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# **FINAL REPORT**

## **Procurement System Review of HAMPTON ROADS TRANSIT**

**Norfolk, Virginia**

**Dates of Site Visit: February 7-11, 2011**

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## **EXECUTIVE SUMMARY**

Under contract to the United States Department of Transportation, Federal Transit Administration (FTA), Leon Snead & Company, P.C., performed a review of the Hampton Roads Transit (HRT) procurement system to assess its compliance with the requirements of the FTA Circular 4220.1F. The procurement system review (PSR) was conducted in Norfolk, Virginia during the period from February 7 through February 11, 2011.

The review assessed the grantee's compliance with 56 "elements," or requirements, as defined in FTA Circular 4220.1F. The review assessment is divided into levels of findings as defined in circular; (a) Not Deficient - indicates that the grantee complied with the basic requirement of the element and (b) Deficient - indicates that the grantee did not always comply with the requirements of the element.

The review covered 40 contracts and purchase orders awarded by HRT valued at more than \$265 million. During the 24-month period ended December 31, 2010, covered by the PSR, HRT awarded about 114 contracts and 33,015 purchase orders for approximately \$537 million.

We found both strengths and weaknesses in the HRT's procurement system. Our review of the procurement operations disclosed that the grantee had no deficiencies with respect to 31 elements (procurement requirements) of the FTA Circular 4220.1F and it had deficiencies relative to 24 elements. Compliance with one element in the FTA Circular did not apply to the contract files reviewed (See Appendix I).

HRT's procurement system was strong with respect to the following procurement elements: (a) adequate solicitation; (b) written procurement selection procedures; (c) complete specifications; (d) price quotations for small purchases; (e) evaluation of RFP; and (f) written record of procurement history.

The principal weaknesses relate to HRT's need to implement procurement policies contained in FTA Circular 4220.1F. HRT needs to comply with FTA requirements in the following areas: (a) the documentation supporting independent cost estimates; (b) brand name restrictions; (c) sole source justifications and related cost analysis requirement; (d) lack of properly defined time and material contract provisions; (e) lack of documentation for pre-award and post-delivery of rolling stock; (f) written standards of conduct; (g) contract administration system; and (h) procurement policies and procedures.

Practices that could be followed by HRT as described in the FTA Best Practices Procurement Manual are included in this report. The report also includes advisory comments to correct elements with "deficiencies" and to assist HRT in its procurement practices.

We believe that when HRT implements the corrective actions recommended in the report, its procurement system will be strengthened and will be in compliance with FTA Circular 4220.1F.

## **I. PROCUREMENT SYSTEM REVIEW BACKGROUND**

### **Background**

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

The PSR of the HRT was performed in accordance with FTA procedures and included a risk assessment phase and contract review phase. During the assessment phase we obtained an understanding of the grantee's procurement system environment and assessed its risk for noncompliance. During the contract review phase we assessed the grantee's compliance with FTA Circular 4220.1F and other applicable regulations through review of a sample of procurement files that were selected based on our risk assessment.

### **Required Elements**

The procurement system review looks at both systemwide elements and individual procurement elements. Systemwide procurement elements are FTA requirements that apply to the procurement system as a whole. Individual procurement elements are requirements evaluated on an individual contract-by-contract basis.

### **Classification of Findings**

The reviewer records deficiencies for each systemwide and individual procurement element. The reviewer determines deficiencies for systemwide elements based on the results of the Systemwide Requirements Review Check List. The reviewer determines deficiencies for each individual procurement element based upon all the contract files reviewed.

Two levels of findings are used:

- Not Deficient. A finding of "not deficient" indicates that HRT complied with the basic requirements of the element. This is defined as, "The review of the selected procurement files found that in all instances, the grantee complied with the requirement."
- Deficient. A finding of "deficient" indicates that HRT did not always comply with the requirements of the element. This is defined as, "The review of the selected procurement files found that in one or more of the applicable instances, the grantee did not comply with the requirement."

At an exit conference held on February 11, 2011, we discussed our finding and recommendations with the following HRT personnel:

Philip Shucet	President & CEO
David C. Sullivan	Chief of Staff
Wright Parkes	Director of Procurement Transit
Deborah Purcell	Deputy Director of Procurement
Charles Bashay	Procurement
Avis Long	Administration
Laticia Thompson*	Regional Administrator, Region III
Reginal Lovelace*	Deputy Regional Administrator, Region III
Katherine Berillo*	Regional Engineer, Region III

\* Via follow-up Telephone call

## **II. DESCRIPTION OF THE GRANTEE**

The Transportation District Commission of Hampton Roads (Hampton Roads Transit-HRT) was formed on October 1, 1999 by the merger of two predecessor agencies. The Transportation District Commission of Hampton Roads is HRT's governing body. HRT is governed by the Board of Commissioners as regulated by the Transportation District Act of 1964 (Title 15.2, Chapter 45, Code of Virginia). The Commission consists of representatives from each of the seven cities HRT serves, one state senator, one state delegate and the chairman of the Commonwealth Transportation Board or his designee. HRT provides public transportation services within the seven cities of Hampton Roads, employs 850 people, and operates over 350 revenue vehicles. The total service area is over 370 square miles with annual ridership exceeding 15 million passengers.

