**SUBRECIPIENT NAME**

**PROCUREMENT POLICY**

**For FTA and TDOT-Funded Purchases**

**POLICY DATE**

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# INTRODUCTION

## Purpose

This policy establishes guidelines and minimum standards that Subrecipient Name (hereinafter “Subrecipient”) will use in the management of its third party contracts. This manual is intended to ensure that Subrecipient complies with Federal Transit Administration’s (FTA) and Tennessee Department of Transportation’s standards to ensure full and open competition and equitable treatment of all potential sources for all purchases made with funding derived from the Federal, state, and local governments. In all purchasing activity, the goal of Subrecipient is to ensure maximum open and free competition consistent with:

* FTA Circular 4220.1F "Third Party Contracting Guidance" or latest version thereof;
* 2 CFR §§ 200.318 – 200.327

## Applicability

This manual applies to all procurements undertaken and financed, in whole or in part, with FTA and State of Tennessee financial assistance provided to Subrecipient to support **open market procurements**. An open market solicitation is used to purchase a good or service by soliciting from any available source. Most grantee procurement activity will be undertaken on the open market. Open market procurements exclude:

* Employment Contracts;
* Intergovernmental Agreements.

The goal of this procurement policy is to provide an atmosphere in which all procurement transactions will be conducted in a manner providing full and open competition. Subrecipient will avoid the following situations considered to be restrictive of competition:

* Application of unreasonable requirements placed on firms in order for them to qualify to do business;
* Imposition of geographic preference standards in the selection of vendors;
* Imposition of unnecessary experience and excessive bonding requirements;
* Use of noncompetitive pricing practices between firms or between affiliated companies;
* Employment of noncompetitive awards to any person or firm on retainer contracts;
* Failure to recognize organizational conflicts of interest, which means that because of other activities, relationships, or contracts, a contractor is unable, or potentially unable, to render impartial assistance or advice to the grantee; a contractor's objectivity in performing the contract work is or might be otherwise impaired; or a contractor has an unfair competitive advantage;
* Use of "brand name" specifications without listing its salient characteristics and not allowing "an equal" product to be offered; and
* Any arbitrary action in the procurement process.

Subrecipient will conduct procurements in a manner that does not give in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. This does not pre-empt Tennessee licensing laws from being considered in those disciplines that are regulated by the State of Tennessee. Geographic location may be a selection criterion in procurements for architectural and engineering (A&E) services if an appropriate number of qualified firms, given the nature and size of the project, are able to compete for the contract.

## Third Party Contracting Capacity

FTA regulations (2 CFR § 200.319(c) and FTA Circular 4220.1F, Chapter III, § 3a) require Subrecipient to have written procurement procedures. This policy is designed to meet FTA and TDOT’s requirements in this regard.

## Procurement Personnel

Subrecipient shall designate individuals to serve in the following roles:

* *Procurement Officer*: Subrecipient shall designate a Procurement Officer tasked with the implementation of this policy. Specifically, the Procurement Officer’s responsibilities include but are not necessarily limited to: determining the applicability of this policy to Subrecipient’s procurement activities (see Section 1.5), identifying and resolving conflicts of interest (Sections 2.5.2 – 2.6), overseeing the potential prequalification of bidders and proposers (Section 5.3), preparing written justifications for any non-competitive procurements (Section 5.6.1.2), overseeing the evaluation of bids and proposals (Section 5.7.3), managing contract time extensions (Section 6.2.3.3), and ensuring that Subrecipient’s protest procedures are included in all solicitation documents as well as assisting the Subrecipient’s Attorney with the resolution of protests (Sections 6.7.2 – 6.7.3).
* *Attorney or Legal Expert*: Subrecipient shall designate an Attorney (or other individual with legal expertise) tasked with reviewing potential organizational conflicts of interest (Section 2.6), as well as reviewing all procurement protests and advising Subrecipient on potential resolutions (Section 6.7.2).
* *Project Manager(s)*: Prior to execution of each third party contract, Subrecipient shall designate a Project Manager to serve as its principal point of contact with the contractor and as the primary administrator of the contract (Section 6.1).

## Relationship to Other Subrecipient Policies

These policies and procedures pertain only to Subrecipient’s purchases made with FTA and/or Tennessee funds for the transit program; purchases with local funds and for purposes other than transit should follow applicable regulations and Tennessee law. This document shall not supersede any internal administrative procedures applicable to Subrecipient, which may include procedures for requesting and approval of purchases.

This document may not answer all questions related to purchasing; if any employee of Subrecipient has a question regarding these procedures, the organization’s Procurement Officer should be contacted for clarification and guidance. When any conflict exists between this policy and the existing policies of the Subrecipient, the Procurement Officer shall render an opinion regarding which policy shall prevail. If any employee of Subrecipient determines that a conflict exists between these policies and state and local law, they shall contact the Procurement Officer and communicate the conflict.

# CODE OF ETHICS AND CONFLICT OF INTEREST POLICY

## Purpose

Federal grant management rules (2 CFR § 200.318(c)(1)) require each recipient to maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts. This policy must address:

* Personal conflicts of interest
* Gifts; and
* Violations.

## Definition of Key Terms

As used herein, the following definitions apply:

**Conflict of Interest** – A situation in which an employee, board member, officer, or agent has a private or personal interest sufficient to appear to influence the objective exercise of his or her official duties. A conflict of interest represents a divergence between a person covered by this policy and their private interests and their professional obligations to Subrecipient such that an independent observer might reasonably question whether the individual’s professional actions or decisions are determined by considerations of personal gain, financial or otherwise.

**Financial Interest** – An officer, agent, board member, his or her partner, employee, or their immediate family, is considered as having a financial interest in a company if: they receive more than $10,000 in consulting income, salaries, or equity in the company; they have more than 5 percent equity in the company; they have intellectual property rights in or receive royalties from the company; or they serve as a director, officer, partner, trustee, manager or employee of the company.

**Immediate Family** – Immediate family includes an employee’s spouse, grandparent, parent, brother, sister, child or grandchild, his or her partner.

## Applicability

No employee, elected official, agent, or other individual under an employment contract with Subrecipient, or their immediate family member, partner, or organization that employs or is about to employ any of the foregoing may participate in the selection, award, or administration of a contract supported with FTA assistance if a conflict of interest, real or apparent, would be involved.

Such a conflict would arise when any of those previously listed individuals has a financial or other interest in the firm selected for award.

## Gifts

Any contractor, subcontractor, or supplier who has a contract with Subrecipient; has performed under such a contract within the past year; or anticipates bidding on such a contract in the future shall be prohibited from making gifts or providing favors to any individual defined in Section 2.2, who is charged with the duty of:

* Preparing plans, specifications, or estimates for public contract; or
* Awarding or administering public contracts; or
* Inspecting or supervising construction.

Subrecipient also prohibits all covered individuals defined in Section 2.2. who perform the functions listed above from receiving or accepting any such gift or favor.

## Employee Conflicts of Interest

### Conflicts of Interest

It shall be a breach of ethical standards for any Subrecipient employee to participate directly or indirectly in a procurement when the employee knows:

* The employee or any member of the employee’s immediate family, board member, officer, agent, his or her partner, has a financial interest pertaining to the procurement;
* A business or organization in which the employee, or any member of the employee’s immediate family, has a financial interest pertaining to the procurement; or
* Any other person, business or organization with whom the employee or any member of employee’s immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.

### Discovery of Actual or Potential Conflict of Interest (Disqualification and Waiver)

Upon discovery of an actual or potential conflict of interest, an employee participating directly or indirectly in a procurement shall:

* Promptly file a written statement of disqualification with the Procurement Officer; and
* Withdraw from further participation in the procurement.

The employee may, at the same time, request from the Procurement Officer, an advisory opinion as to what further participation, if any, the employee may have in the procurement. It shall be at the sole discretion of the Procurement Officer to determine if the employee may have any further participation in the procurement and, if so, the extent to which the employee may participate. Any employee who fails to comply with the provisions of this paragraph may be subject to disciplinary action.

### Employee Disclosure Requirements

A Subrecipient employee, who has reason to believe that he/she or his/her immediate family have an interest that may be affected by his/her official acts or actions as a Subrecipient employee or by the official acts or actions of Subrecipient, shall disclose the precise nature and value of such interest in a written disclosure statement to the Procurement Officer who, in turn, will respond to the employee in writing with an opinion as to the propriety of said interest.

In the event that the Procurement Officer has reason to believe that he/she or his/her immediate family has an interest that may be affected by his/her official acts or actions as a Subrecipient employee or by the official acts or actions of Subrecipient, he/she shall disclose the precise nature and value of such interest in a written disclosure statement.

### Confidential Information

A Subrecipient employee may not directly or indirectly make use of, or permit others to make use of, for the purpose of furthering a private interest, confidential information acquired by virtue of their position or employment with Subrecipient.

### Solicitation Provision

Subrecipient’s Procurement Officer shall insert the following provisions in all formal competitive solicitation documents for products and services:

*“These policies shall apply to Subrecipient employees involved in procurement. It is a breach of ethical standards for any Subrecipient employee to participate directly or indirectly in a procurement when the employee knows:*

* *The employee or any member of the employee’s immediate family has a financial interest pertaining to the procurement;*
* *A business or organization in which the employee, or any member of the employee’s immediate family, has a financial interest pertaining to the procurement; or*
* *Any other person, business or organization with whom the employee or any member of employee’s immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.*

*In addition, any persons acting as members of an evaluation committee for any procurement shall, for the purposes of the procurement, be bound by conditions of this Section. Throughout the bid/proposal evaluation process and subsequent contract negotiations, offerors shall not discuss or seek specific information about this procurement, including but not limited to, the contents of submissions, the evaluation process or the contract negotiations, with members of any evaluation committee, governing board, or other Subrecipient employees other than the designated Procurement Officer.”*

## Organizational Conflicts of Interest

The Procurement Officer and technical personnel are encouraged to work closely with the Subrecipient's Attorney to review all situations that appear to have the potential for an organizational conflict of interest.

