracts, while reasonable in certain situations, might be unwarranted if construed too broadly. Specifically, the commenter expressed the belief that there are advantages to using well-known industry developed forms, such as the AIA forms used in the construction industry or payment request forms and similar documents whose contract terms and clauses are familiar to contractors performing the work. In other situations,

a recipient should be able to solicit specifications or contract terms for possible use in a future solicitation. We agree that judicious use of standard forms, specifications, and contract terms may be justified in certain situations, and have revised the subsection on industry contracts to clarify that the recipient may use them if they can accommodate Federal requirements.

#### Subsection 3.e—Special Notification Requirements for States

Two commenters had concerns about the project and contract notification requirements for States that have been included in DOT's annual appropriations acts for the last few years. FTA Circular 4220.1E described former Appropriations Act notification requirements having a \$500,000 threshold that applied to all FTA recipients. In contrast, the DOT Appropriations Acts in the last few years have limited their notification requirements to States, but no longer recognize a \$500,000 threshold. Now each State must include statements in all its requests for proposals, solicitations, Federal assistance applications, forms, notifications, press releases, or other publications involving FTA assistance that FTA is or will be providing Federal assistance for the project, the amount of Federal assistance FTA has provided or expects to provide, and the Catalog of Federal Domestic Assistance (CFDA) Number of the program that authorizes the Federal assistance.

One commenter asked whether, when issuing its announcements, it really must include the CFDA Number for the FTA program under which the project is supported. FTA's position is that because identification of the CFDA number is expressly required by the recent DOT appropriation acts, the recipient must include the requisite CFDA number. The commenter also asked whether the requirement for States must flow down to its subrecipients. FTA interprets the appropriations laws to require compliance with those notification requirements by the State's subrecipients, lessees, or third party contractors at any tier, and we have included a provision in the final circular to that effect.

Another commenter has requested FTA to discuss this notification requirement in its grant management circulars and to take other measures to communicate with States directly about these broad notification requirements. We agree and will make special efforts to inform the States of these requirements.

### Subsection 3.f—Use of Technology/ Electronic Commerce

One commenter recommended that FTA expressly endorse a more extensive use of electronic contracting, including electronic bidding and reverse auctions, and that FTA permit the recipient to engage contractors to perform those services. FTA approves the use of electronic bidding and reverse auctions for third party procurements of \$100,000 or less and, if permitted under State or local law, for third party procurements of a greater value. A recipient may perform electronic contracting using its own staff or may engage one or more contractors to act on its behalf.

### Section 4—Audit

We received no comments on this section of Chapter III.

#### *D. Chapter IV—The Recipient's Property and Services Needs and Federal Requirements Affecting Those Needs*

We have restructured Chapter IV to consolidate provisions pertaining to the various categories of recipients and their projects. We expanded the chapter to include additional paragraphs in response to comments on the proposed circular. As a result, some of the guidance originally included in other chapters of the proposed circular has been transferred to this chapter of the final circular.

However, much of this chapter retains provisions that are substantially similar to their counterpart provisions in FTA Circular 4220.1E or its footnotes, with important exceptions discussed below.

### Section 1—Determining the Recipient's Needs

One commenter suggested that the acquisition planning and project management functions addressed in this chapter should not be included in a circular focused on third party contracting guidance. FTA disagrees. FTA considers procurement procedures to be only one aspect of third party contracting. The fundamental purpose of procurement is to acquire property and services that meet the purchaser's needs. The type, amount, characteristics, and features of the property or services an FTA recipient seeks and conditions under which the property and those services are acquired must satisfy Federal requirements that apply to federally assisted procurements if the recipient intends to use FTA assistance to support the costs of the property or services it procures. For an FTA recipient, these requirements will encompass Federal requirements focused on FTA acquisitions as well as

general Federal requirements that apply to all federally assisted acquisitions.

For example, some Federal requirements may change the way a contractor fabricates and delivers property; others will affect how the contractor provides the requested services, the amount of wages it must pay, and the labor protections it must provide to some or all employees. As a result, to assure that FTA assistance can be used to support the costs of property and services a recipient seeks, it is important that the recipient's acquisition comply with all of the many applicable Federal laws and regulations having an indirect effect, if not a direct effect, on the property or services to be acquired and also on the contractor that provides the property and services.

FTA believes it important that the recipient be fully aware of these requirements and restrictions at the time it begins to determine the types of property and services it needs. FTA cannot support a recipient's procurement that in some way has violated one or more Federal requirements. Thus FTA cautions the recipient to examine its initial preferences in light of Federal requirements before undertaking a procurement for which it intends to use FTA assistance. As an aid, we refer you to the checklists in Appendix C. In the course of developing the checklists identified with specific provisions of the final circular, we have consolidated requirements pertaining to specific aspects of procurement in separate chapters, and thus have found it necessary to transfer some information from Chapter IV of the proposed circular to Chapter VI of the final circular, which provides procedural guidance for open market procurements.

#### Subsection 1.a—Eligibility

The property or services a recipient acquires with FTA assistance must be eligible for Federal support. One commenter requested a more definitive explanation of eligibility and requested examples. We have expanded that explanation to focus on the requirements for eligibility under Federal law as well as eligibility under the scope of the specific project supported by the FTA assistance to be used.

#### Subsection 1.b—Necessity

##### Paragraph 1.b(1)—Unnecessary Reserves

One commenter expressed concern about FTA's position that the recipient's acquisitions be limited to its immediate needs, especially when followed by prohibitions against the procurement of

excess capacity for assignment purposes (which FTA does permit in limited circumstances). The commenter asked whether the recipient can and should rely on its own understandings about what it needs or whether FTA is, in effect, prohibiting cooperative procurements.

We have revised this discussion for clarity. FTA's decision to limit participation in the costs of acquisitions to only that property or services the recipient requires to fulfill its immediate needs, is justified by the requirements of the Common Grant Rules. In monitoring whether a recipient has complied with its procedures to determine what property or services are necessary, FTA bases its determinations on what would have been a recipient's reasonable expectations at the time it entered into the contract.

##### Paragraph 1.b(2)—Acquisition for Assignment Purposes

FTA recognizes that a recipient's later needs might decrease due to changed circumstances or even honest mistakes. In those cases, it is appropriate for a recipient to assign its extra contract authority to another entity needing the property or services. Although it may be difficult to determine precisely, FTA expects the recipient to make a concerted effort to measure its actual immediate needs carefully before entering into a procurement. A recipient should be cautious about acquiring contract rights whose use or disposition is genuinely uncertain at the time of contract award, except if the contract is intended to support State or local purchasing schedules.

#### Subsection 1.c—Procurement Size

Other commenters raised concerns that the guidance would prohibit cooperative procurements. We understand that by "cooperative procurements," the commenters are referring to what we designate as "joint procurements," meaning a method of contracting in which two or more purchasers agree from the outset to use a single solicitation document and enter into a single contract with a vendor for delivery of property or services in a fixed quantity, even if expressed as a total minimum and total maximum. This restriction does not preclude joint (cooperative) procurements because a joint (cooperative) procurement is intentionally developed to meet the actual, immediate needs of the two or more parties that seek to acquire similar property or services, as discussed more fully below. Nor does this restriction apply to a State that enters into contracts with various vendors to

establish State Purchasing Schedules for its convenience and the convenience of its authorized users.

One commenter has expressed the opinion that market conditions are not the usual reason for using joint or cooperative procurements, maintaining that joint procurements result when they are economically advantageous. FTA disagrees on the grounds that market conditions can affect what is economically advantageous to a recipient. We have, however, revised the Procurement Size paragraph of the final circular to emphasize the importance of economic advantage to the recipient.

Other commenters requested FTA to acknowledge that “grantees are not responsible for the actions of other grantees, even when conducting joint or cooperative procurements.” FTA is unwilling to make that change. FTA generally holds recipients responsible for compliance with Federal requirements by all participants in its project, apart from a few exceptions involving designated recipients in FTA’s Urbanized Area Formula program that relinquish their responsibilities to other grantees.

#### Section 2—Federal Requirements That May Affect a Recipient’s Acquisitions

One commenter recommended that FTA remove the references to its Master Agreement, maintaining that they are inapplicable to the discussion of Federal laws and regulations in this chapter. We disagree, but have transferred our discussion of the Master Agreement to the introductory paragraphs of Chapter I, subsection 6.f of the final circular, which provides a general discussion of Federal Requirements that may affect a recipient’s acquisitions.

#### Subsection 2.a—Contractor Qualifications

##### Paragraph 2.a(2)—Debarment and Suspension

One commenter has informed us that its State maintains its own debarment and suspension list, and that it checks both the Federal and State lists for debarments and suspensions. FTA has no objection to a recipient precluding a prospective participant included in a State debarment or suspension list from participating in an FTA assisted project, even if that prospective participant is not included in GSA’s Excluded Parties List System (EPLS).

##### Paragraph 2.a(5)—Federal Civil Rights Laws and Regulations

##### Subparagraph 2.a(5)(b)—Nondiscrimination on the Basis of Sex

We added a subparagraph reminding the recipient that its third party contractors must comply with Federal laws and regulations pertaining to nondiscrimination on the basis of sex.

##### Subparagraph 2.a(5)(c)—Nondiscrimination on the Basis of Age

We added a subparagraph reminding the recipient that its third party contractors must comply with Federal laws and regulations pertaining to nondiscrimination on the basis of age.