HRT has administrative offices in Hampton and Norfolk with operations and maintenance facilities in Hampton, Norfolk, and Virginia Beach.

HRT provides traditional fixed route transportation. In addition, HRT provides downtown shuttle and circulator services and seasonal trolley services at the Virginia Beach resort area. HRT also operates ferry service between the downtowns of Norfolk and Portsmouth, vanpools and demand-responsive paratransit service. A light rail line, the Tide, within the City of Norfolk is currently nearing completion of construction and will begin revenue service 2011. The Tide is Virginia's first light rail system. It will extend 7.4 miles from downtown Norfolk to the Norfolk-Virginia Beach border at Newton Road. The Tide will debut with nine-of-the-art light rail vehicles and will carry between 6,500 and 12,000 riders per average weekday. An enhanced feeder bus system will provide strong bus connections to the rail system for broader public access. HRT's budget for fiscal year 2011 is \$81 million and is funded in the following manner:

- Federal Assistance - 34%
- State Assistance - 13%
- Passenger Revenues - 19%
- Municipal Operating Assistance - 34%

### III. RESULTS OF THE REVIEW

The results of the review are summarized for each systemwide and individual procurement element. For each procurement requirement, the report describes the required element, cites a reference to FTA Circular 4220.1F (and other applicable regulations), discusses the issues and identifies deficiencies, presents best practices/advisory comments, and incorporates the grantee's Corrective Actions and Implementation Schedule.

#### A. SYSTEMWIDE PROCUREMENT ELEMENTS

Systemwide procurement elements are requirements that apply to the procurement system as a whole. The systemwide procurement elements are primarily evaluated during the Assessment Phase. During the Assessment Phase, we interviewed senior management and reviewed the policies, regulations and procedures of the grantee to assess the procurement system environment. We also interviewed procurement staff to assess the effectiveness of the procurement system. The findings in this section are a result of these interviews, review of regulations, and additional insights gained during the Contract Review Phase.

#### NOT DEFICIENT

The recipient's system is "not deficient" with respect to the following elements:

**Element 4 – *Prequalification System*** [FTA C 4220.1F, ¶ VI, 1. c.].

**Element 5 – *Procedures for Ensuring Most Efficient and Economic Purchase***  
[FTA C 4220.1F, ¶ IV, 1.b.,c.,& e.]

**Element 29 – *Advertised/Publicized***

(a) "...sealed bidding (is) a procurement method in which bids are publicly solicited." [FTA C 4220.1F, ¶ VI, 3.c.]

(b) The invitation for bids will be publicly advertised." [FTA C 4220.1F, ¶ VI, 3.c. (2) (a)]

(c) "Procurement Procedures. The following procedures apply to procurements by competitive proposals: (a) Publicity. The request for proposals is publicly advertised." [FTA C 4220.1F, ¶ VI, 3.d. (2) (a)]

#### DEFICIENT

**Element 1 – *Written Standards of Conduct*** [FTA C 4220.1F, ¶ III, 1.a.,b.,&c.]

"WRITTEN STANDARDS OF CONDUCT. The Common Grant rules require each recipient to maintain written standards of conduct governing the performance of its employees engaged in the award and administration of contracts.

a. Personal Conflicts of Interest. As provided in the Common Grant Rules and the Federal Transit Administration (FTA) Master Agreement, no employee, officer, agent, or board member,



or his or her immediate family member, partner, or organization that employs or is about to employ any of the foregoing may participate in the selection, award, or administration of a contract supported with FTA assistance if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when any of those previously listed has a financial or other interest in the firm selected for award. (Emphasis added)

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

c. Violations. To the extent permitted by State or local law or regulations, such standards of conduct will provide for penalties, sanctions, or other disciplinary action for violation of such standards by the recipient's officers, employees, agents, board members, or by contractors or sub-recipients or their agents."

### **Discussion**

The recipient's system is "deficient" with respect to this element. The HRT Personnel Manual contains most of the required conflict of interest coverage. It needs to be expanded to include the underlined portion of the personal conflicts of interest paragraph above.