Organizational conflicts of interest may result in bias and potentially provide an unfair competitive advantage to a potential offeror. An organizational conflict of interest occurs due to the type of work to be performed under a third-party contract, or because of other activities or relationships such as:

* A contractor is unable, or potentially unable, to render impartial assistance or advice to Subrecipient;
* A contractor’s objectivity in performing contract work is or might otherwise be impaired;
* A contractor has an unfair competitive advantage; or
* A contractor has established, in an earlier contract, ground rules for a future procurement by developing specifications, evaluation factors, or similar documents.

Bias arises when a contractor is placed in a situation where there may be an incentive to distort advice or decisions. Whenever a contract is awarded that involves the rendering of advice, the question must always be asked as to whether the potential for a conflict of interest exists for the contractor rendering the advice. Subrecipient’s Procurement Officer will insert the following Conflict of Interest Disclosure Statement in its solicitation when contracting for services of this nature:

*“(a) The offeror shall provide a statement in its proposal which describes in a concise manner all past, present or planned organizational, financial, contractual or other interest(s) with the Subrecipient, or with an organization whose interests may be substantially affected by the Subrecipient’s activities, and which is related to the work under this solicitation. The interest(s) described shall include those of the proposer, its affiliates, proposed consultants, proposed subcontractors and key personnel of any of the above. Past interest shall be limited to within one year of the date of the offeror's technical proposal. Key personnel shall include any person owning more than 20% interest in the offeror, and the offeror's corporate officers, its senior managers and any employee who is responsible for making a decision or taking an action on this contract where the decision or action can have an economic or other impact on the interests of a regulated or affected organization.*

*(b) The offeror shall describe in detail why it believes, in light of the interest(s) identified in (a) above, that performance of the proposed contract can be accomplished in an impartial and objective manner.*

*(c) In the absence of any relevant interest identified in (a) above, the offeror shall submit in its proposal a statement certifying that to its best knowledge and belief no affiliation exists relevant to possible conflicts of interest. The offeror must obtain the same information from potential subcontractors prior to award of a subcontract.*

*(d) The Procurement Officer will review the statement submitted and may require additional relevant information from the offeror. All such information, and any other relevant information known to Subrecipient will be used to determine whether an award to the offeror may create a conflict of interest. If any such conflict of interest is found to exist, the Procurement Officer may (1) disqualify the offeror, or (2) determine that it is otherwise in the best interest of Subrecipient to contract with the offeror and include appropriate provisions to mitigate or avoid such conflict in the contract awarded.*

*(e) The refusal to provide the disclosure or representation, or any additional information required, may result in disqualification of the offeror for award. If nondisclosure or misrepresentation is discovered after award, the resulting contract may be terminated. If after award the Contractor discovers a conflict of interest with respect to the contract awarded as a result of this solicitation, which could not reasonably have been know prior to award, an immediate and full disclosure shall be made in writing to the Procurement Officer. The disclosure shall include a full description of the conflict, a description of the action the contractor has taken, or proposes to take, to avoid or mitigate such conflict. The Procurement Officer may, however, terminate the contract for convenience if he or she deems that termination is in the best interest of Subrecipient.”*

# SUBRECIPIENT RESPONSIBILITIES UNDER FEDERAL LAW

## Third Party Contracting Capacity

Subrecipient must maintain adequate technical capacity to carry out its FTA and/or Tennessee assisted projects and comply with Federal and state rules. Subrecipient’s third party contracting capability must be adequate to undertake its procurements effectively and efficiently in compliance with applicable Federal, state, and local requirements.

## Contract Administration System

Subrecipient must maintain a contract administration system to ensure that it and its third-party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders and applicable Federal, state and local requirements. A contract administration system is addressed in Section 6.

### Written Procurement Procedures

Subrecipient must maintain and follow written procurement procedures that address:

1. Solicitations – Requirements for Subrecipient solicitations are addressed in Section 5.
2. Necessity – Requirements related to Subrecipient’s need for products or services are addressed in Section 3.2.2.
3. Lease Versus Purchase – Requirements related to the use of lease or purchase alternatives to achieve an economical and practical procurement are addressed in Section 3.2.2
4. Metric Usage – Requirements related to the acceptance of products and services dimensioned in the metric system of measurement are addressed in Section 3.5.2.
5. Environmental and Energy Efficiency Preferences – Requirements related to preference for products and services that conserve natural resources, protect the environment, and are energy efficient are addressed in Sections 3.4.3 and 3.4.4.
6. Procurement Methods – Descriptions of the procurement methods that Subrecipient may use are included in Section 5.
7. Legal Restrictions – Descriptions of Federal and state restrictions on Subrecipient’s acquisitions are included in Section 5.
8. Third Party Contract Provisions – Specific third party contract provisions required for each third party contract and flow down requirements to subcontracts are included in Section 3.1 through 3.7.
9. Sources – Descriptions of the availability and use of various sources of products and services are addressed in Section 4.
10. Resolution of Third Party Contracting Issues – Procedures related to the resolution of third party contracting issues are included in Section 6.8.

### Adequate Third Party Contract Provisions

Subrecipient must include provisions in all of its third-party contracts that are adequate to form a sound and complete agreement.

### Industry Contracts

Subrecipient shall not use an industry developed contract or a contract that is provided by a bidder or offeror unless it has first evaluated the benefits of the contract. Subrecipient shall ensure that such contracts include all required Federal provisions but do not include terms and conditions that may be unfavorable to Subrecipient.

### Revenue Contracts

Subrecipient may enter into a revenue contract with a third party to generate revenues in connection with a transit related activity, or to create business opportunities utilizing an FTA and/or Tennessee funded asset. Any such said contract opportunity will follow a competitive selection procedures and principles outlined herein.

### Record Keeping

Subrecipient must prepare and maintain adequate and readily accessible project performance and financial records, covering procurement transactions as well as other aspects of project implementation. Subrecipient must maintain these records for five (5) years after Subrecipient and its lower-tier subrecipients, if any, have made final payment and all other pending matters are closed. Specific record keeping requirements include:

1. Written Record of Procurement History – Subrecipient must maintain written records detailing the history of each procurement. For all procurements above the micro-purchase level Subrecipient must maintain records relating to:
2. Procurement Method – Subrecipient must provide its rationale for the method of procurement it used for each contract, including a sole source justification for any acquisition that does not qualify as competitive;
3. Contract Type – Subrecipient must state the reasons for selecting the contract type it used;
4. Contractor Selection – Subrecipient must state its reasons for contractor selection or rejection;
5. Contractor Responsibility – Subrecipient must provide a written determination of responsibility for the successful contractor;
6. Cost or Price – Subrecipient must evaluate and state its justification for the contract cost or price; and
7. Reasonable Documentation – Subrecipient must retain documentation commensurate with the size and complexity of the procurement.
8. Access to Records – Subrecipient must provide FTA and TDOT officials, the Comptroller General, or any of their representatives, access to and the right to examine and inspect all records, documents, and papers, including contracts, related to any FTA project financed with Federal assistance.
9. Use of Technology/Electronic Commerce – Subrecipient may use an electronic commerce system to conduct third party procurements. If Subrecipient uses an electronic commerce system, then the following requirements apply:
10. Sufficient System Capacity – Subrecipient’s system must have sufficient system capacity necessary to accommodate all Federal requirements for full and open competition.
11. Written Procedures – Before any solicitation takes place, Subrecipient must establish adequate written procedures to ensure that all information FTA/TDOT requires for project administration is entered into the system and can be made readily available to FTA/TDOT as needed.

## Determination of Needs

Subrecipient must maintain and follow adequate procedures for determining the types and amounts of products and services it needs to acquire. Subrecipient shall comply with the following requirements when determining the types and amounts of products and services it needs to acquire:

## Eligibility

All products and services to be acquired with FTA and/or Tennessee funds must be eligible under the Federal and state law authorizing the FTA and/or Tennessee assistance award and any regulations thereunder. All products and services to be acquired with FTA and/or Tennessee funds must also be eligible for support within the scope of the underlying grant or cooperative agreement from which the FTA and/or Tennessee assistance to be used is derived.

## Necessity

Subrecipient shall adhere to the following standards for avoiding the purchase of duplicative and/or unnecessary products and services it does not need.

### Unnecessary Reserves

Subrecipient shall limit the acquisition of Federally and state-assisted property and services to the amount it needs to support its operations.

### Acquisition for Assignment Purposes

Subrecipient shall contract only for its current and reasonably expected public transportation needs and shall not add quantities or options to third party contracts solely to permit assignment to another party at a later date. These limits on assignments, however, do not preclude joint procurements that are entered into simultaneously by two or more parties to obtain advantages unavailable for smaller procurements.

* 1. General Prohibition – Subrecipient may contract only for its current and reasonably expected public transportation needs and may not add quantities or options to third party contracts solely to permit assignment to another party at a later date.
  2. Changes in the Recipient’s Needs – TDOT and FTA recognize that the quantity of property or services a recipient reasonably believes it may need at the time of contract award may change. Subrecipient’s later needs might decrease due to changed circumstances or honest mistakes. In those situations, Subrecipient may assign its unneeded contract authority to another entity that would like to acquire the property or services.
  3. Exceptions – These limits on assignments, however, do not preclude:
     1. Joint Procurements – Subrecipient and one or more other FTA and/or state recipients may enter into a single procurement at the same time to obtain advantages unavailable for smaller procurements.
     2. Participation in TDOT Sponsored Vehicle Procurements – Subrecipient may enter into contracts developed by the State of Tennessee to acquire vehicles. See Section 4.3 of this policy for a full discussion of state government purchasing schedules and contracts.
  4. Procurement Size – For every procurement, Subrecipient shall consider whether to consolidate or break out the procurement to obtain the most economical purchase. Absent efforts to foster greater opportunities for Disadvantaged Business Enterprises (DBEs), small and minority firms and women’s business enterprises, Subrecipient shall not split a larger procurement merely to gain the advantage of micro-purchase or small purchase procedures.
  5. Options – Subrecipient shall justify, as needed, all option quantities included in every solicitation and contract. An option is a unilateral right in a contract by which, for a specified time, Subrecipient may acquire additional equipment, supplies, or services than originally procured. An option may also extend the term of the contract.
  6. Lease Versus Purchase – Subrecipient shall review lease versus purchase alternatives for acquiring property and shall prepare or obtain an analysis to determine the most economical alternative. If Subrecipient chooses to lease an asset then it must prepare a written comparison of the cost of leasing the asset compared with the cost of purchasing or constructing the asset.
  7. Lease of Rolling Stock – For rolling stock and related equipment, the Fixing America’s Surface Transportation (FAST) Act removed the requirement to demonstrate the cost effectiveness of leasing compared to purchasing described above in subsection (f). The FAST Act, however, now requires Subrecipient to submit a report to FTA within three years of executing a rolling stock lease that includes: (1) An evaluation of the overall costs and benefits of leasing rolling stock; and (2) A comparison of the expected short-term and long-term maintenance costs under a lease versus maintenance costs when buying rolling stock.
  8. Specifications – Subrecipient’s procurement specifications shall clearly describe the products or services to be procured and shall state how the proposals will be evaluated. Subrecipient’s procurement specifications shall not be exclusionary, discriminatory, unreasonably restrictive or otherwise in violation of Federal or Tennessee laws or regulations.