##### Paragraph 2.a(6)—Socio-Economic Development

##### Subparagraph 2.a(6)(a)—Disadvantaged Business Enterprises (DBE), and

##### Subparagraph 2.a(6)(b)—Small and Minority Firms and Women’s Business Enterprises

One commenter objected to the application of both DOT’s DBE regulations and the Common Grant Rules’ participation preferences for small and minority firms and women’s business enterprises. FTA disagrees with the commenter. At a minimum, each recipient must comply with DOT’s general DBE regulatory prohibition against discrimination, 49 CFR 26.13, irrespective of whether the recipient is required to have a DBE program. A recipient required to have a DBE program must comply with the provisions of its program. All Federal recipients, including FTA recipients, must comply with the Common Grant Rules’ provisions concerning participation by small and minority firms and women’s business enterprises. FTA believes it is possible to comply with both the DOT’s DBE regulations and the Common Grant Rules, because the Common Grant Rules for participation by small and minority firms and women’s business enterprises do not require fixed goals or actions, such as extending the reach of DBE program requirements to all minority firms and women’s business enterprises that would not otherwise qualify for inclusion under DOT’s DBE regulations. These regulations contain no provisions requiring them to be mutually exclusive.

##### Paragraph 2.a(7)—Sensitive Security Information

One commenter asked whether the Federal “Protection of Sensitive Security Information” requirements of 49 U.S.C. section 40119(b) and its implementing DOT regulations,

“Protection of Sensitive Security Information,” 49 CFR Part 15, and 49 U.S.C. 14(s) and its implementing Department of Homeland Security (DHS) regulations, “Protection of Sensitive Security Information,” 49 CFR Part 1520, actually apply to FTA assisted procurements and must be included in third party contracts. The commenter believes those regulations are targeted mainly on airlines.

While recognizing the focus on airline security, FTA has determined that these laws and regulations do apply to public transportation agencies and other FTA recipients that have sensitive security information, such as information related to vulnerability assessments (including any information addressing vulnerabilities or corrective actions) conducted after September 11, 2001, and other information covered by the regulations. Therefore, FTA’s view is that recipients must include requirements for compliance with those regulations in their third party contracts to assure that their contractors will take the necessary steps to protect any sensitive security information within their control.

This determination is based on the DHS Interim Final Rule issued in 2004 that extended sensitive security information protections to all forms of transportation coupled with the Transportation Safety Administration and DOT amendments to their regulations removing limiting references to “aviation or maritime” in their regulations at 49 CFR Parts 1520 and 15, respectively. *See*, 70 FR 1379, January 7, 2005.

##### Paragraph 2.a(8)—Seat Belt Use

One commenter asked for a model contract clause for Seat Belt Use with flowdown requirements in the final circular or FTA’s BPPM. We have not included a model clause in the final circular but will draft one for inclusion in the BPPM.

##### Subsection 2.b—Administrative Restrictions on the Acquisition of Property and Services

Notably we have re-arranged the format of this subsection to group topics for easier usage in conjunction with the new checklists we have included in Appendix C.

##### Paragraph 2.b(3)—Period of Performance

Four commenters objected to the period of performance provisions in the proposed circular. One commenter found our period of performance discussion confusing. We have restructured that discussion as

requested. Two other commenters objected to our statement that the third party contract terms be no longer than “minimally necessary” as unduly restrictive and not found in applicable law. Our response is that this is not a new standard. In fact, FTA Circular 4220.1E, the predecessor to the final circular, also provided that, “Grantees are expected to be judicious in establishing and extending contract terms no longer than minimally necessary to accomplish the purpose of the contract.” We understand, however, that if a recipient takes that guidance to an extreme, allowing no reasonable period to accommodate even small performance delays, then the guidance would be undesirable. We have therefore removed the “minimally necessary” standard, replacing it with guidance that the recipient is expected to establish a period of performance consistent with “the time necessary to accomplish the purpose of the contract.”

Four commenters also objected to the position that every time extension would constitute an out-of-scope change requiring a sole source justification. One commenter seems to believe that we would treat all time extensions not contemplated in the original contract as out-of-scope changes. This provision, which is included in FTA Circular 4220.1E, is not new. Nevertheless, we agree that a time extension can sometimes be a legitimate remedy in circumstances beyond the recipient’s control, and should not in all cases be considered an out-of-scope change. In other instances, however, the circumstances surrounding other time extensions, especially those in which significant new deliverables would be added, would be an out-of-scope change. We have revised the final circular accordingly.

**Paragraph 2.b(5)—Payment Provisions**  
**Subparagraph 2.b(5)(b)—Advance Payments**

One recipient pointed out that prohibiting a recipient from using local share funds for advance payments without first obtaining FTA’s consent is unfair, particularly if no Federal assistance is at risk. We agree, and have modified the paragraph to remove the prohibition for projects having automatic preaward authority or projects having some form of preaward authority.

Another recipient asked for more examples of allowable pre-award expenditures. We agree, and have identified additional examples in the

final circular, noting that the examples given are not all-inclusive.

**Paragraph 2.b(6)—Protections Against Performance Difficulties**

**Subparagraph 2.b(6)(a)—Changes**

One commenter emphasized the need for changes clauses. We have strengthened our recommendations that recipients include changes clauses in their contracts. We recognize, however, that a recipient may only be able to include a contract provision requiring the contractor to consider a change rather than demand a change. Every recipient may not have the economic leverage to compel a third party contractor to continue contract work until it is assured payment and other terms under which it must work. We do expect the recipient to include changes and changed conditions clauses that provide for both parties to negotiate in good faith about desirable changes.

**Subparagraph 2.b(6)(b)—Remedies**

**Sub-subparagraph 2.b(6)(b)1—Liquidated Damages**

Four commenters requested changes to the liquidated damages provisions in the proposed circular. Two commenters recommended that acceptable methods of calculating liquidated damages, in addition to time, be acknowledged as acceptable. We agree, and the final circular includes additional methods of calculating liquidated damages. Another commenter recommended that we substitute the proposed circular’s statement that “the rate and measurement period may not be excessive,” with the established standard for liquidated damages “that the measure of damages must be calculated to reasonably reflect the costs estimated to be incurred by the recipient should the standard not be obtained, and that the procurement file should contain a record of the calculation and rationale.” We agree, and have made that change. Another commenter asked how we expect a recipient to document the reasonableness of the liquidated damages it intends to use. We have included provisions in the final circular explaining that FTA expects the recipient to calculate a rate and measurement standard that reasonably reflects the costs should the standard not be met, and expects the recipient to include this information in its solicitation and contract. We have also added a discussion in Chapter VII of how liquidated damages might, in certain situations, foster settlements.

**Subsection 2.c—Socio-Economic Requirements for the Acquisition of Property and Services**

**Paragraph 2.c(1)—Labor**

**Subparagraph 2.c(1)(a)—Wage and Hour Requirements**

Two commenters pointed out that the threshold for the wage and hour requirements of the Contract Work Hours and Safety Standards Act has been amended to apply to contracts of \$100,000 or more. We agree, and the final circular includes that change.

**Subparagraph 2.c(1)(b)—Fair Labor Standards**

Consistent with the FTA Master Agreement, we added a reminder that the Fair Labor Standards Act protects employees engaged in commerce.

**Paragraph 2.c(2)—Civil Rights**

**Subparagraph 2.c(2)(c)—Environmental Justice**

We added a subparagraph reminding the recipient of Federal Environmental Justice provisions.

**Subparagraph 2.c(2)(d)—Limited English Proficiency (LEP)**

We added a subparagraph reminding the recipient of Federal Limited English Proficiency provisions.

**Subparagraph 2.c(2)(e)—Nondiscrimination on the Basis of Disability**

**Sub-subparagraph 2.c(2)(e)3—DOT Public Transportation Regulations Implementing Section 504 and the ADA**

We consolidated references to the major Federal regulations that describe the various requirements for public transportation services to individuals with disabilities, and provided some examples of their application.

**Subparagraph 2.c(2)(f)—Electronic Reports and Information**

One commenter asked us to clarify whether the requirement to use accessible electronic formats when delivering reports would apply only to third party contracts for delivery of reports, or also to other information in electronic format that the recipient intends to provide to FTA. We have revised the paragraph on electronic reports and information to clarify that all information submitted to FTA must be provided in accessible formats.

**Paragraph 2.c(3)—Environmental Requirements****Subparagraph 2.c(3)(f)—Recycled Products**

One commenter asked FTA to post on its Web site a link to EPA's Web site about recovered materials advisory notices. We have included the EPA Web site in the final circular.

**Paragraph 2.c(5)—Preference for U.S. Property—Buy America**

One commenter pointed out that the proposed circular's description of FTA's Buy America requirements omitted discussion of the \$100,000 threshold. We agree, and have included this information in the final circular. We have also revised the Buy America provisions for the final circular to clarify that FTA's Buy America requirements apply to property delivered to the recipient, but not to property acquired by a contractor for use in performing contract work if the property used is not delivered to the recipient.

**Subsection 2.d—Technical Restrictions on the Acquisition of Property and Services****Paragraph 2.d(3)—Use of \$1 Coins**

One commenter objected to the Presidential \$1 Coin Act of 2006 requirement that each FTA-assisted public transportation service property that uses coins or currency to be fully capable of accepting and dispensing \$1 coins because it is likely to cause an undue hardship on rural public transportation agencies because they will need to either retrofit existing equipment, including farebox and ticket dispensing equipment, or purchase new equipment. The Department of Treasury is implementing those requirements, and FTA lacks the authority to waive them.