### **Best Practices/Advisory Comments**

Within 30 days of the date of this report HRT should amend its Personnel Manual to include the expanded coverage of who may not participate in the selection, award, or administration of a contract supported with FTA assistance. It is also advised that HRT should, on an annual basis, require all employees who participate in the procurement process to sign an assurance that they have read, understand, and will comply with HRT's personal conflicts of interest policy.

### **Corrective Actions and Implementation Schedule**

1. By June 20, 2011, the HRT Personnel Manual will be amended to include expanded coverage of Personal Conflicts of Interest, Gifts, and Violations, identifying who may not participate in the selection, award, or administration of a contract supported with FTA assistance.
2. On an annual basis, HRT will require all employees who participate in the procurement process to sign a certification that they have read, understand, and will comply with HRT's personal conflicts of interest policy.
3. Should it be determined that a personal conflict of interest exists, a process will be implemented to neutralize or mitigate the conflict, i.e. a change in personnel assignment.

### ***Element 2 – Contract Administration System*** [FTA C 4220.1F, ¶ III. 3.]

3. "THIRD PARTY CONTRACTING CAPACITY. As part of an FTA recipient's obligation to maintain adequate technical capacity to carry out its project and comply with the Common Grant Rules, the recipient's third party contracting capability must be adequate to undertake its

procurements effectively and efficiently in compliance with applicable Federal, State, and local requirements. The Common Grant rules require the recipient to maintain a contract administration system to ensure that it and its third party contractors comply with the terms, conditions, and specifications of their contracts or purchase orders and applicable Federal, State and local requirements. Many FTA recipients assign contracting duties to technical, financial or management personnel. If the recipient lacks qualified personnel within its organization to undertake the various procurement tasks, such as drafting specifications, evaluating contracts, or performing internal audits for the recipient, FTA expects the recipient to acquire the necessary services from sources outside the recipient's organization..."

## **Discussion**

The recipient's system is "deficient" with respect to this element. HRT does not have a documented contract administration system. Contract administration is a shared function between the program offices and the administrative office that has contract authority. However, specific responsibilities and duties for contract administration are not made specifically clear. Reporting and recording requirements are not specified. Contract administration duties such as tracking contract deliverables, schedules, progress payments with required incurred cost documentation, insurance, inspections, warranties, etc. are not specified. Program personnel are not informed of their authority or lack of authority to make changes to the contract or to direct the contractor within the scope of the contract.

## **Best Practices/Advisory Comments**

Within 120 days of the date of this report HRT should develop and implement a contract administration system (Manual) 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. The Contract Administration Manual should cover all contract administration functions from contract award thru to contract close-out. It should describe each function and a system for assigning responsibility for its accomplishment, recordkeeping and reporting.

A system for delegating contracting authority and setting the limits of that authority should be included in the Manual. [One effective method of assigning such responsibilities and also controlling the use of contracting officer authority is to use a letter of delegation to the employee responsible for the administration of a specific contract. The letter should list all functions the employee is responsible for and describe what contractual actions he or she may and may not take. A place is provided on the letter for the employee to also sign and date his or her receipt of the delegation.]

The Manual should include an effective "Change Control System" which ensures that all contract changes are priced and definitized in a timely manner. If a change cannot be priced before issuance because of some urgency, strict time limits should be set for the submission of the contractor's price proposal and negotiation of the final contract modification. This will prevent the contract modification from becoming a cost-plus-percentage-of-cost arrangement.

Such an arrangement exists when a product modification is priced after the work is performed and profit is allowed as a percentage of cost.

### **Corrective Actions and Implementation Schedule**

1. By September 11, 2011, a contract administration system will be fully implemented within the Procurement department, to implement procedures and management controls. The procurement procedures manual will be amended to document the system requirements to include the following:
  - A. incorporation of all contract administration functions from pre-solicitation planning to contract award and administration through close out;
  - B. expansion of the contracting authority delegations to include contract administration personnel through the use of a standard letter of delegation listing all functions of responsibility and describing allowed contractual actions by the contract administrator. The designee will be required to sign the letter, which will become permanent procurement record;
  - C. implementation of a written requisition for initiating all new procurement actions, identifying the project manager, funding source, scope of work, and independent cost estimate or identification of the estimator responsible for the independent cost estimate;
  - D. a detailed review and written approval of solicitations and supporting contract administration files;
  - E. A change control system to ensure contract modifications are priced negotiated and executed in compliance with regulations, and in a timely manner.
  - F. Issuance of contract administration and project management delegation letters for each contract, which details the responsibilities and authority in the administrative and technical management of the contract. The delegation letters will be maintained in the official contract file.

### **Element 3 – *Written Protest Procedures* [FTA C 4220.1F, ¶ VII,1.a.(2)]**

“a. The Recipient’s Role and Responsibilities. The Common Grant Rules charge the recipient with the initial responsibility to resolve protests of third party contract awards...