## Contractor Responsibilities

Subrecipient, in awarding contracts, financed in whole or in part, with FTA and/or Tennessee financial assistance, shall follow guidance in this section to evaluate contractor capabilities to perform the contract.

In addition to the Federal rules (2 CFR § 200.318(h)) that require contract awards be made only to responsible contractors, Federal transit law at 49 U.S.C. § 5325(j) limits third party contractor awards to those contractors capable of successfully performing under the terms and conditions of the proposed contract. Before selecting a contractor for award, Subrecipient must consider such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

### Debarment and Suspension

Debarment and suspension regulations and guidance include the following provisions.

#### DOT Debarment and Suspension Regulations

U.S. Department of Transportation (DOT) regulations, “Nonprocurement Suspension and Debarment,” 2 CFR Part 1200 apply to each third party contract at any tier of $25,000 or more, to each third party contract at any tier for a federally required audit (irrespective of the contract amount), and to each third party contract at any tier that must be approved by an FTA official irrespective of the contract amount (2 CFR § 1200). Subrecipient shall apply DOT’s debarment and suspension requirements to itself and each third-party contractor at every tier to the extent required by DOT’s regulations that incorporate the requirements of Office of Management and Budget (OMB), “Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement)” (2 CFR § 180).

Specifically, Subrecipient must verify that the prospective contractor is not debarred, suspended, or otherwise ineligible by:

* Checking System for Award Management Exclusions (at SAM.gov); or
* Collecting a certification; or
* Adding a clause or condition to the covered transaction.

#### System for Award Management

The System for Award Management (SAM) combines Federal procurement systems and the Catalog of Federal Domestic Assistance into one new system. SAM includes the functionality from the following systems:

* Central Contractor Registry (CCR)
* Federal Agency Registration (Fedreg)
* Online Representations and Certifications Application
* Excluded Parties List System (EPLS)

As a best practice, Subrecipient should print the screen with the results of the SAM search to include in the procurement file. Alternatively, Subrecipient may collect a debarment and suspension certification from the prospective third party contractor or include a clause in the third party contract requiring disclosure. FTA notes that affirmative actions, such as checking SAM.gov or including a requirement for a signed certification, are preferred.

### Lobbying Certification and Disclosure

If a third-party contract will exceed $100,000, before awarding the contract, Subrecipient will obtain a lobbying certification, and if applicable, a lobbying disclosure from a prospective third party contractor (see DOT regulations, “New Restrictions on Lobbying,” 49 CFR Part 20, modified as necessary by 31 U.S.C. Section 1352).

### Required Contract Clauses

In addition to the requirements outlined above, there are various required clauses that may apply to Subrecipient’s third-party contracts, depending upon the type of procurement, funding source, and the anticipated dollar value of said contract. It is the responsibility of Subrecipient to assess each procurement and determine the applicable terms and conditions that should be included in the solicitation and contract documents.

For FTA-funded procurements, please see the listing of required third-party contract clauses contained in the most recent FTA Master Agreement.

For Tennessee-funded procurements, please see the Grant Contract between the State of Tennessee, Department of Transportation and Subrecipient for a listing of standard terms and conditions to be included in the solicitation and contract documents.

## Bonding

Some procurements may necessitate Subrecipient to require the vendor to submit a bid bond, performance bond, or payment bond (typically construction projects). When bonding is required, the following conditions will apply.

### Thresholds

For construction or facility improvement contracts or subcontracts exceeding the Simplified Acquisition Threshold, the minimum requirements must be as follows:

#### Bid Guarantee

A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

#### Performance Bond

A performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

#### Payment Bond

A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract. FTA has determined that payment bonds in the following amounts are adequate to protect Federal interest and will accept a local bonding policy that meets the following minimums:

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

### Acceptable Sureties

Federal rules for non-governmental recipients requires the non-governmental recipient to obtain construction bonds from companies holding certificates of authority as acceptable sureties under Department of the Treasury regulations, “Surety Companies Doing Business with the United States,” (31 CFR Part 223). For a current list of approved sureties, see Department of the Treasury’s Listing of Approved Sureties (Department Circular 570). As FTA encourages governmental recipient to require similarly acceptable sureties, it shall be the policy of Subrecipient to such accept sureties.

### Reduced Bonding

Subrecipient recognizes that bonding costs can be expensive. Subrecipient will accept a local bonding policy that conforms to the minimums described in Section 3.4.1. If bonding levels are sought at levels less than these amounts, Subrecipient must obtain the prior approval of TDOT/FTA. TDOT/FTA shall approve such requests only if it determines that Subrecipient’s bonding policy adequately protects the Federal interest in the project.

### Excessive Bonding

Subrecipient will adhere to FTA’s rules on excessive bonding requirements (FTA Circular 4220.1F, Chapter IV, § 2h(1)(f)). However, if Subrecipient determines it has a material risk of loss because of a failure of the prospective contractor, bonding requirements may exceed those outlined in Section 3.7.1 only with the prior approval of TDOT/FTA.

## Preference for U.S. Property—Buy America

Any FTA-funded contract exceeding $150,000 entered into by Subrecipient requires that all iron, steel, manufactured products (including rolling stock), and construction materials used are produced or manufactured in the United States, unless a waiver has been granted by FTA or the product is subject to a general waiver.

Property that the contractor acquires to perform its construction activities for the recipient, such as tools, machinery, and other equipment or facilities, is not covered by FTA’s Buy America requirements unless the recipient intends to take possession of that property upon completion of the project. Thus, if a third party contractor is acquiring property for its general inventory of equipment or facilities to conduct its overall business affairs, Subrecipient may enter the cost of that acquisition into its calculations of overhead amounts applicable to the FTA assisted project irrespective of whether that property would comply with FTA’s Buy America regulations.

## Accessibility

Facilities to be used in public transportation service must comply with 42 U.S.C. Sections 12101 *et seq*. and DOT regulations, “Transportation Services for Individuals with Disabilities (ADA),” 49 CFR § 37; and Joint ATBCB/DOT regulations, “Americans with Disabilities (ADA) Accessibility Specifications for Transportation Vehicles,” 36 CFR § 1192 and 49 CFR § 38. Notably, DOT incorporated by reference the ATBCB’s “Americans with Disabilities Act Accessibility Guidelines” (ADAAG), revised July 2004, which include accessibility guidelines for buildings and facilities, and are incorporated into Appendix A to 49 CFR Part 37. DOT also added specific provisions to Appendix A modifying the ADAAG, with the result that buildings and facilities must comply with both the ADAAG and amendments thereto in Appendix A to 49 CFR Part 37.

## Veteran Hiring Preference in Construction Contracts

Subrecipient shall ensure that contractors working on a capital project funded using FTA assistance give a hiring preference, to the extent practicable, to veterans (as defined in section 2108 of title 5) who have the requisite skills and abilities to perform the construction work required under the contract. This subsection shall not be understood, construed or enforced in any manner that would require an employer to give preference to any veteran over any equally qualified applicant who is a member of any racial or ethnic minority, female, an individual with a disability, or former employee.

# SOURCES OF ACQUISITIONS

## Force Account

Force account means the use of Subrecipient’s own labor forces and equipment to undertake a capital project. Force account work may consist of design, construction, refurbishment, inspection, and construction management activities, as well as capital project work on rolling stock. Incremental labor costs from flagging protection, service diversions, or other activities directly related to a capital award may also be defined as force account work. Force account work does not include preventive maintenance or award/project administration activities, which are otherwise direct project costs.

Pursuant to FTA Circular 5010.1E, Chapter IV, Section 5, one of the following conditions must be present to justify use of force account labor: (1) cost savings, (2) exclusive expertise, (3) safety and efficiency of operations, and (4) union agreement.

When the cost of force account work for a project is greater than $1,000,000 but less than $10,000,000, Subrecipient is required to develop and maintain a force account plan, as well as submit a force account justification to FTA prior to incurring costs. When the cost of force account work to be performed is $10,000,000 or more, both the force account plan and justification must be submitted to FTA, and prior FTA approval of the plan is required before incurring costs. Specifically, the force account plan must contain the following information to be approved by FTA:

* A description of the scope of work;
* A detailed estimate of costs and project schedule; and
* A copy of the proposed Agreement when another public agency is involved.

## Joint Procurements

Subrecipient may participate in joint procurements whereby it and one or more other entities agree from the outset to use a single solicitation document and enter into a single contract with a vendor for delivery of products or services. The following requirements apply to Subrecipient’s participation in joint procurements:

* Solicitation documents may not be drafted for the purpose of accommodating the needs of other parties that may later want to participate in the benefits of the contract.
* Subrecipient is responsible for ensuring that the joint procurement solicitation and contract complies with all Federal requirements and that the solicitation document and contract includes all required clauses and certifications.

## State or Local Government Purchasing Schedules or Purchasing Contracts

### Definition

FTA uses the term “state or local government purchasing schedule” to mean an arrangement that a State or local government has established with several or many vendors in which those vendors agree to provide essentially an option to the State or local government, and its subordinate government entities, to acquire specific property or services in the future at established prices. These arrangements are somewhat similar to the General Services Administration’s (GSA) Cooperative Purchasing Program available for Federal Government use.