**Subsection 2.e—Rolling Stock—Special Requirements****Paragraph 2.e(8)—In-State Dealers**

One commenter asked how we will administer the SAFETEA-LU amendment to 49 U.S.C. 5325 providing that bus purchases may not be restricted to in-State dealers. The commenter's concern is focused on the conflict that would arise if State law limits purchases of motor vehicles to in-state dealers, while 49 U.S.C. 5325(i) prohibits the limitation. The commenter points out that recipients must comply with Federal law as well as State law. We agree that Federal laws that appear to conflict with similar State laws can cause problems to FTA's recipients.

However, 49 U.S.C. 5325(i) preempts conflicting in-state dealer requirements contained in State laws.

**Paragraph 2.e(10)—Five-Year Limitation**

One commenter asked how FTA plans to enforce the five-year limitation on rolling stock contracts, and whether FTA will require the recipient to prepare a five-year needs document for its contract files. Our response is that FTA has considerable discretion to take actions to determine and enforce compliance with the statutory requirements in its enabling legislation. We believe it useful for the recipient to have documentation in its files that can justify any actions that might call into question the recipient's compliance with statutory requirements of any type, including compliance with the five-year limitation on rolling stock contracts.

**Subsection 2.f—Public Transportation Services—Special Requirements****Paragraph 2.f(1)—Protections for Public Transportation Employees**

Consistent with the FTA Master Agreement, we added a reminder that the Fair Labor Standards Act protects employees engaged in commerce.

**Subsection 2.g—Architectural Engineering and Related Services—Special Requirements**

We received three comments about procurements of architectural, engineering, and related services as specified in 49 U.S.C. 5325(b)(1).

**Paragraph 2.g(2)—Relation to Construction**

Two commenters pointed out inconsistencies between Chapter IV and Chapter VI of the proposed circular in determining when qualifications-based procurement procedures must be used and may not be used. We have re-drafted provisions of both chapters to stress that qualifications-based procurement procedures may be used only when the services are directly in support of, directly connected to, directly related to, or lead to construction, alteration, or repair of real property.

**Subparagraph 2.g(2)(c)—Type of Contractor Not Determinative**

One commenter also suggested that we state that certain architectural engineering firms have the capability of performing services beyond traditional A&E services. We have amended both chapters for consistency, so that the final circular emphasizes that it is the nature of the work to be performed and its relationship to construction, not the nature of the prospective contractor,

that determines whether qualifications-based procurement procedures must be used or whether qualifications-based procurement procedures may not be used.

Another commenter asked how these qualifications-based procurement requirements would apply to various activities undertaken in an Intelligent Transportation System (ITS) project involving construction or improvements to real property. The final circular now contains a list of some of the activities likely to take place during the implementation and development of an ITS project, and have identified those in which qualifications-based procurement procedures must be used and those in which qualifications-based procurement procedures may not be used.

**Subsection 2.h—Construction—Special Requirements****Paragraph 2.h(1)—Bonding****Subparagraphs 2.h(1)(f)—Excessive Bonding**

Three commenters questioned whether FTA would accept State bonding policies that differ from Federal requirements. We have amended the proposed circular to affirm that we will not challenge State or local bonding policies that exceed FTA's requirements. One commenter requested that we address the use of bonding for acquisitions beyond construction, commenting on its expense and usefulness. We have amended the proposed circular to explain that while bonding is expensive, bond requirements can be useful if the recipient has a material risk of loss because of a failure of the prospective contractor. This is to prevent potential risks associated with contractor bankruptcy or financial failure at the time of partially completed work. Another commenter urged us not to encourage recipients to submit each bonding request that exceeds the limits described in the proposed circular to FTA for approval. We agree, and the final circular now reminds the recipient that it may contact the Regional Administrator for the region administering the project for approval of its bonding policies if it chooses to do so. If a recipient's bonding policies far exceed FTA or State or local requirements to an extent that competition is reduced, FTA cannot assure the availability of FTA assistance to support the costs of that acquisition.

**Paragraph 2.h(3)—Value Engineering**

One commenter cautioned us about our statement that "FTA will not approve a New Starts grant application

for final design funding or a full funding grant agreement until value engineering is complete.” While that sentence is based on the requirements of 49 U.S.C. 5309, we agree that restrictions pertaining to New Starts projects should not be included in the final circular in a way that might become invalid due to later changes in law. Therefore, we have softened the statement to caution that value engineering can be required as a pre-requisite for some FTA assistance awards.

Another commenter asked that we include a definition of “value engineering” that distinguishes it from cost-cutting. We agree, and have added a definition to Chapter I, section 5 that will be used consistently in our revised circulars.

#### Paragraph 2.h(5)—Prevailing Wages

Two commenters expressed their belief that, along with raising the threshold of the Contract Work Hours and Safety Standards Act to \$100,000, the threshold of the Davis-Bacon Act requiring prevailing wages to be paid for construction labor had also been raised to \$100,000. FTA disagrees. The Davis-Bacon Act has not been so amended. The Davis-Bacon Act applies its prevailing wage requirements to “every contract in excess of \$2,000 . . .” 40 U.S.C. 3142.

#### Paragraph 2.h(9)—Preference for U.S. Property—Buy America

Three commenters objected to FTA’s Buy America provisions for construction projects as overbroad. We agree, and the final circular now includes information about the \$100,000 threshold. The final circular also clarifies FTA’s position that its Buy America requirements apply to property delivered to the recipient, but not to property acquired by a contractor for use in performing contract work if that property the recipient used is not delivered to the recipient under their contract.

#### Subsection 2.i—Research, Development, Demonstration, Deployment, and Special Studies—Special Requirements

##### Paragraph 2.i(1)—Patent Rights

One commenter asked whether FTA will grant a waiver of patent rights when the recipient wants the source code being created to be an open source so that others will be encouraged to use that source code; or when the recipient wants to contract with an entity that has already created an open source code to tailor that code and allow the tailored code also to become open source. At the outset, FTA cannot waive another party’s patent rights. While Federal law

does not generally authorize a Federal agency to require inventors to make their federally assisted inventions available to the public at large, FTA can and does support projects in which participants agree to make rights to use an invention developed or reduced to practice under an FTA project broadly available.

##### Paragraph 2.i(2)—Rights in Data

One commenter took exception to FTA’s rights in data policy as being inconsistent with the Common Grant Rules. For data developed under a research, development, demonstration, or special studies project, FTA’s general policy is to obtain sufficient rights to permit FTA to make either FTA’s license in the copyright to the subject data or a copy of the subject data to which it would be entitled under the Common Grant Rules available to any FTA recipient, subrecipient, third party contractor, or third party subcontractor. FTA obtains these rights in data through the recipient’s agreement set forth in the FTA Master Agreement. If FTA is not able to secure sufficient rights in data derived from the research projects it supports and is unable to make that data available for the general benefit of transportation, then certain research and development projects might not be worth pursuing.

The commenter then requested an explanation of those contracts excepted from these requirements. FTA does not seek these broad rights in data for other than research, development, demonstration, or special studies projects. For example, FTA does not seek greater rights in data supplied under its capital projects than those rights provided in the Common Grants Rules, because FTA is not providing Federal assistance for the research and development of property or services at the time the property or services are eligible for capital funding. Due to questions that arose in connection with licensing automatic data processing equipment or programs for the recipient’s use, if FTA capital assistance is used to support those costs, then FTA would not take the greater rights. In summary, FTA does not seek greater rights in data used in projects for which FTA did not directly finance the research and development costs of that data.

##### Paragraph 2.i(3)—Export Control

One commenter requested that we provide a citation to the Export Control regulations referenced in the proposed circular. We agree, and have added the requested citation to the final circular.

#### Subsection 2.j—Audit Services

Three commenters asked for more information about obtaining audit information from other Federal agencies. We have included information about Federal agencies that work with various types of recipients and contractors to establish indirect cost rates consistent with FAR cost principles. It is our understanding that those Federal agencies are charged with those responsibilities and are expected to fulfill them. While a Federal agency might not perform all audits for recipients of Federal assistance, the Federal agency charged with the responsibility for establishing indirect cost rates and other similar functions would be expected to provide the recipient sufficient data that the recipient’s private or internal auditors could perform their duties properly. When we revise our BPPM, we will include more information.

#### E. Chapter V—Sources

##### Section 1—Force Account

Four commenters questioned our inclusion of force account as a source from which a recipient could obtain services. Three commenters asserted that the use of force account is a grants management issue, not a procurement issue. Understanding our decision to discuss force account in contrast with third party contracting, one commenter recommended that we clarify that the final circular does not apply to force account work. We agree, and the final circular states that its procurement guidance does not apply to a recipient’s force account work.

##### Section 3—Joint Procurements, and

##### Section 4—State or Local Government Purchasing Schedules or Purchasing Contracts

Several commenters informed us that the proposed circular’s descriptions of joint procurements and procurements through State or local government purchasing schedules or contracts is confusing, and recommended that we reinstate the provisions of FTA Circular 4220.1E. Two commenters, for example, pointed out that joint procurements are unlikely to be undertaken using State or local government purchasing schedules. We agree, and we have revised the sections on Joint Procurement as well as the section on State or Local Government Purchasing Schedules or Purchasing Contracts for clarity.