(2) Responsibilities to FTA. The recipient’s minimum responsibilities to FTA consist of the following:

(a) Timely Notification. The Common Grant Rule for governmental recipients requires a governmental recipient to notify FTA when it receives a third party contract protest to which this circular applies, and to keep FTA informed about the status of the protest. A non-governmental recipient involved in a protest is similarly expected to notify FTA when it receives a third-party contract protest to which the circular applies, and to similarly keep FTA informed about the status of the protest. The recipient is expected to provide the following information:

1. Subjects. A list of protests involving third party contracts and potential third party contracts that:
  - a. Have a value exceeding \$100,000, or

- b. Involve a controversial matter, irrespective of amount, or
    - c. Involve a highly publicized matter, irrespective of amount.
  - 2. Details. The following information about each protest:
    - a. A brief description of the protest,
    - b. The basis of disagreement, and
    - c. If open, how far the protest has proceeded, or
    - d. If resolved, the agreement or decision reached, and
    - e. Whether an appeal has been taken or is likely to be taken.
  - 3. When and Where. The recipient should provide this information:
    - a. In its next quarterly Milestone Progress Report, and
    - b. at its next Project Management Oversight review, if any.
- Small recipients may report less frequently if no protests are outstanding.

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

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

## **Discussion**

The recipient’s system is “deficient” with respect to this element. HRT’s policies and procedures regarding protests were not clear with respect to these reporting requirements.

## **Best Practices/Advisory Comments**

Within 30 days of the date of this report HRT should amend its protest procedures to direct its employees to notify FTA of protests involving FTA funded contracts. Such procedures should include the information required by FTA Circular 4220.1 F.

## **Corrective Action and Implementation Schedule**

By June 20, 2011, the Protest section of the procurement procedures manual will be expanded to further clarify and fully detail role and responsibilities regarding reporting and resolving protests. The contract administration system will implement procedures and management controls to ensure compliance.

## **Element 6 – *Procurement Policies and Procedures* [FTA C 4220.1F, ¶ III. 3.a.]**

Grantees are required to have written procurement procedures that reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law,

including the requirements and standards identified FTA Circular 4220.1F. If there is no State law on a particular aspect of procurement, then Federal contract law principles will apply.

## **Discussion**

The recipient's system is "deficient" with respect to this element. HRT's procurement policies and procedures were reviewed for the mandatory requirements of FTA C 4220.1F. The following FTA requirements, listed by the FTA Circular paragraph number, were either not found or needed clarification:

### **"Organizational Conflicts of Interest.**

2. Remedies. FTA expects the recipient to analyze each planned acquisition in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible, and avoid, neutralize, or mitigate potential conflicts before contract award." FTA C 4220.1F, ¶ VI.2.a(4)(h)

[HRT's policies and procedures contained a definition of organizational conflict of interest but did not provide guidance on how to mitigate or eliminate such conflicts in its contracting.]

"Architectural Engineering (A&E) Services and Other Services. FTA's enabling legislation at 49 U.S.C. Section 5325(b)(1) requires the use of the qualifications-based procurement procedures contained in the "Brooks Act," 40 U.S.C. Sections 1101 through 1104, to acquire A&E services, but also for program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping and 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 as described below. FTA C 4220.1F, ¶ VI.3.f.(2)

(2) Qualifications-Based Procurement Procedures Prohibited. Unless FTA determines otherwise in writing, a recipient may not use qualifications-based procurement procedures to acquire other types of services if those services are not directly in support of, directly connected to, or do not lead to construction, alteration, or repair of real property. Even if a contractor has performed services listed herein in support of a construction, alteration, or repair project involving real property, selection of that contractor to perform similar services not relating to construction may not be made through the use of qualifications-based procurement procedures.

A project involving construction does not always require that qualifications-based procurement procedures be used. Whether or not qualifications-based procurement procedures may be used depends on the actual services to be performed in connection with the construction project. For example, the design or fabrication of message signs, signals, movable barriers, and similar property that will become off-the-shelf items or will be fabricated and delivered as final end products for installation in an FTA assisted construction project are not services for which qualifications-based procurement procedures may be used. Nor are actual construction, alteration, or repair to real property the type of services for which qualifications-based procurement procedures may be used."

[HRT's policies and procedures do not clearly define the applicability of, and prohibitions regarding, qualifications-based procurement procedures relative to services such as program

management, feasibility studies, preliminary engineering, design, surveying, mapping that do not lead directly to construction.]