### Small Quantity Conditions for Rolling Stock

To the extent practicable, Subrecipient will use the innovative procurement tools authorized under Section 3019 of the FAST Act, including joint procurements and state or local government contracts. If Subrecipient conducts a stand-alone procurement (i.e., not part of a state/local government contract or joint procurement) for fewer than five buses using Section 5339 grant funding, it must prepare a written justification for not using an authorized “innovative procurement tool” pursuant to 49 USC § 5339(a)(10)(B).

### Applicability of Federal Provisions

When using FTA funding to obtain property or services from a state or local government contract, Subrecipient must ensure all Federal requirements, required clauses, and certifications (including Buy America) are properly followed and included, whether in the master intergovernmental contract or in the recipient's purchase document.

If such requirements, clauses, and certifications were not included in the original purchase solicitation and contracts, Subrecipient may request the vendor to append the required Federal and/or state clauses in the purchase order or other document that affects Subrecipient’s procurement. When this method is used, Subrecipient shall obtain Buy America certification before entering into the purchase order. This method cannot be used to circumvent FTA’s Buy America requirements.

### Federal Supply Schedules

Purchases by Subrecipient from Federal Supply Schedules established by the U.S. General Services Administration (GSA) are limited to the purchase of information technology (IT) products and to products and services to facilitate recovery from a major disaster. The following requirements apply to Subrecipient’s purchases from GSA schedules:

* Subrecipient is authorized to use GSA schedules for purchases of products and services to facilitate recovery from a major disaster that is declared by the President of the United States. Upon declaration of a major disaster by the President, Subrecipient may purchase products and services from GSA schedules both in advance and in the aftermath of the emergency event. Subrecipient shall be responsible for ensuring that the products and services acquired will only be used for recovery.
* Subrecipient must ensure that all Federal requirements, required clauses and certifications are properly followed and included, whether in the master intergovernmental contract or Subrecipient’s purchase document.
* Subrecipient is required to evaluate the reasonableness of prices obtained from GSA schedules. GSA schedule pricing may not be used as a sole or single source for procurement. Subrecipient may only use GSA schedule pricing as one of multiple pricing sources solicited in accordance with its requirements for small purchases described in Section 5.

### Existing Contracts

Subrecipient may use existing contract rights as an acquisition source. An “existing contract” means a contract that, when formed, was intended to be limited to the original parties thereto.

#### Permissible Actions

Within the conditions set forth below, Subrecipient may use existing contract rights held by another recipient of FTA assistance:

1. Exercise of Options – Subrecipient may use contract options held by another recipient of FTA assistance with the following limitations:
2. Consistency with the Underlying Contract – Subrecipient must ensure that the terms and conditions of the option it seeks to exercise are substantially similar to the terms and conditions of the option as stated in the original contract at the time it was awarded.
3. Price – Subrecipient may not exercise an option unless it has determined that the option price is better than prices available in the open market, or that when it intends to exercise the option, the option is more advantageous.
4. Awards Treated as Sole Source Procurements – The following actions may constitute non-compliant sole source awards:
5. Failure to Evaluate Options Before Awarding the Underlying Contract – If a contract has one or more options and those options were not evaluated as part of the original contract award, exercising those options after contract award will result in an unjustified sole source award.
6. Negotiating a Lower Option Price – Exercising an option after Subrecipient has negotiated a lower or higher price will also result in an unjustified sole source award unless that price can be reasonably determined from the terms of the original contract, or that price results from Federal actions that can be reliably measured.
7. Assignment of Contract Rights (“Piggybacking”) – If Subrecipient finds that it has inadvertently acquired contract rights in excess of its needs, it may assign those contract rights to another recipient of FTA financial assistance if the original contract contains an assignability provision that permits the assignment of all or a portion of the specified deliverables under the terms originally advertised, competed, evaluated, and awarded, or contains other appropriate assignment provisions. Subrecipient may use contractual rights through assignment from another recipient of FTA assistance after first determining the contract price remains fair and reasonable, and the contract provisions are adequate for compliance with all Federal requirements. Subrecipient need not perform a second price analysis if a price analysis was performed for the original contract; however, Subrecipient must determine whether the contract price or prices originally established are still fair and reasonable before using those rights. Subrecipient shall be responsible for ensuring the contractor’s compliance with FTA’s Buy America requirements and execution of all the required pre-award and post-delivery Buy America review certifications. Before proceeding with the assignment, however, Subrecipient shall review the original contract to be sure that the quantities the assigning recipient acquired, coupled with the quantities that Subrecipient seeks, do not exceed the amounts available under the assigning recipient’s contract.

#### Impermissible Actions

Subrecipient may not use Federal assistance to finance:

1. Improper Contract Expansion – A contract has been improperly expanded when it includes a larger scope, greater quantities, or options beyond the recipient’s reasonably anticipated needs. A contract has also been improperly expanded when excess capacity has been added primarily to permit assignment of those contract rights to another entity.
2. Cardinal Changes – A significant change in contract work that causes a major deviation from the original purpose of the work or the intended method of achievement, or causes a revision of contract work so extensive, significant, or cumulative that, in effect, the contractor is required to perform very different work from that described in the original contract, is a cardinal change or “tag-on”. A change within the scope of the contract is not a cardinal change or “tag-on”.

## The Open Market

Subrecipient will acquire most of the property and services it needs through procurements in the open market using procedures described in Section 5 of this Manual.

# PROCEDURES FOR OPEN MARKET PROCUREMENTS

## Solicitation of Competitive Price Quotes, Bids or Proposals

Compliance with the solicitation procedures described in Section 5.4 below will fulfill FTA requirements for “full and open competition.”

## Receipt and Evaluation of Unsolicited Proposals

Subrecipient may enter into contracts based on an unsolicited proposal when authorized by applicable State law or regulation. Receipt of an unsolicited proposal does not, by itself, justify contract award without providing for full and open competition. Unless the unsolicited proposal offers a proprietary concept that is essential to contract performance, Subrecipient must seek competition. To satisfy the requirement for full and open competition, Subrecipient must take the following actions before entering into a contract resulting from an unsolicited proposal:

* Publicize its receipt of the unsolicited proposal;
* Publicize an adequate description of the products or services offered without improperly disclosing proprietary information or disclosing the originality of thought or innovativeness of the products or services sought;
* Publicize its interest in acquiring the products or services described in the proposal;
* Provide an adequate opportunity for interested parties to comment or submit competing proposals; and
* Publicize its intention to award a contract based on the unsolicited proposal or another proposal submitted in response to the publication.

If it is impossible to describe the products or services offered without revealing proprietary information or disclosing the originality of thought or innovativeness of the products or services sought, Subrecipient may make a sole source award to the offeror. A sole source award may not be based solely on the unique capability of the offeror to provide the specific products or services proposed.

## Prequalification

Subrecipient may prequalify bidders, offerors, and products for procurement purposes; however, Subrecipient is not required to do so. The decision of whether to require prequalification for eligibility to participate in procurement shall be made separately for every procurement and shall be approved by the Procurement Officer.

If Subrecipient opts to prequalify bidders, offerors, and products for procurement purposes, the following conditions apply:

* Subrecipient must ensure that all prequalification lists it uses are current;
* Subrecipient must ensure that all prequalification lists it uses include enough qualified sources to provide maximum full and open competition; and
* Subrecipient must permit potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date). Subrecipient is not required to hold a particular solicitation open to accommodate a potential supplier that submits products for approval before or during that solicitation nor must Subrecipient expedite or shorten prequalification evaluations of bidders, offerors, or products presented for review during the solicitation period.

## Solicitation Requirements and Restrictions

Every procurement solicitation that Subrecipient issues must include the following information and be advertised in a manner that ensures adequate and open competition.

### Description of the Property or Services

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

#### Descriptive Elements

Subrecipient will prepare descriptions of property, goods, or service in terms of functions to be performed or level of performance required, including the range of acceptable characteristics or minimum acceptable standards. Detailed product specifications should be avoided if at all possible; however, there is no prohibition against their use when appropriate.

#### Quantities

Additional quantities or options above Subrecipient’s needs at the time of acquisition may not be added to contracts solely to allow assignment of those quantities or options at a later date.

#### Brand Name or Equal

When it is impractical or uneconomical to provide a clear and accurate description of the technical requirements of the property to be acquired, a “brand name or equal” description may be used to define the performance or other salient characteristics of a specific type of property. The salient characteristics of the named brand that bidders or offerors must provide must be identified.

#### Prohibited Practices

Solicitations with requirements that contain features that unduly restrict competition may not be used. Subrecipient shall not:

* Impose unreasonable business requirements for bidders or offerors.
* Impose unnecessary experience requirements for bidders and offerors.
* Use prequalification procedures that conflict with the prequalification standards described in Section 5.3.
* Make a noncompetitive award to any person or firm on a retainer contract with Subrecipient if that award is not for the property or services specified for delivery under the retainer contract.
* Impose unreasonable restrictive bonding requirements on bidders and offerors in excess of FTA and state requirements.
* Specify only a “brand name” product without allowing offers of an “equal” product, or allowing an “equal” product without listing the salient characteristics that the “equal” product must meet to be acceptable for award.
* Specify in-state or local geographical preferences, or evaluating bids or proposals in light of in-state or local geographic preferences, even if those preferences are imposed by State or local laws or regulations. The only exception expressly mandated or encouraged by Federal law that may be applicable to Subrecipient is the procurement of Architectural and Engineering (A&E) Services. Geographic location may be a selection criterion in the procurement of A&E services if an appropriate number of qualified firms are eligible to compete for the contract in view of the nature and size of the project.
* Engage in practices that result in organizational conflicts of interest. An organizational conflict of interest occurs when any of the following circumstances arise:
  + Lack of Impartiality or Impaired Objectivity – When the bidder or offeror is unable, or potentially unable, to provide impartial and objective assistance or advice to Subrecipient due to other activities, relationships, contracts, or circumstances.
  + Unequal Access to Information – When the bidder or offeror has an unfair competitive advantage through obtaining access to nonpublic information during the performance of an earlier contract.
  + Biased Ground Rules – When during the conduct of an earlier procurement, the bidder or offeror has established the ground rules for a future procurement by developing specifications, evaluation factors, or similar documents.
* Support or acquiesce in noncompetitive pricing practices between firms or between affiliated companies.
* Take any arbitrary action in the procurement process.