##### Section 3—Joint Procurements

The final circular defines “joint procurement” to mean a method of contracting in which two or more

purchasers agree from the outset to use a single solicitation document and enter into a single contract with a vendor for delivery of a property or services in a fixed quantity, even if expressed as a total minimum and total maximum. The final circular emphasizes that the contract resulting from a joint procurement is not drafted with the understanding that its terms will be made available to purchasers other than the original parties at a later date. As with all FTA assisted contracts, the recipient must comply with all applicable Federal requirements.

One commenter asked whether a "Cooperative Purchasing Program" is the same as a joint procurement. We used the term "Cooperative Purchasing Program" to refer to the GSA Cooperative Purchasing Program for the Federal Government. The final circular now identifies that program as the "GSA's Cooperative Purchasing Program" to preclude confusion with joint procurements.

#### Subsection 3.a—Use Encouraged

One commenter suggested that discussing the advantages of joint procurement as being able to "exactly match" each participating recipient's requirements is misleading, and informs us that in many cases customizing would be required. We agree, and we removed the term "exactly match."

#### Section 4—State or Local Government Purchasing Schedules or Purchasing Contracts

In this section, we have established a definition of "state or local government purchasing schedule" to mean an arrangement that a State or local government has established with multiple vendors in which those vendors agree to provide essentially an option to the State or local government to acquire specific property or services in the future at established prices. If the State or local government wishes to permit others to use the schedules, the State or local government might seek the agreement of the vendor to provide the listed property or services to others with access to the schedules, or it may permit the vendor to determine whether it wishes to do so. This arrangement has two parts: (1) Establishing the schedule, and (2) acquiring property and services from the schedule. FTA does not provide Federal assistance to a State or local government when it is establishing its schedule. FTA assistance is provided after the schedule is established and a recipient acquires property or services from that schedule.

#### Subsection 4.a—Use Encouraged

One commenter asked how State or local government schedules or purchasing agreements could be available to other parties. The extent to which a State or local government chooses to make its purchasing agreements or schedules available rests with the State or local government that has established the schedule or purchasing contract.

#### Subsection 4.b—All FTA and Federal Requirements Apply

Several commenters expressed the view that it would be impossible for a recipient to use State or local government schedules or purchasing agreements if FTA requirements were to apply to those procurements. FTA recognizes that when a State or local government establishes a schedule, it has not contemplated the need to comply with FTA's third party procurement requirements. For example, a State or local government generally does not consider matters such as FTA Buy America standards at the time its schedules are introduced. A recipient that seeks to use FTA assistance to acquire property or services from a State or local government purchasing schedule, however, must comply with applicable FTA requirements. To do so, the recipient is expected to use competition by seeking bids from three or more vendors listed on the schedule, and then determine whether the property or services as offered would comply with Federal requirements. Among other things, the recipient would need to determine whether a product sought from the schedule would qualify as domestic or foreign under our Buy America standards, if the product would be shipped by ocean-going vessel or by air for compliance with Federal cargo preference requirements, if a new bus had been tested and whether preaward and post delivery review could be obtained, whether the property sought had been manufactured in accordance with environmental restrictions, and so forth. FTA is not able to waive Federal requirements beyond what is permissible under law. Only if the property or services listed on a State or local government purchasing schedule complies with FTA's requirements would the recipient be able to use FTA assistance to support the costs of that property or services.

One commenter asked us to describe methods of meeting FTA requirements when acquiring property and services through a State or local government purchasing schedule. While the

recipient would not prepare an open market solicitation for the property or services when attempting to use a State or local government purchasing schedule, the recipient might choose to append the relevant Federal requirements to a purchase order and obtain the vendor's consent to those conditions as a prerequisite for using FTA assistance to support the costs of that property or those services. But whatever procedure the parties use, requirements applicable to FTA procurements cannot be waived.

#### Section 6—Federal Supply Schedules

##### Subsection 6.d—Competition and Price Reasonableness

One commenter asked whether State and local governments must verify competition was used for the procurement of items listed on GSA schedules before using those schedules. Our response is that there is no need to verify that competition was used for the property and services listed on GSA schedules prior to using the schedules. Vendors listed on GSA schedules should be treated as prospective sources. Therefore, a recipient is generally expected to select at least three vendors from a GSA schedule and seek proposals.

#### Section 7—Existing Contracts

##### Subsection 7.a—Permissible Actions

##### Paragraph 7.a(1)—Exercise of Options

##### Subparagraph 7.a(1)(c)—Awards Treated as Sole Source Procurements

One commenter requested that we explain what we mean by "failure to evaluate the option." There is no requirement to solicit for options or obtain firm option prices as part of a solicitation. If option prices are obtained, the recipient need not evaluate those option prices in determining the underlying contract award. However, if the recipient does not evaluate options when the contract was awarded, it may not exercise the options at a later date unless it can justify a sole source award.

Two commenters objected to our position that negotiating a lower option price would always result in a sole source award requiring justification. FTA recognizes that it is reasonable to permit the price of an option to be reduced if the lower price can be reasonably determined from the terms of the original contract, or if that price results from actions that can be reliably measured, such as changes in Federal prevailing labor rates, or as authorized under State or local law. One of the commenters also objected to our view

that negotiating a higher option price would always result in a sole source award requiring justification. FTA has not changed its position. If only a higher price is available, then competition would normally be required unless the higher price results from actions that can be reliably measured, such as increases in Federal prevailing labor rates, or as authorized under State or local law.

One commenter objected to our requirement for contracts to include maximum quantities. The commenter believes that requiring maximum quantities could adversely affect the establishment of State or local government purchasing schedules. FTA disagrees. FTA does not finance the establishment of State or local purchasing schedules, so that when State or local governments and their vendors enter into contracts for their purchasing schedules, those contracts are not subject to FTA requirements. It is only when a recipient intends to use FTA assistance to acquire property or services that FTA requirements are imposed. Thus if an FTA recipient seeks to acquire an indefinite amount of property or services through a State or local purchasing schedule, it would need to specify a maximum quantity as well as a minimum quantity.

#### Paragraph 7.a(2)—Assignment of Contract Rights

##### Subparagraph 7.a(2)(a)—Acquisition Through Assigned Contract Rights

Three commenters objected to our position that a recipient seeking an assignment of contract rights from another recipient must ensure that the assigning recipient “has not improperly expanded the quantity of property or services to be delivered under its original contract.” The purpose of this provision is to express FTA’s intention that the recipient seeking the assignment would review the assigning recipient’s contract to determine whether the total quantities sought would not exceed the limits of that original contract. We agree that a recipient seeking an assignment of contract rights cannot determine whether or not the assigning recipient specified greater quantities than the assigning recipient needed at the time of its original solicitation. We have revised this guidance to clarify FTA’s concerns.

#### Subsection 7.b—Impermissible Actions

##### Paragraph 7.b(2)—Cardinal Changes

One commenter asked us to provide more guidance about cardinal changes and not use the terms “in-scope” and “out-of-scope” as determinative of

contract changes. The commenter warned that if the contract provisions are read without consideration of their context, minor changes not expressly addressed or even contemplated under the contract when it was signed might be considered out-of-scope changes. Minor changes, even if considered “out-of-scope” because they are not addressed in the contract, should not be considered “cardinal” changes. The commenter recommended that a cardinal change be described as “a major deviation from the original purpose of the work or the intended method of achievement,” rather than an “out-of-scope change.” Although the Federal Court of Claims coined the term “cardinal change” to describe changes that are beyond the scope of the contract, we agree that some changes necessary to fulfill the original intent of the contract might not be expressly included in the contract. Therefore, we have adopted the commenter’s recommendation, and the final circular contains revised provisions.

One commenter wanted many more examples and much more guidance. Such guidance can be found in FTA’s BPPM at the FTA Web site: [http://www.fta.dot.gov/funding/thirdpartyprocurement/grants\\_financing\\_6037.html](http://www.fta.dot.gov/funding/thirdpartyprocurement/grants_financing_6037.html) and “Frequently Asked Questions” at the FTA Web site: [http://www.fta.dot.gov/funding/thirdpartyprocurement/grants\\_financing\\_6039.html](http://www.fta.dot.gov/funding/thirdpartyprocurement/grants_financing_6039.html).

Two commenters objected to the example of an engine change or similar large component change as a cardinal change per se, particularly since it might be necessary to obtain a compatible new engine if the old engine is no longer available. FTA’s view is that if a major component of a vehicle is no longer available, the recipient should use competition to obtain a compatible substitute. In some cases, the recipient would need to enter into a contract with the original manufacturer if installation of the needed component would be complicated, but in other cases, similar components available from more vendors might be usable and available. If the vehicle has not been fabricated when a specific major component became obsolete, whether using a different component would cause a cardinal change would depend on the extent of the effect of that change. The final circular, however, states that the circumstances surrounding the need for changing major components will determine whether or not a change would be a cardinal change.

#### F. Chapter VI—Procedural Guidance for Open Market Procurements

We have also restructured Chapter VI so that the final circular consolidates provisions pertaining to the various procurement methods. Chapter VI of the final circular includes additional paragraphs to respond to unanticipated comments on the proposed circular. As a result, we have transferred some of the guidance originally included in other chapters of the proposed circular to Chapter VI of the final circular. Much of this chapter retains provisions substantially similar to their counterpart provisions in FTA Circular 4220.1E or its footnotes, with important exceptions discussed below.

#### Section 1—Competition Required

##### Subsection 1.b—Unsolicited Proposals

Two commenters pointed out that the unsolicited proposal provisions of the proposed circular are too broad. FTA agrees that the proposed circular’s guidance could be misunderstood. The final circular now permits a recipient to use the same standards applicable to a Federal agency that must comply with the FAR.