**“2. FEDERAL REQUIREMENTS THAT MAY AFFECT A RECIPIENT’S ACQUISITIONS.**

Before a recipient may use FTA assistance to support the acquisition of property or services, it must comply with all applicable Federal laws and regulations, whether or not addressed in the Common Grant Rules. Some of those laws and regulations will affect the third party contractor providing the property or services or even determine which entities may qualify as a third party contractor. Other laws and regulations will affect the nature of the property or services to be acquired or the terms under which the property or services must be acquired. A recipient may not use FTA assistance to support acquisitions that do not comply with all applicable Federal requirements... FTA C 4220.1F, ¶ IV.2.h.(1)

h. Construction - Special Requirements. The following Federal laws and regulations impose requirements that may affect FTA assisted construction projects:

- (1) Bonding. The Common Grant Rules require bonds for all construction contracts exceeding the simplified acquisition (\$100,000) threshold unless FTA determines that other arrangements adequately protect the Federal interest...”

[HRT’s policies and procedures regarding bonds contain a reference to the Virginia Public Procurement Act threshold for bonds at \$250,000. It is not clear that all FTA assisted construction projects must be bonded above the small purchase threshold of \$100,000.]

**HRT Standard Contract Clause**

The review found a standard contract clause used in Invitations for Bids which stated that “The Commission may award to other than the low bidder.”

[This is not appropriate for IFB’s. If the contractor is the low bidder and is determined to be responsive and responsible, the award must be made to that contractor. If other evaluation criteria are necessary, IFB is not the appropriate procurement method.]

**Best Practices/Advisory Comments**

Within 30 days of the date of this report HRT should develop and implement policies and procedures that include the FTA Circular requirements shown above.

**Corrective Action and Implementation Schedule**

By June 20, 2011, the procurement procedures manual will be expanded to include checklists and templates noted above, to ensure conformance to Virginia Public Procurement Act and FTA Circular 4220.1F. Standard clauses (general conditions) for invitations for bid and requests for proposals will be developed, to include mandatory federal requirements, in compliance with C 4220.1F, to implement procedures and management controls.

The procurement procedures manual also will be expanded to include:

1. Guidance on Organizational Conflicts of Interest;

2. Clarifications regarding prohibitions of qualifications based procurement procedures outside of construction;
3. Clarification that bonds are required for construction contracts above \$100,000.

## **B. INDIVIDUAL PROCUREMENT ELEMENTS**

The individual procurement elements are applicable to the contract files reviewed. We compiled the findings from all contracts reviewed by each individual procurement element. The results of those findings and conclusions are presented below and organized by whether the element was evaluated as "not deficient" or "deficient." Those elements for which the recipient is "not deficient" are shown first and those defined as "deficient" with respect to that element are shown second. The elements classified as "not applicable" to the sample contract files reviewed are shown in Appendix I, Report Summary Table. Within each category, the numbered elements appear as they are listed in FTA's Procurement System Review Guide.

**NOT DEFICIENT** (A full description of the elements for which the recipient is not deficient is in Appendix II.)

The recipient is "not deficient" with respect to the following elements:

- Element 8 – *A&E Geographic Preference***
- Element 9 – *Unreasonable Qualification Requirements***
- Element 10 – *Unnecessary Experience and Excessive Bonding***
- Element 11 – *Organizational Conflict of Interest***
- Element 12 – *Arbitrary Action***
- Element 14 – *Geographic Preferences***
- Element 15 – *Period of Performance Limitations***
- Element 16 – *Written Procurement Selection Procedures***
- Element 17 – *Solicitation Prequalification Criteria***
- Element 20 – *No splitting [Micro-Purchases]***
- Element 23 – *Price Quotations [Small Purchases]***
- Element 24 – *Complete Specifications***
- Element 26 – *Firm Fixed Price [Sealed Bid]***
- Element 27 – *Selection on Price [Sealed Bid]***
- Element 28 – *Discussions Unnecessary [Sealed Bid]***
- Element 29 – *Advertised/Publicized***
- Element 30 – *Adequate Solicitation***
- Element 31 – *Sufficient Bid Time [Sealed Bid]***
- Element 33 – *Responsiveness [Sealed Bid]***
- Element 34 – *Lowest Price [Sealed Bid]***
- Element 35 – *Rejecting Bids [Sealed Bid]***
- Element 36 – *Evaluation [RFP]***
- Element 37 – *Price and Other Factors [RFP]***
- Element 40 – *Evaluation of Options***
- Element 43 – *Exercise of Options***
- Element 46 – *Progress Payments***

**Element 48 – *Cost Plus Percentage of Cost***  
**Element 49 – *Liquidated Damages Provisions***  
**Element 51 – *Qualification Exclude Price [A&E]***  
**Element 52 – *Serial Price Negotiations [A&E]***  
**Element 53 – *Bid Security [Construction over \$100,000]***  
**Element 54 – *Performance Security [Construction over \$100,000]***  
**Element 55 – *Payment Security [Construction over \$100,000]***  
**Element 56 – *Clauses***

## **DEFICIENT**

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

### **Element 7 - *Independent Cost Estimate***

"6. COST AND PRICE ANALYSIS. "The Common Grant Rules require the recipient to perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis depends on the facts and circumstances surrounding each procurement, but as a starting point, the recipient must make independent estimates before receiving bids or proposals." [FTA C 4220.1F, ¶ VI, 6.]