### Evaluation Factors.

All solicitations issued by Subrecipient shall identify all factors to be used in evaluating bids or proposals and their relative importance. At the discretion of the Procurement Officer, the actual weighting of evaluation factors may, but is not required to, be communicated to prospective offerors.

### Permissible Contract Types

Subrecipient shall state the type of contract that will be awarded in all solicitation documents. The following types of contracts will typically be executed with the successful vendor:

#### Firm Fixed Price

A firm fixed price contract includes a price that remains fixed irrespective of the contractor’s cost experience in performing the contract. A firm fixed price contract may include an economic price adjustment provision, incentives, or both.

#### Cost Reimbursement

A cost-reimbursement contract provides for payment of the contractor’s allowable incurred costs, to the extent prescribed in the contract. Allowable costs may include incentives if the recipient believes they can prove helpful. Cost-reimbursement contracts are suitable for use only when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed price contract.

### Prohibitive or Restricted Contract Types

The following contract types are prohibited or restricted:

#### Cost Plus Percentage of Cost

Cost plus percentage of cost type contracts are prohibited.

#### Time and Materials

Time and Materials type contracts may be used only after a written determination is made that no other contract type is suitable. In addition, the contract between Subrecipient and the Contractor must specify a ceiling price that the Contractor may not exceed except at its own risk.

### Other Requirements Affecting the Property or Services to be Acquired

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

### Other Requirements Affecting the Bidder or Offeror and the Contractor

The solicitation and resulting contract must identify all Federal and state requirements that a bidder or offeror must fulfill before and during contract performance.

### Reservation of Right to Award to Other Than the Low Bidder or Offeror

The solicitation must specifically reserve Subrecipient’s right to award a contract to other than the low bidder or offeror. If the solicitation documents do not specify this right, Subrecipient will be obligated to award the contract to the low bidder.

### Reservation of Right to Reject All Bids or Offers

The solicitation must specifically reserve Subrecipient’s right to reject all bids or offers.

## Methods of Procurement

Subrecipient shall use competitive procedure(s) appropriate for the acquisition undertaken. The procedures used must comply with Tennessee and local law as well as with Federal requirements. Federal restrictions vary with the type of procurement method used. The following guidance is based on the requirements of 2 CFR § 200.318 – 200.327, supplemented by FTA policies that address the needs of FTA recipients.

### Micro-Purchases

#### Definition

Micro-purchases are those purchases of products and services that cost $10,000 or less, as defined by 2 CFR §200.67 (or current threshold established by Federal Acquisition Regulations (FAR)). *(For FTA-funded procurements, TDOT strongly recommends that its subrecipients use the purchasing thresholds included in this template, which match those currently set at the Federal level. These purchasing thresholds can be distinct and separate from those governing non-FTA-funded procurements. In the event that your organization is subject to overarching purchasing thresholds that are lower/more restrictive than those at the Federal level (e.g., due to local requirements etc.), please follow the lower thresholds and make the necessary changes throughout this document)*

#### Approval Authority

Micro-purchases must be approved in writing by one of the following Subrecipient employees:

* Transit Director

#### Competition

Subrecipient may acquire products and services valued at less than the micro-purchase limit without obtaining competitive quotations. Micro-purchases should be distributed equitably among qualified suppliers.

Micro purchases are exempt from FTA’s Buy America requirements. Davis-Bacon prevailing wage requirements, however, will apply to construction contracts exceeding $2,000, even though the recipient uses micro-purchase procurement procedures.

#### Prohibited Divisions

The size or dollar value of procurements may not be divided or reduced merely to come within the micro-purchase limit. The only allowable exception to this restriction is for the express purpose of fostering greater participation of DBEs, small and minority firms and women’s business enterprises in Subrecipient’s Federally-assisted procurements. In such situations, Subrecipient may divide contracting requirements into smaller tasks or quantities, when economically feasible.

#### Documentation

Every micro-purchase must be accompanied by a written determination that the price is fair and reasonable and a description of how that determination was made.

### Small Purchases

#### Definition

FTA defines small purchases as those purchases of products and services, including construction services, that cost greater than $10,000 but not more than $250,000. *(For FTA-funded procurements, TDOT strongly recommends that its subrecipients use the purchasing thresholds included in this template, which match those currently set at the Federal level. These purchasing thresholds can be distinct and separate from those governing non-FTA-funded procurements. In the event that your organization is subject to overarching purchasing thresholds that are lower/more restrictive than those at the Federal level (e.g., due to local requirements etc.), please follow the lower thresholds and make the necessary changes throughout this document)*

#### Approval Authority

Small purchases must be approved in writing by one of the following Subrecipient employees:

* Transit Director

#### Required Competition

Whenever possible, price or rate quotations must be obtained from at least two, but preferably three or more qualified sources. It is the responsibility of Subrecipient to ensure that an adequate number of quotations, bids, or proposals are received.

#### Prohibited Divisions

The size or dollar value of procurements may not be divided or reduced merely to come within the small purchase limit. The only allowable exception to this restriction is for the express purpose of fostering greater participation of DBEs, small and minority firms and women’s business enterprises in Subrecipient’s Federally-assisted procurements

#### Documentation

Every small purchase must be documented in Subrecipient’s written procurement history file. The level of documentation is stipulated in Section 6.6.1.

For small purchases, price quotations may be oral or written.

#### Special Considerations

Subrecipient may acquire products and services directly from State contract vendors in lieu of competitively procuring such products and services itself through the small purchase method of procurement. When purchasing from a State contract, Subrecipient must maintain copies of all relevant procurement documents and ensure that the underlying contract was solicited and awarded in compliance with relevant FTA and/or Tennessee requirements.

Subrecipient reserves the right to use formal purchase methods, even if small purchase thresholds are met, if the Procurement Officer believes it is in the best interests of Subrecipient to do so.

### Formal Purchases

#### Definition

Formal purchases are those purchases of products and services that cost greater than the current Federal threshold of $250,000. *(For FTA-funded procurements, TDOT strongly recommends that its subrecipients use the purchasing thresholds included in this template, which match those currently set at the Federal level. These purchasing thresholds can be distinct and separate from those governing non-FTA-funded procurements. In the event that your organization is subject to overarching purchasing thresholds that are lower/more restrictive than those at the Federal level (e.g., due to local requirements etc.), please follow the lower thresholds and make the necessary changes throughout this document)*

#### Approval Authority

Large purchases must be approved in writing by the following Subrecipient employees or officials:

* Transit Director

No further delegation of approval authority for large purchases may be made.

#### Procurement Methods

There are two primary methods of procurement for large purchases of products and services:

* Sealed Bid method; and
* Competitive Proposal method.

#### Required Competition

Formal bids and competitive proposals must be publicly advertised.

For formal purchases by the sealed bid method of procurement, two or more responsible bidders must be willing and able to compete effectively for the business.

For formal purchases by the competitive proposal method of procurement, two or more offerors must be willing and able to submit an offer or proposal.

#### Required Documentation

Every formal purchase must, at a minimum, be supported by a written independent cost estimate, formal bids or proposals, a written cost or price analysis as appropriate, a written justification and detailed rationale for contractor selection (including application of evaluation criteria) and a written determination of the responsibility of the contractor. Additional documentation requirements are dependent upon the formal procurement method that is utilized to make the purchase.

#### Special Considerations

Subrecipient may acquire products and services via state contract in lieu of competitively procuring such products and services itself through the sealed bid and competitive proposal methods of procurement.

#### Procedural Methods for Sealed Bids

The sealed bid method of procurement is a formal method in which bids are publicly solicited and a firm fixed price contract is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the Invitation for Bids (IFB), is lowest in price. The IFB document contains technical specifications for the product or service to be purchased, a description of the procedures for submitting a bid, and the forms on which bids must be submitted.

1. When Appropriate – The sealed bid method of procurement is a preferred method for acquiring products and services that, including construction services, cost greater than $250,000. The sealed bid method of procurement may also be used for small purchases if it is determined to be appropriate. The sealed bid method of procurement is appropriate if the following conditions apply:
2. Precise Specifications – A complete, adequate, precise, and realistic specification or purchase description is available.
3. Adequate Sources – Two or more responsible bidders are willing and able to compete effectively for the business.
4. Fixed Price Contract – The procurement generally lends itself to a firm fixed price contract.
5. Price Determinative – The successful bidder can be selected on the basis of price and those price-related factors listed in the solicitation including, but not limited to, transportation costs, life cycle costs, and discounts expected to be taken. Apart from responsibility determinations, contractor selection may not be determined on the basis of other factors whose costs cannot be measured at the time of award.
6. Discussions Unnecessary – Discussions with one or more bidders after bids have been submitted are expected to be unnecessary as award of the contract will be made based on price and price-related factors alone.
7. Requirements for Sealed Bids – The following requirements apply to the sealed bid method of procurement:
8. Publicity – The Invitation for Bids must be publicly advertised.
   * 1. The Procurement Officer shall ensure that sufficient time is allowed to prepare bids before the date of bid opening.
     2. Notice of bidding opportunities may be provided in other ways in addition, but not as a substitute, to a published notice. The methods may include, but not necessarily be limited to:
     3. Direct notice, based on compiled vendor lists or from pre-qualification list, sent to prospective offerors; or
     4. Use of advertisement by electronic means.
9. Adequate Sources – Bids must be solicited from an adequate number of known suppliers.
10. Adequate Specifications – The Invitation for Bids, including any specifications and pertinent attachments, must describe the property or services sought in sufficient detail that a prospective bidder will be able to submit a proper bid.
11. Sufficient Time – Bidders must be allowed sufficient time to prepare bids before the date of bid opening.
12. Public Opening – All bids must be publicly opened at the time and place prescribed in the Invitation for Bids.
13. Fixed Price Contract – A firm fixed price contract must be awarded in writing to the lowest responsive and responsible bidder unless the Invitation for Bids specifically allowed for award of a fixed price incentive contract or the inclusion of an economic price adjustment provision.
14. Rejection of Bids – Any or all bids may be rejected if there is a sound, documented business reason.

#### Procedural Methods for Competitive Proposals

The competitive proposal method of procurement is a formal method in which written proposals are publicly solicited and a contract is awarded to the responsible offeror whose proposal, taking into consideration price and other factors, is considered to be the most advantageous to Subrecipient or that is considered to be the “best value” to Subrecipient. The vehicle through which proposals are solicited is Request for Proposals (RFP). The RFP document contains technical specifications for the product or service to be purchased, a description of the procedures for submitting a proposal and the forms on which proposals must be submitted, if applicable.