#### Section 2—Solicitation Requirements and Restrictions

##### Subsection 2.a—Description of Property or Services

##### Paragraph 2.a(1)—What To Include

Four commenters objected to our admonition that “Detailed technical specifications should be avoided if at all possible in favor of performance specifications.” Two commenters pointed out that prohibiting detailed technical specifications could make fleet management more difficult, while one commenter informed us that the prohibition would conflict with design-bid-build construction contracting procedures. We agree in part, and have revised the discussion of detailed technical specifications so that the final circular only expresses a preference for performance or functional specifications, coupled with a statement explaining that there is no flat prohibition against detailed technical specifications when appropriate. The final circular also includes a statement referencing Common Grant Rules requirements.

##### Paragraph 2.a(2)—Quantities Limited to the Recipient’s Actual Needs

One commenter recommended that a discussion of the recipient’s needs be placed in a different circular or policy document. We disagree. It is important to remind recipients that they should



not contract for excess quantities, particularly because doing so can increase costs and provide more opportunities for them to assign their contract rights to others, a practice FTA does not favor.

#### Paragraph 2.a(4)—Prohibitions

##### Subparagraph 2.a(4)(d)—Retainer Contracts

Two commenters objected to our prohibition against a recipient making noncompetitive awards to any person or firm on a retainer contract without providing further justification. The commenters reminded us that many recipients award retainer contracts based on competition. They expressed their view that this prohibition would unduly limit the recipient's flexibility to acquire the property and services it needs. We agree in part, and the final circular now prohibits only noncompetitive awards to persons or firms on retainer contracts if those awards are not for the property or services specified for delivery under the retainer contracts.

##### Subparagraph 2.a(4)(e)—Excessive Bonding

One commenter requested more discussion of bonding. The final circular now explains more fully our objections to unnecessary bonding as unduly restrictive of competition.

##### Subparagraph 2.a(4)(f)—Brand Name Only

Two commenters requested us to state that specifying a brand name product without stating salient characteristics that would allow for an equivalent may be acceptable as a proper sole source award. We have not adopted that recommendation, as we believe it would encourage specifications based on brand names without descriptions of salient characteristics. The final circular, however, includes a modified discussion of "brand name only" matters indicating that prohibitions against the use of "brand name only descriptions" would apply in some situations.

##### Subparagraph 2.a(4)(g)—In-State or Local Geographic Restrictions

##### Sub-subparagraph 2.a(4)(g)3—Major Disaster or Emergency Relief

One commenter recommended that we revise our discussion of exceptions to in-state or geographical preferences for major disaster or emergency relief projects, making special reference to the Stafford Act's preference for organizations, firms, and individuals residing or doing business primarily in

the affected area. We agree, and the final circular includes this change.

##### Subparagraph 2.a(4)(h)—Organizational Conflicts of Interest

One commenter recommended that the organizational conflict of interest subparagraph be revised for clarity. We agree, and have made that revision.

##### Sub-subparagraph 2.a(4)(h)2—Remedies

Three commenters objected to the proposed circular's provisions that appeared to exempt consortia from organizational conflict of interest restrictions. When drafting those provisions, we were attempting to distinguish arrangements in which a contract would be awarded for both initial and follow-on work from arrangements in which a contract would be awarded for only the initial work. The final circular contains revised provisions stressing that FTA expects the recipient to analyze each planned acquisition for potential organizational conflicts of interest as early in the acquisition process as possible, and to take appropriate measures to avoid, neutralize, or mitigate them before contract award.

##### Subparagraph 2.a(4)(i)—Restraint of Trade

One commenter asked why noncompetitive pricing is included within the same category as matters within the recipient's control. Both Common Grant Rules provide that noncompetitive pricing practices between firms or between affiliated companies are practices that in some situations can be restrictive of competition. Consequently, the recipient should be alert to situations evidencing the possibility that bidders or offerors seeking contracts might be engaging in noncompetitive pricing practices. Questionable practices would include submissions of identical bid prices for the same products by the same group of firms. Other questionable practices would be reflected in an unnatural pattern of awards that had the cumulative effect of apportioning work among a fixed group of bidders or offerors.

##### Subsection 2.c—Contract Type Specified

##### Paragraph 2.c(1)—Typical Contract Types

##### Subparagraph 2.c(1)(a)—Firm Fixed Price

One commenter recommended that we include a discussion of firm fixed price contracts with economic price adjustments. We agree, and revised the

final circular to state that a firm fixed price contract may include an economic price adjustment provision, incentives, or both.

#### Section 3—Methods of Procurement

##### Subsection 3.a—Micro-Purchases

We received three comments about micro-purchases. Two commenters advised us that the discussion in the proposed circular was too detailed, and specifically recommended that documentation procedures be moved to the BPPM. We believe a reasonably comprehensive discussion of micro-purchases is necessary in view of the opportunities for misunderstanding.

One commenter recommended that we remove discussions of dollar limits in connection with micro-purchases, mainly because States or local jurisdictions may have lower limits. We disagree. Although we stated in the proposed circular that the recipient could establish lower thresholds for micro-purchases, the final circular emphasizes that the recipient may set lower thresholds for micro-purchases in compliance with State and local law, or otherwise as it considers appropriate.

The same commenter asked how Davis-Bacon requirements relate to the dollar value of a procurement unless it is FTA's position that contracts subject to Davis-Bacon cannot be procured as micro-purchases. In its discussion of micro-purchases, the proposed and final circulars are cautioning the recipient that even though it may use micro-purchase procedures for procurements of construction, it still must comply with Davis-Bacon prevailing wage requirements.

One commenter asked whether the Service Contract Act's threshold of \$2,500 should be mentioned in connection with micro-purchases. We have not discussed the Service Contract Act because the only FTA recipient that must comply with the Service Contract Act is the District of Columbia.

##### Subsection 3.c—Sealed Bids (Formal Advertising)

##### Paragraph 3.c(1)—When Appropriate

One commenter pointed out that our discussion of sealed bidding gives the impression that sealed bidding can only be used for acquisition of property and construction. We agree that sealed bidding can be used for the acquisition of other types of property and services, and the final circular now clarifies that matter.

**Subparagraph 3.c(1)(d)—Price Determinative**

One commenter recommended that we clarify the term “price-related factors” in our discussion of contract price in the context of sealed bidding procurements. We agree, and revised the final circular to identify transportation costs, life cycle costs, and discounts expected to be taken as examples of price-related factors.

**Subparagraph 3.c(1)(e)—Discussions Unnecessary**

The same commenter recommended that we clarify this subparagraph to distinguish between when discussions are acceptable, such as before receipt of bids, in negotiations after receipt of bids, and in pre-award responsibility determinations, and when discussions are not acceptable, such as after receipt of bids. We agree, and made appropriate changes.

**Subsection 3.d—Competitive Proposals (Request for Proposals)**

The same commenter also recommended that we change the wording of the standard for using competitive proposals to “there is an expectation that there is more than one source willing and able to submit an offer, or proposal.” We agree, and the final circular contains appropriate changes.

Two commenters requested that we clarify that only one of the four pre-conditions justifying the use of competitive proposals need be present. We agree, and the made that revision.

**Paragraph 3.d(1)—When Appropriate****Subparagraph 3.d(1)(a)—Type of Specifications**

One commenter recommended that we support the use of negotiations when performance specifications are used. Two commenters recommended that we delete “unavailability of adequate specifications or descriptions” as a standard justifying use of competitive proposals. We have adopted those recommendations, and the final circular now include a statement that detailed technical specifications may be used if other circumstances, such as the need for discussions or factors other than price alone should determine contract award.

**Subparagraph 3.d(1)(b)—Uncertain Number of Sources**

The same commenter expressed the view that uncertainty about whether more than one offeror will submit a proposal is not in itself a reason to require the use of competitive proposals

if State and local laws permit the recipient to negotiate if it only receives a single bid in response to a formally advertised procurement. The commenter then recommended that we delete the standard or explain it more fully. We agree, and have explained the standard more fully.

**Subparagraph 3.d(1)(c)—Price Alone Not Determinative**

One commenter asked us to clarify the distinction between price-related factors in sealed bidding and award criteria for competitive proposals. We agree, and made the necessary revision.

**Subparagraph 3.d(1)(d)—Discussions Expected**

The same commenter asked us to make the distinction between discussions permitted in sealed bidding and the discussion/negotiation process in competitive proposals. We agree, and made the revision.

**Paragraph 3.d(2)—Procurement Procedures****Subparagraph 3.d(2)(f)—Best Value**

That commenter also requested us to amend the discussion of “Best Value” to stress that the evaluation factors for a specific procurement should reflect the subject matter and the elements that are most important to the recipient. We agree, and made the revision.

**Subsection 3.e—Two-Step Procurement Procedures**

One commenter recommended that competitive negotiation be included in the discussion of two-step procurement processes. We agree, and added guidance about proposals as well as bids in our general discussion of two-step procurement procedures.

**Subsection 3.f—Architectural Engineering Services and Other Services**

Again as in Chapter IV, the same commenter suggested that we state that certain architectural engineering firms have the capability of performing services beyond traditional A&E services. We have revised both Chapter VI and Chapter IV of the final circular for consistency, emphasizing that the nature of the work to be performed and its relationship to construction, not the nature of the prospective contractor, determines whether qualifications-based procurement procedures must be used or may not be used.