### **Discussion**

The recipient is "deficient" with respect to this element. We reviewed 29 procurement files involving request for proposals, invitation for bids, sole source procurements and small purchases and found 20 files lacked supporting documentation indicating an adequate independent cost estimate had been performed by the recipient before the transit authority received bids or proposals. Our review found the recipient does not use a formal procurement requisition form to initiate the procurement process. This form is generated by the requiring organization. The independent cost estimate must be received before receipt of proposals and supported with detailed information as to its development and/or source; in other words how derived and by whom. The independent cost estimate becomes the first step in the cost/price reasonableness analysis. In the deficient procurement files, the in-house estimates were either not found or were budgetary type numbers without details to support the numbers or the origin of the numbers.

### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop procedures and implement management controls to ensure that one of the first steps to be taken in connection with every procurement action is an independent cost or price estimate. This independent estimate should be completed before receiving bids or proposals and should be maintained in the official contract file. The Best Practices Procurement Manual Section 2.3.2 states "A final purpose of the independent cost estimate is for price analysis. Either a cost or price analysis is required for every contract and every change order so that the essential objective of a reasonable price is assured. The adequacy of the price or cost analysis is a critical responsibility of the



contracting official. In many contract awards the bids alone may be adequate to assure a reasonable price. However, in all negotiated procurements, most contract changes, and sealed bids where price competition was not sufficient, further analysis is required. An independent cost estimate prepared before receipt of offers is invaluable in these circumstances. The estimate alone may, if prepared with sufficient detail and reliability in the contracting official's judgment, be sufficient to determine whether the price is reasonable. It will at least supplement other pricing data in making the determination of reasonableness. Because cost analysis can be time consuming, expensive, and raise disputes, the availability of an independent pre-bid estimate which enables price analysis and obviates cost analysis is worth material pre-bid effort."

### **Corrective Actions and Implementation Schedule**

1. By June 20, 2011, standard procedures and management controls will be implemented to require assignment of the independent cost estimator prior to beginning any procurement action.
2. Independent cost estimates shall be required to be completed prior to receipt of bids/proposals, and supported with detailed information as to its development and source.
3. The independent cost estimate which will be maintained in the official contract file will be used as the first step in the cost / price analysis.
4. The procurement procedures manual will be expanded to include detailed implementation and guidance of the required process. Training will be implemented, as required.

### ***Element 13 - Brand Name Restrictions***

"2. SOLICITATION REQUIREMENTS AND RESTRICITONS. The Common Grant Rules require that each solicitation provide the following information:

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

(3) 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 recipient must identify the salient characteristics of the named brand that offerers must provide." [FTA C 4220.1F, ¶ VI, 2. a. (3)]

### **Discussion**

The recipient is "deficient" with respect to this element. We reviewed five procurement files involving small purchases, request for proposals, invitation for bids, and sole source procurements using brand names and found two procurement files failed to cite an or equal or a description of the salient physical or functional characteristics needed. If only a brand name was required, the files did not contain properly approved sole source justifications.

## **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop procedures and implement management controls to ensure that when using “brand name or equal” purchase descriptions will carefully identify the recipient’s minimum needs and clearly set forth those salient physical and functional characteristics of the brand name product in the solicitation. When using a “brand name” specification, the recipient does not need to reverse-engineer a complicated part to identify precise measurements or specifications in order to describe its salient characteristics. FTA’s “Best Practices Procurement Manual,” (BPPM) contains additional information on preparation of specifications including examples with specific language.

## **Corrective Actions and Implementation Schedule**

By June 20, 2011, standard procedures and management controls will be implemented to establish and use standard general terms and conditions. The general terms and conditions will include a standardized brand name or equal clause. A management control procedure will be implemented to review solicitations in detail, prior to issuance, to ensure compliance. The review process will include ensuring that when using a brand name or equal specification, the solicitation specifications clearly identify minimum needs and salient physical and functional characteristics of the brand named product. The FTA Best Practices Manual will be used as a guide.