1. When Appropriate – The competitive proposal method of procurement is appropriate for the acquisition of products and services that cost greater than $250,000 when the nature of the procurement does not lend itself to sealed bidding and Subrecipient expects that more than one source will be willing and able to submit a proposal. The competitive proposal method of procurement may also be used for small purchases if it is determined to be appropriate. The competitive proposal method of procurement is appropriate when any of the following circumstances are present:
2. Type of Specifications – The products or services to be acquired are described in a performance or functional specification, or if described in detailed technical specifications, other circumstances such as the need for discussions or the importance of basing contract award on factors other than price alone are present.
3. Uncertain Number of Sources – Uncertainty about whether more than one bid will be submitted in response to an Invitation for Bids.
4. Price Alone Not Determinative – Due to the nature of the procurement, contract award need not be based exclusively on price or price-related factors.
5. Discussions Expected – Separate discussions with individual offerors are expected to be necessary after they have submitted their proposals.
6. Requirements for Competitive Proposals – The following requirements apply to the competitive proposal method of procurement:
7. Publicity – The Request for Proposals must be publicly advertised.
8. Evaluation Factors – All evaluation factors and their relative importance must be specified in the solicitation, but numerical or percentage ratings or weights need not be disclosed.
9. Adequate Sources – Proposals must be solicited from an adequate number of qualified sources.
10. Evaluation Method – A specific method must be established and used to conduct technical evaluations of the proposals received and to determine the most qualified offeror.
11. Price and Other Factors – An award must be made to the responsible offeror whose proposal is most advantageous to Subrecipient or that represents the “best value” to Subrecipient with price and other factors considered.
12. Best Value – Subrecipient may award a contract to the offeror whose proposal provides the greatest value to Subrecipient. To do so, the solicitation must inform potential offerors that the award will be made on a “best value” basis and identify what factors will form the basis for award. Subrecipient must base its determination of which proposal represents the “best value” on an analysis of the tradeoff of qualitative technical factors and price or cost factors.

#### Two-Step Procurements

Subrecipient may use two-step procurement procedures in both sealed bid and competitive proposal procurements, provided the opportunity for full and open competition is retained.

1. Review of Technical Qualifications and Approach – The first step is a review of the prospective contractors’ technical approach to Subrecipient’s request and their technical qualifications to carry out that approach followed by the establishment of a competitive range consisting of prospective contractors that demonstrate a technically satisfactory approach and have satisfactory qualifications.
2. Review of Bids and Proposals Submitted by Qualified Prospective Contractors – The second step consists of soliciting and reviewing complete bids or proposals, including price, submitted by each prospective contractor determined to be qualified. Absent exceptional circumstances, the second step of the solicitation must result in the attempt to solicit, at a minimum, three bids or proposals from the prospective contractors deemed qualified in the first round. All qualified prospective contractors’ bids or proposals submitted from the first round must be considered.

#### Architectural and Engineering (A&E) Services and Other Services

FTA’s enabling legislation at 49 U.S.C. § 5325(b)(1) requires the use of the qualifications-based procurement procedures contained in the “Brooks Act,” 40 U.S.C. § 1101 through 1104, to acquire A&E services.

1. Qualifications-Based Procurement Procedures Required – Subrecipient must use qualifications-based procurement procedures to acquire architectural and engineering (A&E) services as well as certain other services that are directly in support of, directly connected to, directly related to, or lead to construction, alteration, or repair of real property. In addition to A&E services, other services that must be procured by qualifications-based procurement procedures include:

* Program management;
* Construction management;
* Feasibility studies;
* Preliminary engineering;
* Design, architectural, engineering;
* Surveying, mapping; and
* Other related services.

The nature of the work to be performed and its relationship to construction, not the nature of the prospective contractor, determine whether qualifications-based procurement procedures may be used.

1. Qualifications-Based Procurement Procedures Prohibited – Unless FTA determines otherwise in writing, qualifications-based procurement procedures may not be used to acquire other types of services if those services are not directly in support of, directly connected to, directly related to, or do not lead to construction, alteration, or repair of real property. Qualifications-based procurement procedures may not be used for actual construction, alteration or repair to real property.
2. Qualifications-Based Procurement Procedures – The following procedures apply to qualifications-based procurements:
3. Qualifications – Unlike other two-step procurement procedures in which price is an evaluation factor, an offeror’s qualifications are evaluated to determine contract award.
4. Price – Price is excluded as an evaluation factor.
5. Most Qualified – Price negotiations are first conducted with only the most qualified offeror.
6. Next Most Qualified – Only after failing to agree on a fair and reasonable price may negotiations be conducted with the next most qualified offeror. Then, if necessary, negotiations with successive offerors in descending order may be conducted until contract award can be made to the offeror whose price the recipient believes is fair and reasonable.

#### Design-Bid-Build

The design-bid-build procurement method requires separate contracts for design services and for construction.

1. Design Services – For design services, Subrecipient must use qualifications-based procurement procedures as described above.
2. Construction – Because Subrecipient may not use qualifications-based procurement procedures for the actual construction, alteration or repair of real property, it generally must use competitive procedures for the construction. These may include sealed bidding or competitive negotiation procurement methods, as appropriate.

#### Design-Build

The design‐build procurement method consists of contracting for design and construction simultaneously with contract award to a single contractor, consortium, joint venture, team, or partnership that will be responsible for both the project’s design and construction.

1. Procurement Method Determined by Value – First, Subrecipient must separate the various contract activities to be undertaken and classify them as design or construction, and then calculate the estimated total value of each. Because both design and construction are included in a single procurement, Subrecipient will use the procurement method appropriate for the services having the greatest cost, even though other necessary services would not typically be procured by that method.
2. Construction Predominant – The construction costs of a design‐build project are usually predominant, so Subrecipient would use competitive negotiations or sealed bids for the entire procurement rather than the qualification‐based Brooks Act procurement procedures. Specifically, when construction costs will be predominant, unless FTA determines otherwise in writing, an FTA recipient may not use qualifications‐based procurement procedures to acquire architectural engineering, program management, construction management, feasibility studies, preliminary engineering, design, architectural and engineering, surveying, mapping, or related A&E services.
3. Design Services Predominant – In the less usual circumstance in which the cost of most work to be performed will reflect architectural and engineering, program management, construction management, feasibility studies, preliminary engineering, design, architectural engineering, surveying, mapping, or related A&E services, Subrecipient would use qualifications‐based procurement procedures based on the Brooks Act.

(b) Selection Processes – Subrecipient may structure a design‐build procurement using one or more steps as described below:

1. One‐Step Method – Subrecipient may undertake its design‐build procurement in a single step.
2. Two‐Step Method – Another procurement method Subrecipient may use for large design‐build projects is a two‐step selection process as authorized for Federal Government use by 41 U.S.C. Section 253m. This method consists of:
   * 1. Review of Technical Qualifications and Approach. The first step is a review of the prospective contractors’ technical qualifications and technical approach to the project. Subrecipient may then narrow the competitive range to those prospective contractors with satisfactory qualifications that demonstrate a technically satisfactory approach.
     2. Review of Complete Proposals. The second step consists of soliciting and reviewing complete proposals, including price, submitted by prospective contractors first determined to be qualified.

By using this two‐step method, it will not be necessary for Subrecipient to undertake extensive proposal reviews, nor will prospective offerors need to engage in expensive proposal drafting. This two‐step selection procedure is separate and distinct from prequalification and is but one procurement method available.

## Procurement by Other Than Full and Open Competition

Normally, Subrecipient must provide for full and open competition when soliciting bids or proposals. Federal regulations at 2 CFR § 200.320(f)(1) – (4), however, acknowledges that under certain circumstances, a recipient may conduct procurements without providing for full and open competition.

### When Appropriate

Noncompetitive procurement procedures may only be used when the procurement is inappropriate for small or formal purchase procedures, and at least one of the following circumstances are present:

#### Competition Adequacy

After soliciting several sources and receiving an inadequate response, Subrecipient shall review its specifications to determine if they are unduly restrictive or if changes can be made to encourage submission of more price quotes, bids or proposals. If Subrecipient determines that the specifications are not unduly restrictive and changes cannot be made to encourage greater competition, Subrecipient may determine the original competition adequate and complete the purchase from among the sources that submitted a price quote, bid or proposal. A cost analysis must be performed in lieu of a price analysis when this situation occurs.

1. Single Bid or Proposal – Upon receiving a single bid or proposal in response to a solicitation, Subrecipient should determine if competition was adequate. This should include a review of the specifications for undue restrictiveness and might include a survey of potential sources that chose not to submit a bid or proposal.
   1. Adequate Competition – Competition is adequate when the reasons for a single response were caused by conditions beyond Subrecipient’s control. After documenting the determination of adequate competition in the procurement file, the procurement process may continue with the single response.
   2. Inadequate Competition – Competition is inadequate when the reasons for a single response were caused by conditions within Subrecipient’s control. In such situations, Subrecipient must correct all deficiencies in the procurement process that caused competition to be inadequate (e.g., unduly restrictive specification, inadequate advertisement/ dissemination) and then reissue the solicitation, or determine if the procurement can be justified as a sole source award and then follow that path.