**Paragraph 3.f(1)—Qualifications-Based Procurement Procedures Required**

One commenter reminded us to resolve the inconsistencies between Chapter IV and Chapter VI of the

proposed circular in designating the relationship to real property compared with the relationship to construction as the standard for determining when qualifications-based procurement procedures must be used and may not be used. We have revised both Chapter VI and Chapter IV of the final circular to stress that qualifications-based procurement procedures may be used only when the services are directly in support of, directly connected to, directly related to, or will lead to construction, alteration, or repair of real property.

Another commenter requested us to provide examples of activities related to a project involving “improvements to real property” that would require the use of qualifications-based procurement procedures. The final circular includes several examples.

**Paragraph 3.f(2)—Qualifications-Based Procurement Procedures Prohibited**

The same commenter also requested us to provide examples of “improvements to real property” for which qualifications-based procurement procedures would be prohibited. We agree, and have added several examples.

**Paragraph 3.f(5)—Audits and Indirect Costs****Subparagraph 3.f(5)(d)—Prenotification: Confidentiality of Data**

Two commenters asked us to clarify the confidentiality requirements for cost or rate data used to determine indirect cost rates for architectural engineering contracts, particularly in light of the fact that States have widely differing “Open Records” type laws. FTA recognizes that some State laws might make it difficult for a recipient to protect cost and rate data pertaining to its contractors. Nevertheless, FTA’s enabling legislation at 49 U.S.C. 5325(b)(3)(D) requires a recipient to treat any cost or rate data used to determine indirect cost rates for architectural engineering contracts as confidential. Section 5325(b)(3)(D) also prohibits the recipient from making that data accessible or providing it to another party unless the audited firm provides the recipient written permission to do so. Moreover, if prohibited by law, that cost and rate data may not be disclosed under any circumstances. FTA is not authorized to waive the requirements of 49 U.S.C. 5325(b)(3)(D). Therefore, the final circular recommends that before requesting or using cost or rate data, not only should a recipient notify the affected firm, but it also must obtain permission to provide that data in

response to a valid request under a State's "Open Records" type law.

#### Subsection 3.g—Design-Bid-Build

One commenter asked us to use an outline format for this subsection. We agree, and have revised the format of this subsection for greater consistency with the formats generally used in the final circular.

The same commenter requested us to revise the subsection to emphasize that two contracts are awarded when a recipient uses the design-bid-build procurement method. We agree, and made that revision.

#### Subsection 3.h—Design-Build

In response to comments about format and clarity, we revised the final circular for greater consistency with the formats generally used in the final circular.

#### Subsection 3.i—Other Than Full and Open Competition

##### Paragraph 3.i(1)—When Appropriate.

##### Subparagraph 3.i(1)(b)—Sole Source

##### Sub-subparagraph 3.i(1)(b)1—Unique Capability and Availability

One commenter asked us to provide examples of unique capability and availability that justify a sole source procurement, pointing out that many vendors have unique capabilities that do not justify a sole source procurement. We do not believe specific examples would be helpful and might further cause misunderstanding. In describing property or services that have unique capability and availability, we recognize that property or services with unique or innovative concepts, that have patents or restricted data rights, that would require substantial duplication costs, or would require unacceptable delay meet the standard of having unique capability and availability. Our position is that a unique or innovative concept qualifies as a sole source if it is 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. The property or services must also be available to the recipient only from one source and have not been available in the past to the recipient from another source. We believe situations in which prospective acquisitions are limited by patents or restricted data rights, substantial duplication costs, or requiring unacceptable delay can be readily recognized and need no further explanation.

##### Sub-subparagraph 3.i(1)(b)2—Single Bid or Proposal

Four commenters pointed out that in our discussion of the consequences of procurements resulting in a single bid or proposal, the proposed circular uses the terms "adequate" and "inadequate" in ways different from the BPPM's use of those terms. In short, the commenters requested that we adopt the standard that competition is "adequate" if a single bid or proposal is submitted through no fault of the recipient. We agree, and made that revision.

##### Subparagraph 3.i(1)(d)—Associated Capital Maintenance Item Exception Repealed

Two commenters asked why we omitted associated capital maintenance items as appropriate for sole source. When SAFETEA-LU was signed into law on August 10, 2005, it repealed the sole source procurement authority for associated capital maintenance items. Since then, an associated capital maintenance item must qualify under the same standards that would apply to other sole source acquisitions.

##### Paragraph 3.i(3)—Procurement Procedures

##### Subparagraph 3.i(3)(b)—Sole Source Justification

One commenter recommended that we require that a sole source justification must be prepared by an entity that can independently evaluate information provided by the recipient and prospective contractor. FTA agrees that independent sole source evaluations would be desirable, but believes it would be unrealistic to impose a firm requirement for independent evaluations. Requirements for independent sole source evaluations are not expressly authorized by our law or the Common Grant Rules, and may conflict with State or local procurement procedures.

#### Section 5—Incentive Costs and Payments

One commenter asked whether incentive payments are available only to contractors that provide accurate cost and ridership estimates in connection with a new fixed guideway capital project and to contractors that enable a new fixed guideway capital project to be completed for less than its original estimated cost. Another commenter objected to that limitation. We agree that incentive payments should not be limited to the two situations described. The final circular now contains a reference to the "Incentive Payments" information in "Frequently Asked

Questions" at the FTA Web site: [http://www.fta.dot.gov/funding/thirdpartyprocurement/faq/grants\\_financing\\_6148.html](http://www.fta.dot.gov/funding/thirdpartyprocurement/faq/grants_financing_6148.html).

#### Section—6 Cost and Price Analysis

##### Subsection 6.a—Cost Analysis

One commenter asks whether, as stated in the proposed circular, a cost analysis will be necessary in the case of a single bid or proposal when competition has been determined adequate because submission of only one bid or proposal was not the fault of the recipient, or whether a price analysis would be acceptable. FTA's position is that a cost analysis will be required in the case of a single bid or proposal that is not the fault of the recipient, except if a price analysis can be 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.

##### Paragraph 6.a(2)—Establishing Indirect Cost Rates

One commenter questioned whether the discussion about which entity must approve indirect cost rates applies to architectural engineering contracts. FTA did not intend these provisions to apply to architectural engineering contracts because architectural engineering contracts have their own statutory indirect costs requirements. We have revised this discussion and the final circular now states that the provisions of this paragraph do not apply to architectural engineering contracts.

##### Subparagraph 6.a(2)(b)—Contracts Exceeding \$5 Million

Rather than engage an outside auditor, one commenter has recommended that a recipient be permitted to use its internal audit staff to perform indirect costs when required for contracts exceeding \$5 Million. FTA disagrees. The purpose of using an outside entity is to obtain an objective review of the recipient's rates, profits, and other financial data related to a contract that must undergo cost analysis.

#### Section 7—Evaluations

##### Subsection 7.c—Evaluators

One commenter objected to the proposed circular's implied requirement that all proposal evaluations must be performed by auditors or financial management personnel, pointing out that for certain procurements, technical or public policy personnel should perform the evaluations. We agree that technical and public policy staff should participate in bid or proposal

evaluations and that a recipient may use auditors and financial management personnel as they see fit, and have made that revision to the final circular. We have also clarified that the recipient may contract for those services its staff are unable to perform.

#### Subsection 8—Contract Award

##### Subsection 8.a—Award to Other Than the Lowest Bidder

One commenter recommended that the recipient be advised to state its right to award the contract to other than the low bidder or offeror in its solicitation document. We agree, and the final circular has been revised accordingly.

##### Subsection 8.c—Rejections of Bids and Proposals

Three commenters recommended that the subparagraph discussing bid rejection should be expanded to apply to both bids and offers or proposals. We agree, and have made the revision requested.

#### *G. Chapter VII—Protests, Changes and Modifications, Disputes, Claims, Litigation, and Settlements*

This chapter consolidates FTA guidance pertaining to third party procurement protests with guidance pertaining to disagreements that may emerge during the course of a third party procurement. The chapter now includes discussions of protests, changes and modifications, disputes, claims, litigation, and settlements.

#### Section 1—Protests

Section 1 addresses FTA and the recipient's responsibilities pertaining to protests of third party contract decisions. These provisions are substantially similar to those in FTA Circular 4220.1E. It adds a new discussion of FTA's practice of reviewing only those protests of an "interested party," which must be an actual or prospective bidder or offeror with a direct economic interest in the third party contract award.

##### Subsection 1.a—The Recipient's Role and Responsibilities

##### Paragraph 1.a(2)—Responsibilities to FTA

##### Subparagraph 1.a(2)(a)—Timely Notification

Three commenters asked who the recipient should notify when it receives a third party contract protest. Our response is that FTA expects the recipient to report any current or prospective third party contract protest involving more than \$100,000, and any protests involving controversial or

highly publicized matters irrespective of amount in its next quarterly Milestone Progress Report, and at the next Project Management Oversight review, if any. If the recipient issues a protest decision adverse to the protester, FTA expects the recipient to notify 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, so that FTA can be prepared in case of an appeal. We included that information in the final circular.

##### Subsection 1.b—FTA's Role and Responsibilities

##### Paragraph 1.b(1)—Requirements for the Protester

##### Subparagraph 1.b(1)(a)—Qualify as an "Interested Party"

One commenter asked whether a subcontractor that has committed to be part of a team that prepared the proposal or bid would be eligible to qualify as an "interested party" and file a protest with FTA, or whether only a prime contractor or consultant would qualify as an "interested party." Our response is that a subcontractor does not qualify as an "interested party" that may file a protest with FTA because a subcontractor has only an indirect interest in the results of the procurement; moreover, a subcontractor does not submit bids or offers to the recipient. The final circular lists various entities that either qualify or do not qualify as an "interested party" that may file a protest with FTA. For example, an established consortium, joint venture, team, or partnership that is an actual bidder or offeror would qualify as an "interested party" that has a direct economic interest in the results of the procurement. An individual member of a consortium, joint venture, team, or partnership, acting solely for itself, however, would not qualify as an "interested party." An association or organization that does not perform contracts also would not qualify as an "interested party."