### ***Element 18 - Award to Responsible Contractors***

“8. CONTRACT AWARD. The following provisions apply to third party contract awards:

b. Award to a Responsible Bidder or Offeror. “SAFETEA-LU amended 49 U.S.C. Section 5325 to require FTA assisted contract awards be made only to “responsible” contractors possessing the ability, willingness, and integrity to perform successfully under the terms and conditions of the contract. Responsibility is a procurement issue that is determined by the recipient after receiving bids or proposals and before making contract award. FTA expects the prospective contractor to demonstrate affirmatively to the recipient that it qualifies as “responsible” under the standards of 49 U.S.C. Section 5325 and that its proposed subcontractors also qualify as “responsible.” [FTA C 4220.1F, ¶ VI, 8, b.]

## **Discussion**

The recipient is “deficient” with respect to this element. We reviewed 27 procurement files involving request for proposals, invitation for bids, and sole source procurement and found four files lacked documentation that would indicate a determination had been made that the successful contractor was considered responsible prior to making the award. It should be noted in those files where the recipient had evaluated such responsibility matters as part of the evaluation and award process we found the recipient not deficient. The deficient procurement files lacked a written determination or any indication this issue had been considered.

### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop procedures and implement management controls to ensure that awards are made only to responsible contractors. The contractor must be considered responsible in order to receive an award regardless of the procurement method used to select the contractor. To be considered responsible, a contractor must meet all the following requirements:

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

While the award of a contract itself can in some instances be considered as implicit affirmation that a contractor has been determined to be responsible, where appropriate the written record should state the specific basis for a responsibility determination. When an offer, on which an award would otherwise be made, is rejected because the prospective contractor is found to be not responsible, the recipient should make, sign, and place in the file a determination of no responsibility, which states the basis for this determination. Documents and reports supporting a determination of responsibility or no responsibility, including any pre-award survey reports, should be included in the contract file.

### **Corrective Actions and Implementation Schedule**

By June 20, 2011, procedures and management controls will be implemented to include a responsibility review check list, which will be used for all contractor evaluations prior to award of a contract. The checklist will require review and confirmation of the following:

1. Excluded parties list;
2. Certificate of insurance and surety;
3. Disadvantages Business Enterprise participation goals;
4. Financial resources;
5. Bonds
6. Technical qualifications and experience

7. Past performances, to ensure ability to maintain schedule and completion of work;
8. Integrity and business ethics;
9. Operational experience and capability;
10. History of compliance with regulations and requirements
11. Applicable licensing and certifications;
12. Other verifications as may be deemed appropriate.

Where appropriate, the written record will state the specific basis for a responsibility determination. When an offer is rejected because the prospective contractor is found to be not responsible, a signed determination of non-responsibility, stating the basis for the determination, with all supporting documentation, will be maintained in the official contract file.

### ***Element 19 - Sound and Complete Agreement***

“3. THIRD PARTY CONTRACTING CAPACITY. As part of an FTA recipient’s obligation to maintain adequate technical capacity to carry out its project and comply with the Common Grant Rules, the recipient’s third party contracting capability must be adequate to undertake its procurements effectively and efficiently in compliance with applicable Federal, State, and local requirements...

b. Adequate Third Party Contract Provisions. "The Common Grant Rules require that all third party contracts include provisions adequate to form a sound and complete agreement. Compliance with Federal laws and regulations will necessarily result in the addition of many other provisions to ensure compliance with those laws and regulations." [FTA C 4220.1F, ¶ III, 3, b]

### **Discussion**

The recipient is “deficient” with respect to this element. We reviewed 28 procurement files involving request for proposals, invitation for bids, and sole source to determine if the resulting contract (s) formed a sound and complete agreement. Twenty-seven procurement files were found to be adequate in meeting the requirements for this element and one procurement file was found deficient. In that particular procurement file, the contract had been allowed to lapse and the requirement was continued by the issuance of multiple purchase orders without the benefit of a contract supported by all the FTA required sole source approval and procurement documentation.

### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop procedures and implement management controls to ensure its requirements are covered by a contract that any resultant award is a sound and complete agreement and reflects the understandings of the parties. The contract should take precedence over all other contract documents. Where applicable, the contract or award documents must include all terms and conditions, the negotiated contract price and payment terms, the final statement of work or specification, the delivery schedules and the required clauses including termination for cause and termination for convenience and the basis

for settlement. This document should be, as nearly as possible, a stand-alone document in which all the applicable attachments and exhibits are part of the award. A requirement for management review of proposed contracts is a good method of assuring the completeness and soundness of contracts.

### **Corrective Actions and Implementation Schedule**

All contracts require approval in accordance with the procurement procedures manual. All contracts will be reviewed by management prior to approval of the contract for issuance. By June 20, 2011, standard procedures and management controls will be implemented to track all open contracts, to include maintaining visibility and management of contract periods of performance. The management system will ensure that procurement requirements are covered by a sound and complete contract. Within 90 days prior to contract expiration, the project manager will be notified by the contract administrator, to begin closeout of the expiring contract and planning for any continued requirements. New competitive procurements will be enacted for all continuing requirements. Where interim purchase orders become necessary, they will be supported by FTA required sole source justifications, documentation and approvals, which will be maintained in the official contract file.