#### Sole Source

When Subrecipient requires products or services available from only one responsible source, and no other products or services will satisfy its requirements, Subrecipient may make a sole source award. In addition, when Subrecipient requires an existing contractor to make a change to its contract that is beyond the scope of that contract, Subrecipient will consider the change a sole source award that must be justified. Sole source awards are only appropriate when one of the following conditions apply:

1. Unique Capability or Availability – The products or services are available from only one source if one of the conditions described below is present:
   1. Unique or Innovative Concept – The offeror demonstrates a unique or innovative concept or capability not available from another source. Unique or innovative concept means a new, novel, or changed concept, approach, or method that is the product of original thinking, the details of which are kept confidential or are patented or copyrighted, and is available to Subrecipient only from one source and has not in the past been available to Subrecipient from another source.
   2. Patents or Restricted Data Rights – Patent or data rights restrictions preclude competition.
   3. Substantial Duplication Costs – In the case of a follow-on contract for the continued development or production of highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in substantial duplication of costs that are not expected to be recovered through competition.
   4. Unacceptable Delay – In the case of a follow-on contract for the continued development or production of a highly specialized equipment and major components thereof, when it is likely that award to another contractor would result in unacceptable delays in fulfilling Subrecipient’s needs.
2. Unusual and Compelling Urgency – Subrecipient may limit the number of sources from which it solicits bids or proposals when Subrecipient has such an unusual and urgent need for the products or services and would be seriously injured unless it were permitted to limit the solicitation. Subrecipient may also limit the solicitation when the public exigency or emergency will not permit a delay resulting from competitive solicitation for the products or services.
3. When Prohibited – Less than full and open competition is not justified based on:
4. Failure to Plan – Subrecipient’s lack of advance planning, resulting in limited competition, is not justification for a sole source or single bid award.
5. Limited Availability of Federal Assistance – Concerns about the amount of Federal assistance available to support the procurement.
6. Procurement Procedures – The following requirements apply when Subrecipient completes a procurement utilizing less than full and open competition:
7. Potential Sources – Subrecipient must solicit offers from as many potential sources as is practicable under the circumstances.
8. Sole Source Justification – Subrecipient must justify all sole source procurements in writing. Sole source procurement justifications must describe the reasons for why a sole source procurement is appropriate, state which of the authorized justifications listed in Section 5.6.1.2 are applicable, include a cost analysis and be signed by the Procurement Officer. If Subrecipient decides to solicit an offer from only one source, Subrecipient must justify its decision in writing. The written justification must include the same elements as a sole source justification except that it must state which of the authorized justifications listed in Section 5.6.1.2 are applicable to the sole source purchase.
9. Cost Analysis – Subrecipient must prepare or obtain a cost analysis verifying the proposed cost data, the projections of the data, and the evaluation of the costs and profits. A price analysis shall not be adequate to justify a sole source purchase.
10. Exception for Procurement Activities Using Non-FTA Funds – When it is determined by the Procurement Officer to be in the best interest of Subrecipient, noncompetitive procurement procedures may be utilized to acquire professional or other transportation-related services that do not involve the use of FTA or Tennessee financial assistance. Any such determination must be made in writing and signed by the Procurement Officer.

## Evaluation Requirements

The following standards shall apply to all evaluations of bids or proposals conducted by Subrecipient.

### General

When evaluating bids or proposals received in response to a solicitation, Subrecipient shall consider all evaluation factors specified in the solicitation documents and shall evaluate the bids or offers proposals only on the evaluation factors included in those solicitation documents. Subrecipient may not modify its evaluation factors after bids or proposals have been received without re-opening the solicitation.

### Options

The following standards shall apply when awarding contracts that include options:

#### Evaluation Required

In general, Subrecipient must evaluate bids or offers for any option quantities or periods contained in a solicitation if it intends to exercise those options after the contract is awarded.

#### Evaluation Not Required

Subrecipient need not evaluate bids or offers for any option quantities when it does not intend to exercise those options after the contract is awarded or if it determines that evaluation would not otherwise be in its best interests.

### Evaluators

In addition to evaluators with experience in technical or public policy matters related to the procurement, other evaluators may also include auditors and financial experts to the extent that the Procurement Officer determines would be necessary or helpful. If Subrecipient lacks qualified personnel within its organization, it may solicit evaluators from other transit organizations or may contract for evaluation services. If it does so, the procurement procedures in this policy will apply to those contracts and to those contractors selected to perform evaluation functions on behalf of Subrecipient.

## Contract Award Requirements

The following standards shall apply to all contract award decisions made by Subrecipient:

### Award Only to a Responsible Bidder or Offeror

Subrecipient may only award contracts to responsible contractors possessing the ability, willingness, and integrity to perform successfully under the terms and conditions of the contract and who demonstrate that its proposed subcontractors also qualify as responsible. Subrecipient must consider such matters as contractor integrity, compliance with public policy, record of past performance and financial and technical resources when making a determination of contractor responsibility.

Subrecipient must verify that the prospective contractor is not debarred, suspended, or otherwise ineligible by either checking the System for Award Management Exclusions (at SAM.gov), collecting a certification, or adding a clause or condition to the covered transaction. FTA notes that affirmative actions, such as checking SAM.gov or including a requirement for a signed certification, are preferred.

As a best practice, Subrecipient should ensure that the contractor is not listed as a debarred or suspended contractor on the System for Award Management (SAM), which is maintained by the General Services Administration (GSA), at the time of contract award. Entities that are listed as debarred or suspended contractors on SAM may not be determined to be responsible contractors by Subrecipient. For every procurement action above the micro-purchase level, Subrecipient must make a written determination of the responsibility of the contractor and include such determination in the applicable contract file (See Section 3.6).

To designate a prospective contractor “responsible” as required by 49 U.S.C. § 5325, Subrecipient must determine and ensure that the prospective contractor satisfies the following criteria described herein. In addition to being otherwise qualified and eligible to receive the contract award under applicable laws and regulations, a responsible contractor:

1. Integrity and Ethics – Has a satisfactory record of integrity and business ethics, in compliance with 49 U.S.C. Section 5325(j)(2)(A).
2. Debarment and Suspension – Is neither debarred nor suspended from Federal programs under DOT regulations, “Nonprocurement Suspension and Debarment,” 2 CFR Parts 180 and 1200, or under the FAR at 48 CFR Chapter 1, Part 9.4.
3. Affirmative Action and DBE – Is in compliance with the Common Grant Rules’ affirmative action and FTA’s Disadvantaged Business Enterprise requirements.
4. Public Policy – Is in compliance with the public policies of the Federal Government, as required by 49 U.S.C. § Section 5325(j)(2)(B).
5. Administrative and Technical Capacity – Has the necessary organization, experience, accounting, and operational controls, and technical skills, or the ability to obtain them, in compliance with 49 U.S.C. Section 5325(j)(2)(D).
6. Licensing and Taxes – Is in compliance with applicable licensing and tax laws and regulations.
7. Financial Resources – Has, or can obtain, sufficient financial resources to perform the contract, as required by 49 U.S.C. Section 5325(j)(2)(D).
8. Production Capability – Has, or can obtain, the necessary production, construction, and technical equipment and facilities.
9. Timeliness – Is able to comply with the required delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments.
10. Performance Record – Is able to provide a:
11. Current Performance – Satisfactory current performance record; and
12. Past Performance – Satisfactory past performance record in view of its records of long-time performance or performance with a predecessor entity, including:
13. Sufficient Resources. Key personnel with adequate experience, a parent firm with adequate resources and experience, and key subcontractors with adequate experience and past performance,
14. Adequate Past Experience. Past experience in carrying out similar work with particular attention to management approach, staffing, timeliness, technical success, budgetary controls, and other specialized considerations as described in the recipient’s solicitation, and
15. Any Past Deficiencies Not the Fault of the Bidder or Offeror. A prospective bidder or offeror that is or recently has been seriously deficient in contract performance is presumed to be non-responsible, unless the recipient determines that the circumstances were properly beyond the bidder or offeror’s control, or unless the bidder or offeror has taken appropriate corrective action. Past failure to apply sufficient tenacity, perseverance, and effort to perform acceptably is strong evidence of non-responsibility. Failure to meet the quality requirements of a contract is a significant factor to consider in determining satisfactory performance. TDOT expects Subrecipient to consider the number of the bidder or offeror’s contracts involved and the extent of deficient performance in each contract when making this determination.

#### Rejection of Bids and Proposals

Subrecipient may reject all bids or proposals submitted in response to an Invitation for Bids or Request for Proposals. Subrecipient must include a statement in its solicitation document reserving the right to reject all bids or proposals.

1. Extent and Limits of Contract Award – The selection of a contractor to participate in one aspect of a project does not, by itself, constitute a sole source selection of the contractor’s wholly owned affiliates to perform other work in connection with the project.

## Independent Cost Estimate and Cost and Price Analysis

### Independent Cost Estimate

For every procurement estimated to cost more than the micro-purchase limit, Subrecipient shall make a written independent estimate of cost prior to receiving price quotes, bids or proposals.

### Cost or Price Analysis

Subrecipient shall perform a cost or price analysis in connection with every procurement over the micro-purchase limit and for all contract modifications.

#### Price Analysis

If Subrecipient determines that competition was adequate, a written price analysis, rather than a cost analysis, is required to determine the reasonableness of the proposed contract price.

#### Cost Analysis

Subrecipient must perform or obtain a cost analysis when:

1. A price analysis will not provide sufficient information to determine the reasonableness of the contract cost.
2. When the offeror submits elements of the estimated cost.
3. When only a sole source is available, even if the procurement is a contract modification.
4. In the event of a change order.

# CONTRACT ADMINISTRATION REQUIREMENTS AND CONSIDERATIONS

## Subrecipient Staff Responsibilities

Prior to execution of each third party contract, Subrecipient shall designate a Project Manager to serve as its principal contact with the contractor and as the primary administrator of the contract. The Project Manager assigned to each contract shall have responsibility for directing and overseeing the work performed by the contractor; reviewing and approving deliverables and invoices from the contractor; determining percentage of contract completion for progress payments (if applicable); making recommendations on the exercise of contract options (if applicable); recommending contract changes; preparing justifications for contract changes; performing independent cost estimates and cost or price analyses for contract changes; making recommendations on approval or rejection of subcontractors; assisting with the resolution of contract disputes; making recommendations on contract termination or other contractor disciplinary actions; maintaining complete contract files; and other contract administration duties that may be necessary.

## Administrative Restrictions on the Acquisition of Property and Services

The following Federal laws and regulations impose administrative requirements, many of which will affect specific third party procurements.

### Legal Eligibility

The property or services acquired must be eligible for support under the restrictions accompanying the Federal statute authorizing the Federal assistance to be used.

### Scope of the Project

The property or services acquired must be eligible for support within the scope of the underlying grant or cooperative agreement from which the Federal assistance to be used is derived.

### Period of Performance

Subrecipient will use sound business judgment and be judicious in establishing and extending a contract’s period of performance.

#### General Standards

The period of performance generally should not exceed the time necessary to accomplish the purpose of the contract. Subrecipient will also consider competition, pricing, fairness, and public perception. Subrecipient’s procurement files will document its rationale for determining the performance period designated for each contract.