##### Paragraph 1.b(2)—Extent of FTA Review

In view of FTA's decision to limit its review of third party contract protests to a recipient's failure to have or to follow its protest procedures, a recipient's failure to review a complaint or protest, or allegations of violations of Federal law or regulations, one commenter complained that FTA's requirements for recipients are very detailed and impose additional administrative burdens on the recipient to report each protest to the FTA even if the protest does not

involve any of the areas that the FTA would review. We disagree. The Common Grant Rules for governmental recipients require the recipient "in all instances \* \* \* [to] \* \* \* disclose information regarding the protest to the awarding agency." FTA reserves the right to obtain as much information as it needs about each protest, although the amount of information it may request will vary depending on whether FTA is asked to participate in the costs of defending the protest and its resolution. The extent of information FTA may require will also vary depending on whether the protest involves controversial or highly publicized matters. The final circular states that FTA is particularly interested in any protest of an FTA assisted third party contract exceeding \$100,000, and any protest of an FTA assisted third party contract involving controversial or highly publicized matters irrespective of the amount.

#### Section 2—Changes and Modifications

This section consists of guidance on changes and modifications to third party contracts. We revised the guidance in the final circular to accommodate some of the comments discussed below.

One commenter requested an extensive discussion of the procedures for contract changes and modifications. Our response is that more extensive information about changes and modifications can be found in the BPPM.

The same commenter asked that the final circular include references to other parts of the circular pertaining to contract changes. In Chapter I, section 5 of the final circular, we have established definitions for "cardinal change," "change order," and "constructive change." We are not using the term "constructive change order" in the final circular. The final circular includes information about changes in Chapter IV, paragraph 2.b(3) in connection with period of performance, in Chapter IV, subparagraph 2.b(6)(a) in connection with protecting against performance difficulties, and Chapter V, paragraph 7.b(2) in connection with assignment of contract rights.

#### Section 3—Disputes

The final circular changes the location of the section on disputes with the section on claims set forth in the proposed circular, and adds more information in response to comments we received as described below.

### Subsection 3.a—The Recipient's Role and Responsibilities

#### Paragraph 3.a(1)—Notify FTA about Disputes

One commenter asked whom the recipient should notify when it becomes involved in a dispute related to a third party contract. Our response is that FTA expects the recipient to report any current or prospective third party contract dispute involving more than \$100,000, and any dispute involving controversial or highly publicized matters irrespective of amount, in its next quarterly Milestone Progress Report, and at the next Project Management Oversight review, if any. The final circular contains that information.

#### Paragraph 3.a(2)—Adequate Documentation

One commenter argued that requiring the recipient to include all pertinent facts, events, negotiations, applicable laws, and a legal evaluation of the likelihood of success in any potential litigation pertaining to a dispute appears to imply that FTA would question any settlement the recipient arranges unless there is no likelihood of successful litigation. The commenter also added that while some disputes may lead to litigation, many should be settled. We agree in principle that many disputes may best be resolved through settlement. But whether or not FTA seeks access to the recipient's records pertaining to a dispute, FTA expects the recipient to include adequate documentation in its project files of the facts, events, negotiations, applicable laws, and a legal evaluation of the likelihood of success in any potential litigation proceeding as may be necessary to justify FTA's concurrence in the compromise or settlement of the claim, should FTA determine its concurrence would be necessary. Maintaining adequate documentation of a dispute or other significant event will likely benefit the recipient, even if FTA does not inspect those records. The amount of information FTA may request will vary depending upon the nature of the claim. FTA is particularly interested in any current or prospective major dispute exceeding \$100,000, and any dispute involving controversial or highly publicized matters irrespective of amount relating to any third party contract. The final circular contains that information.

#### Paragraph 3.a(3)—Audit

The same commenter expressed concerns about our recommendation that the recipient obtain a project audit,

and argued that for FTA to delay participation in settlement costs until an audit has been completed could unnecessarily hamper negotiations and delay closure of the project. Our response is that a recipient should rely on itself to finance its own settlements, with the use of project funds that have been awarded for the contract under the grant or cooperative agreement to the extent that settlement costs are supportable under the Federal cost principles that apply to the recipient. The recipient should not rely on FTA to provide any extra Federal assistance beyond the amount previously awarded to support the settlement.

The same commenter asked why FTA would recommend an audit after the recipient has reached a settlement agreement. We consider an audit to be a tool that the recipient can use to justify that the settlement is necessary, reasonable, adequately documented, and that FTA should participate in its costs.

### Section 4—Claims and Litigation

In addition to changing the location of the section on claims with the section on disputes as set forth in the proposed circular, the final circular includes a discussion of litigation and also includes more information in response to comments we received as described below.

#### Subsection 4.a—The Recipient's Role and Responsibilities

One commenter asked us to clarify whether the Common Grant Rules' assignment of responsibility to the recipient to resolve third party contract claims means that the recipient is expected to resolve claims made under its third party contracts or claims against the contractor made by third parties. FTA's interpretation of the Common Grant Rules is that the recipient is expected to resolve claims made under its third party contracts, but not claims against the contractor made by third parties. We have revised the circular to make that clarification.

#### Paragraph 4.a(2)—Legal Rights and Remedies

The same commenter complained about the provision in the proposed circular directing the recipient to pursue all legal rights and remedies available under any third party contract, claiming that doing so would preclude settlement of minor disputes until all contract remedies, including termination or litigation, have been exhausted. The commenter pointed out that such an interpretation would have significant adverse effects on the project. We agree

in part with the commenter's observations. The final circular has been revised to clarify that, in resolving third party contract claims, FTA expects the recipient to take reasonable measures to pursue its rights and remedies available under law, including settlement, particularly if failure to do so would jeopardize the Federal interest in the project or cause the recipient to seek additional Federal assistance.

The same commenter argued that providing the level of documentation specified in the proposed circular would have the potential of violating attorney/client privilege, and that providing documentation relative to any disputed negotiations is very different from producing procurement files relative to a particular solicitation. While FTA understands that providing information in connection with claims or litigation can be difficult, FTA reserves the right to review the recipient's records and supporting documentation that would justify the use of FTA assistance to support the costs resulting from the claim or litigation. The amount of information FTA may request will vary depending on the nature of the claim or litigation. FTA is particularly interested in any current or prospective major third party contract claim or litigation in amounts exceeding \$100,000, and any claim or litigation involving controversial or highly publicized matters irrespective of the amount relating to any third party contract. The final circular contains that information.

#### Subsection 4.b—FTA's Role and Responsibilities

##### Paragraph 4.b(1)—Proceeds Recovered

One commenter pointed out that it may not be possible to calculate the amount of proceeds a recipient recovers in proportion to the Federal share committed to the project. The amount of "any net proceeds" may not have a direct correlation to a portion of an overall project. Except for unusual circumstances, we disagree. We believe that equitable calculations of the Federal share committed to a project or part of a project may in some instances be difficult, but not impossible. Moreover, the last sentence of 49 U.S.C. 5309(h)(6) requires proportionate refunds of the Federal share when reductions in the net project costs of capital investment projects are made. The Common Grant Rules provide that recipients should expend refunds and rebates for project costs before requesting further payments from the Federal Government, which would have the effect of providing some, if not a

strictly proportionate, refund of Federal assistance to the Federal grantor agency.

#### Paragraph 4.b(2)—Liquidated Damages

One commenter asked whether in negotiating a settlement, the recipient could exchange its rights to liquidated damages for extra property or services. We agree that in some situations doing so would be reasonable. The final circular includes a new paragraph addressing that matter.

#### Section 5—FTA Participation in Settlements, Arbitration Awards, and Court Awards

Much of the guidance in this section has been transferred from FTA Circular 5010.1C, “Grant Management Guidelines,” 10–01–98 substantially intact, modified to accommodate the comments we received as discussed below.

##### Subsection 5.a—The Recipient’s Responsibilities

#### Paragraph 5.a(1)—Settlement Arrangements Must Be Reasonable

One commenter asked that FTA discuss settlements in lieu of liquidated damages that substitute additional services or equipment for cash payments, possibly resulting in benefits to all parties. We agree that, in certain situations, substitutions of extra property or services rather than liquidated damages payments could constitute all or part of a reasonable settlement. FTA also recognizes that in certain instances a settlement may require the recipient to relinquish its claims for all or part of the liquidated damages and other amounts the recipient would be owed if it prevailed on all matters at issue. The final circular includes a new paragraph explaining FTA’s views on reasonable settlements.

#### Subparagraph 5.a(3)(c)—Special Federal Interest or Federal Concern

We have amended the heading of this subparagraph to include the term “Federal Concern,” which is sometimes used interchangeably with “Special Federal Interest.” We believe it is in the best interests of the recipient to obtain FTA review and written concurrence in settlements when a special Federal interest or concern is declared due to program management concerns, possible mismanagement, impropriety, waste, or fraud. One commenter requested that we explain when and how the recipient should be aware that a special Federal interest in a project is “declared,” and complained that, as written, the declaration could be an after-the-fact action by FTA. Our response is that if the recipient has entered into a

settlement before FTA has declared a special interest in the matter at issue, then the recipient would not be able to obtain FTA’s review and concurrence in advance. In such a case, if after the recipient agreed to a settlement and FTA became interested in the project due to allegations of program management concerns, possible mismanagement, impropriety, waste, or fraud, FTA could refuse to participate in the costs of activities associated with those improprieties, and even recover the Federal assistance used to support those improprieties. The purpose of obtaining FTA review and concurrence is to gain assurance that the costs of specific activities, including procurements, will be eligible for FTA assistance.

##### Subsection 5.b—FTA’s Prerogatives

#### Paragraph 5.b(2)—Provide Federal Assistance

The same commenter expressed concerns that FTA will fund only a portion of eligible costs of contractor’s claims. Our response is as follows: To the extent that the recipient has not used all or part of the FTA assistance budgeted for the activity that was the subject of a dispute, claim, or litigation, the recipient may use the funds so budgeted to pay the costs of the settlement or resolution of the matter. Any additional FTA assistance that could be provided would depend on the availability of all or part of the FTA assistance requested. Even if all the requested FTA assistance were available, we cannot assure that FTA will be able to provide a sufficient amount of Federal assistance to pay for the entire Federal share of those costs. Nevertheless, FTA generally attempts, subject to availability of funds, to provide FTA assistance in the percentage that matches the percentage of the original award. However, any expenditure of FTA assistance is also subject to the requirement that the costs claimed be reasonable, allowable, and allocable.

#### Paragraph 5.b(3)—Deny Federal Assistance

Three commenters objected to the list of situations in which FTA may determine the extent to which FTA assistance could be used for their support. The commenters pointed out that many of the situations listed involving the recipient, the contractor, and other jurisdictions or entities may be a result from judgments entered into in good faith that turned out bad, rather than matters of negligence or incompetence. We agree, and have

revised the final circular to clarify FTA’s views that the situations described in the paragraph do not always mean that FTA will not provide all or some Federal assistance contemplated, or that FTA will withdraw all or some Federal assistance previously awarded, or that FTA will attempt to recover all or some Federal assistance used in the situation.

The commenter asked that FTA remove its examples of specific circumstances in which FTA might not participate in project costs unless those circumstances are exhaustive. FTA disagrees. Not knowing all the possibilities that can affect a project, we are unable to provide an all-inclusive list of examples that might cause FTA to reduce, withdraw, or seek recovery of all or some Federal assistance. We believe these examples can be useful indications of situations of concern to FTA.

Another commenter implied that failure by FTA or its oversight contractors to note and correct errors the recipient has made should affect FTA’s decision to participate in the costs of resolving protests, disputes, claims or litigation in which the recipient otherwise might be found to be at fault. We disagree. FTA pays its “oversight” contractors only to perform “oversight” and report their findings and recommendations to FTA. Neither FTA nor its oversight contractors act as a recipient’s quality control agents nor do they make decisions for recipients. Any perceived failure of FTA or its oversight contractors to note and correct a recipient’s error does not indicate FTA’s concurrence in the recipient’s action, nor does it impose any liability on FTA.

#### Appendix A—References

One commenter provided recommendations about changes to citations as listed in the Appendix. The final circular includes most of those recommended changes.

#### Appendix B—FTA Regional and Metropolitan Office Contact Information

The final circular’s list of regional and metropolitan office contact information now includes the Philadelphia Metropolitan Office, which was erroneously omitted.

#### Appendix C—Third Party Contracting Checklists

In response to one commenter’s request for review aids and worksheets, the final circular now includes a new Appendix C with checklists including references to specific sections of the final circular.

### Appendix D—Federally Required and Other Model Clauses

In response to one commenter's request for clause matrices, the final circular now includes a new Appendix D with matrices identifying the various clauses and contract provisions that might be required.

#### Index

One commenter asked us to include "piggybacking" and "tag-on" to the index. We agree, and the final circular includes those terms in this index.

The same commenter asked that topic headings be formatted to stand out more clearly. The final circular includes these changes.

Issued in Washington, DC, this 24th day of September, 2008.

**James S. Simpson,**  
*Administrator.*

[FR Doc. E8-22914 Filed 9-29-08; 8:45 am]

**BILLING CODE 4910-57-P**

### DEPARTMENT OF THE TREASURY

#### Open Meeting of the President's Advisory Council on Financial Literacy

**AGENCY:** Office of Financial Education, Treasury.

**ACTION:** Notice of meeting.

**SUMMARY:** The President's Advisory Council on Financial Literacy will convene its fifth meeting on Tuesday, October 14, 2008, in the Cash Room of the Main Department Building, 1500 Pennsylvania Avenue, NW., Washington, DC beginning at 2 p.m. Eastern Time. The meeting will be open to the public.

**DATES:** The meeting will be held on Tuesday, October 14, 2008, at 2 p.m. Eastern Time.

**ADDRESSES:** The President's Advisory Council on Financial Literacy will convene its fifth meeting in the Cash Room of the Main Department Building, 1500 Pennsylvania Avenue, NW., Washington, DC.

*Submission of Written Comments:* The public is invited to submit written statements with the President's Advisory Council on Financial Literacy by any one of the following methods:

#### Electronic Statements

E-mail  
[FinancialLiteracyCouncil@do.treas.gov](mailto:FinancialLiteracyCouncil@do.treas.gov);  
or

#### Paper Statements

Send paper statements in triplicate to President's Advisory Council on Financial Literacy, Office of Financial

Education, Room 1332, Department of the Treasury, 1500 Pennsylvania Avenue, NW., Washington, DC 20220.

In general, the Department will post all statements on its Web site (<http://www.treas.gov/offices/domestic-finance/financial-institution/fin-education/council/index.shtml>) without change, including any business or personal information provided such as names, addresses, e-mail addresses, or telephone numbers. The Department will make such statements available for public inspection and copying in the Department's library, Room 1428, Main Department Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, on official business days between the hours of 10 a.m. and 5 p.m. You can make an appointment to inspect statements by telephoning (202) 622-0990. All statements, including attachments and other supporting materials, received are part of the public record and subject to public disclosure. You should submit only information that you wish to make available publicly.

#### FOR FURTHER INFORMATION CONTACT:

Edwin Bodensiek, Director of Outreach, Department of the Treasury, Main Department Building, 1500 Pennsylvania Avenue, NW., Washington, DC 20220, at [ed.bodensiek@do.treas.gov](mailto:ed.bodensiek@do.treas.gov).

#### SUPPLEMENTARY INFORMATION:

In accordance with section 10(a) of the Federal Advisory Committee Act, 5 U.S.C. App. and the regulations thereunder, Dubis Correal, Designated Federal Officer of the Advisory Council, has ordered publication of this notice that the President's Advisory Council on Financial Literacy will convene its fifth meeting on Tuesday, October 14, 2008, in the Cash Room in the Main Department Building, 1500 Pennsylvania Avenue, NW., Washington, DC, beginning at 2 p.m. Eastern Time. The meeting will be open to the public. Because the meeting will be held in a secured facility, members of the public who plan to attend the meeting must contact the Office of Financial Education at 202-622-1783 or [FinancialLiteracyCouncil@do.treas.gov](mailto:FinancialLiteracyCouncil@do.treas.gov) by 5 p.m. Eastern Time on Friday, October 10, 2008, to inform the Department of their desire to attend the meeting and to provide the information that will be required to facilitate entry into the Main Department Building. To enter the building, attendees should e-mail the Department their full name, date of birth, social security number, organization, and country of citizenship. The purpose of this meeting is for the President's Advisory Council on

Financial Literacy to discuss new agenda items, update the President's Advisory Council on Financial Literacy on the work of the committees and follow-up on issues from previous meetings.

Dated: September 24, 2008.

**Taiya Smith,**

*Executive Secretary, Treasury Department.*

[FR Doc. E8-22941 Filed 9-29-08; 8:45 am]

**BILLING CODE 4810-42-P**

### DEPARTMENT OF THE TREASURY

#### Office of Thrift Supervision

#### Ameribank, Northfork, WV; Notice of Appointment of Receiver

Notice is hereby given that, pursuant to the authority contained in section 5(d)(2) of the Home Owners' Loan Act, the Office of Thrift Supervision has duly appointed the Federal Deposit Insurance Corporation as sole Receiver for Ameribank, Northfork, West Virginia (OTS No. 14177).

Dated: September 23, 2008.

By the Office of Thrift Supervision.

**Sandra E. Evans,**

*Federal Register Liaison.*

[FR Doc. E8-22744 Filed 9-29-08; 8:45 am]

**BILLING CODE 6720-01-M**

### DEPARTMENT OF VETERANS AFFAIRS

#### Advisory Committee on Women Veterans; Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92-463 (Federal Advisory Committee Act) that the Advisory Committee on Women Veterans will meet October 28-30, 2008 at the Capital Hilton, 16th and K Street, NW., Washington, DC, from 8:30-4:30 p.m., each day. The meeting is open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs regarding the needs of women veterans with respect to health care, rehabilitation, compensation, outreach, and other programs and activities administered by the VA designed to meet such needs. The Committee will make recommendations to the Secretary regarding such programs and activities.

On October 28, the agenda will include overviews of the Veterans Health Administration, the Veterans Benefits Administration, the National Cemetery Administration, an update on the 2008 Advisory Committee on Women Veterans Report, and an update on the activities conducted by the