#### Time Extensions

Consistent with the general tone of FTA Circular 4220.1F, contract time extensions shall be considered in light of whether they are permissible changes or impermissible cardinal changes. Once Subrecipient awards a third party contract, an extension of the contract term length that amounts to a cardinal change will require a sole source justification.

#### Authority to Extend

The Subrecipient’s Transit Director has the authority to approve and execute contract modifications. The Procurement Officer for the contract shall recommend all contract time; prior to making a recommendation for a contract time extension. The Procurement Officer shall prepare a written justification and cost analysis (if applicable) for the contract time extension and shall negotiate the appropriate contract modification with the contractor.

## Federal Cost Principles

Federal rules require project costs to conform to applicable Federal cost principles for allowable costs. In general, costs must be necessary and reasonable, allocable to the project, authorized or not prohibited by Federal law or regulation, and must comply with Federal cost principles applicable to the recipient.

OMB guidance for grants and agreements, “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards,” 2 CFR § 200, applies to project costs incurred by Subrecipient.

## Payment Provisions

Subrecipient will follow the provisions of this section when using FTA funds to support its third party contracts.

### Financial Support for the Project

Costs may only be incurred by Subrecipient if FTA and/or TDOT has awarded a financial assistance contract to Subrecipient.

#### Progress Payments

Progress payments are payments for contract work that has not been completed. Subrecipient may use FTA and/or TDOT financial assistance to support progress payments provided it obtains adequate security for those payments and has sufficient written documentation to substantiate the work for which payment is requested.

#### Adequate Security for Progress Payments

Adequate security for progress payments may include taking title or obtaining a letter of credit or taking equivalent measures to protect the recipient’s financial interest in the progress payment. Adequate security should reflect the practical realities of different procurement scenarios and factual circumstances. Subrecipient should always consider the costs associated with providing security (for example, Subrecipient may need to acquire bonds or letters of credit in the commercial marketplace) and the impact of those costs on the contract price, as well as the consequences of incomplete performance.

#### Adequate Documentation

Sufficient documentation is required to demonstrate completion of the amount of work for which progress payments are made.

#### Percentage of Completion Method

Federal rules require that any progress payments for construction contracts be made on a percentage of completion method described therein. Percentage of completion is typically based on construction performance reports and is verified by onsite technical inspections. Subrecipient, however, may not make progress payments for other than construction contracts based on this percentage method.

## Protections Against Performance Difficulties

Subrecipient shall include provisions in its third party contracts that will reduce potential problems that might occur during contract performance, as follows:

### Changes

Subrecipient shall include provisions that address changes and changed conditions in all third party contracts except for routine supply contracts. The language of the provisions may differ depending upon the nature of the contract and the end-item being procured, however, they are intended to achieve the following purposes:

* To give Subrecipient flexibility to unilaterally order changes in the work, which may be necessary due to advances in technology or changes in its requirements;
* To give the contractor a method of suggesting changes to the work, thus improving the quality of the contract end-items;
* To give Subrecipient authority to order additional work that is within the general scope of the contract, thereby avoiding a separate procurement with all of the time and expense associated with undertaking another solicitation;
* To require the contractor to proceed with the changed work and resolve the issue of compensation later. This is important since it gives Subrecipient a unilateral contract right to order changes without having to agree beforehand on the price of the work.

### Remedies

Subrecipient shall include provisions that address remedies in its third party contracts. Provisions related to remedies may include provisions for:

#### Liquidated Damages

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

#### Violation or Breach

FTA-funded third party contracts exceeding the simplified acquisition threshold must include administrative, contractual, or legal remedies for violations or breach of the contract by the third party contractor. These provisions are described in Section 39 of the FTA Master Agreement (version 29, February 7, 2022), and include:

* FTA Interest. FTA has a vested interest in the settlement of any violation of federal law, regulation, or requirement, and FTA reserves the right to concur in any settlement or compromise.
* Notification to FTA. Subrecipient is required to promptly notify the FTA Regional Counsel of any current or prospective legal matters that may affect the Federal government. The types of legal matters that require notification include, but are not limited to, a major dispute, breach, default, litigation, or naming of the Federal government as a party to litigation or a legal disagreement in any forum for any reason.
* Federal Interest in Recovery. The Federal Government retains the right to a proportionate share of any proceeds recovered from any third party, based on the percentage of the federal share for the Underlying Agreement. Notwithstanding the preceding sentence, Subrecipient may return all liquidated damages it receives to its Award Budget for its Underlying Agreement rather than return the federal share of those liquidated damages to the Federal Government, provided that Subrecipient receives FTA’s prior written concurrence.
* Enforcement. Subrecipient must pursue its legal rights and remedies available under any third party agreement or any federal, state, or local law or regulation.

#### Suspension of Work

Subrecipient may include provisions pertaining to suspension of work in its third party contracts.

#### Termination

Termination for cause and termination for convenience provisions must be included in third party contracts exceeding $10,000.

## Contract Administration and Close-Out Documents

Subrecipient shall maintain written records detailing the performance and close-out of the contract, including records relating to:

### Contractor Performance

Subrecipient must maintain documents related to contractor adherence to budget and schedule, compliance with contract terms and conditions, DBE participation, progress reports, disputes and disciplinary actions.

### Contract Deliverables

Subrecipient must maintain copies of all contract deliverables and records relating to approval, rejection and requested modifications of contract deliverables.

### Contract Changes

Subrecipient must maintain copies of all contract modifications, including documentation related to the determination of need, written justification and rationale, cost analysis, negotiation and execution.

### Contract Payments

Subrecipient must retain documentation of invoices, approval of payments, requests for modifications to invoices, determination of percentage of contract completion for partial payments (if applicable), and ownership of title to partial work products.

### Contract Close-Out

Subrecipient must retain documentation related to contractor performance and evaluation, approval of final deliverables and payments, transfer of title to complete work products to Subrecipient, and contract audit and final reconciliation.

## Protest Procedures

### Statement of Policy

Subrecipient is responsible for resolving all contractual and administrative issues, including protests of evaluations and contract awards, arising out of its third party procurements using good administrative practices and sound business judgment.

Regarding protests of FTA-funded procurements, FTA will not substitute its judgment for that of Subrecipient unless the matter is primarily a Federal concern. Nevertheless, TDOT and FTA can become involved in Subrecipient’s administrative decisions when a protest decision is appealed to TDOT.

Subrecipient shall give timely notification to TDOT when it receives a third party procurement protest and will keep FTA informed about the status of any such protest. Subrecipient shall disclose all information about any third party procurement protest to TDOT upon request.

Subrecipient’s procedure for addressing third party procurement protests is described in Paragraph 6.9.2 below. Subrecipient shall insert its protest procedure in all formal solicitations.

### Subrecipient Staff Responsibilities

The following staff responsibilities shall be assigned in all protests:

* Procurement Officer – Responsibilities include: ensuring that Subrecipient’s Protest Procedure is included in all solicitation documents; and providing information to and assisting the Subrecipient’s Attorney with the resolution of protests.
* Subrecipient Attorney – Responsibilities include: reviewing all procurement protests; and advising and assisting Subrecipient as needed with the resolution of all procurement protests.

### Solicitation Provisions

Subrecipient’s Procurement Officer shall insert the following protest provisions in all solicitation documents:

*“Pre-Proposal Protests*

*All protests concerning solicitation specifications, criteria and/or procedures shall be submitted in writing (electronic mail is acceptable) to the Procurement Officer in advance of the deadline for submission of bids/proposals.*

*The Procurement Officer may, within his or her discretion, postpone the deadline for submission of bids/proposals, but in any case, shall provide a written response to all protests. If the deadline for submission of bids/proposals is postponed by the Procurement Officer as the result of a protest, the postponement will be announced through an addendum to the solicitation.*

*The decision by the Procurement Officer shall be the final agency decision on the matter but shall be subject to review by TDOT as set forth below.*

*Pre-Award Protests*

*With respect to protests made after the deadline for submission of bids/proposals but before contract award by Subrecipient, protests shall be limited to those alleging a violation of Federal or State law, a challenge to the bids/proposals evaluation and award process, Subrecipient’s failure to have or follow its protest procedures, or its failure to review a complaint or protest. Such protests shall be submitted in writing (electronic mail is acceptable) to the Procurement Officer not* *later than five (5) business days after the recommendation for contract award is announced by Subrecipient.*

*The Procurement Officer may, within his or her discretion, postpone the award of the contract, but in any case, shall provide a written response to all protests prior to actual award of the contract.*

*The decision by the Procurement Officer shall be the final agency decision on the matter but shall be subject to review by TDOT as set forth below.*

*Requirements for Protests*

*All protests must be submitted to Subrecipient in writing (electronic mail is acceptable) with sufficient documentation, evidence and legal authority to demonstrate that the Protestor is entitled to the relief requested. The protest must be certified as being true and correct to the best knowledge and information of the Protestor, and be signed by the Protestor. The protest must also include a mailing address to which a response should be sent.*

*Protests received after the deadlines for receipt of protests specified above are subject to denial without any requirement for review or action by Subrecipient.*

*Protest Response*

*The Procurement Officer shall issue written responses to all protests received by the required protest response dates. All protest responses shall be transmitted by first-class U.S. Postal Service to the address indicated in the protest letter.*

*For convenience, Subrecipient will also send a copy of the response to the Protester by electronic mail if the email address is indicated in the protest letter. The protest response transmitted by U.S. Postal Service shall be the official Subrecipient response to the protest and Subrecipient will not be responsible for the failure of the Protester to receive the protest response by electronic mail.*

*Review of Protests by TDOT*

*All protests involving contracts financed with Federal assistance shall be disclosed to TDOT. Protesters shall exhaust all administrative remedies with Subrecipient prior to pursuing protests with TDOT. TDOT limits its reviews of protests to: a grantee’s failure to have or follow its protest procedures; a grantee’s failure to review a complaint or protest when presented an opportunity to do so; or violations of Federal law or regulation. Appeals to TDOT must be received within five (5) working days of the date the Protester has received actual or constructive notice of Subrecipient’s final decision or within five (5) working days of the date the Protester has identified other grounds for appeal to TDOT.”*