### ***Element 21 - Fair and Reasonable Price Determination***

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

(2) Procedures. The following procedures apply to micro-purchases:

(c) Documentation. “FTA’s only documentation requirement for micro-purchases is a determination that the price is fair and reasonable and a description of how the recipient made the determination.” [FTA C 4220.1F, ¶ VI, 3, a, (2) (c)]

### **Discussion**

The recipient is "deficient" with respect to this element. We reviewed 11 procurement files involving micro-purchases and found four procurement files did not contain the required minimum documentation stating the price was fair and reasonable and how the determination was derived.

### **Best Practices/Advisory Comments**

Within 30 days after the date of this report the recipient should develop procedures and implement management controls to ensure that all micro-purchase procurement files contain minimum documentation that the price is fair and reasonable. For micro-purchases a fair and reasonable price determination is made based on price analysis. The Best Practices Procurement Manual, Section 5.2, provides some common price analysis techniques as follows:

- Comparison of proposed prices received in response to the solicitation.

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

### **Corrective Actions and Implementation Schedule**

By June 20, 2011, standard procedures and a management control system will be implemented to verify the completeness of the procurement records, and ensure file documentation is maintained to establish price reasonableness. The procedure will require that micro-purchase procurement files contain written determination that the price is fair and reasonable, including detailing the basis for the determination. A standard form will be developed and implemented for this purpose.

### ***Element 25 – Adequate Competition - Two or More Bidders***

“3.b. Small Purchases. The Common Grant Rule for governmental recipients authorizes governmental recipients to use relatively simple and informal small purchase procedures as follows:

(2) Procedures. When using small purchase procedures:

(a) Competition. The recipient must obtain price or rate quotations from an adequate number of qualified sources. [FTA C 4220.1F, ¶ VI, 3.b.(2)(a); BPPM § 4.2]

### **Discussion**

The recipient is “deficient” with respect to this element. We reviewed nineteen procurement files involving request for proposals and invitations for bids and found two instances where the contract files failed to contain documentation reflecting two or more responsible bidders were not willing and able to compete for the business.

### **Best Practices/Advisory Comments**

Within 30 days of the date of this report, the recipient should develop procedures and implement management controls to ensure that invitation for bid and request for proposal solicitations are publicly advertised in a timely manner and sent to an adequate number of qualified suppliers. When only one offer is received, the procurement files should be documented to so reflect the

reasons why this occurred and what actions are to be taken to mitigate its happening in the future.

### **Corrective Actions and Implementation Schedule**

1. By June 20, 2011, standard procedures and a management control system will be implemented to ensure all small purchases are supported by two or more competitive bids. When competitive bids cannot be obtained, the file shall detail the procurement efforts and document mitigating procedures for obtaining competition.
2. All planned procurement actions estimated to be above \$100,000 will be posted to HRT's website as upcoming, upon receipt of the procurement requisition. Legal notices (ads) will run in appropriate publications, to publish the solicitation.
3. Post solicitation surveys will be completed to document reasons when only 1 or no bids are received. Mitigating actions will be implemented when this occurs. Plan holders lists and survey results will be maintained in the official contract file.

### ***Element 32 – Bid Opening***

“c. Sealed Bids (Formal Advertising)

(2) Procurement Procedures.

(e) Public Opening. All bids are publicly opened at the time and place prescribed in the invitation for bids;” [FTA 4220.1F, ¶ VI, 3.c. (2) (e)]

### **Discussion**

The recipient is “deficient” with respect to this element. We reviewed nine procurement files involving invitation for bids and found two procurement files deficient. The deficiency in these procurement files centers on the lack of documentation to support the actual bid opening. There was documentation in the procurement file and or solicitation to support a public opening was contemplated. The seven non deficient files had advertised the public openings and the files contained bid abstracts recording the bid prices. The documentation should also contain evidence of timely opening, persons in attendance, and any anomalies. Further, in this era of heightened security it is more important than ever to not only identify the location and room but also any procedures necessary to gain access to that bid opening location.

### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop procedures and implement management controls to insure that solicitations are clear regarding the public bid opening and the procurement files properly document the bid opening. This documentation should include sign-in sheets to reflect attendance by the public or any other officials or any documentation regarding any unusual actions or reactions that may have occurred on the part of potential offerors during the bid opening. The recipient should refer to Best Practices Procurement Manual, Section 4.4.2, for additional details on the process of receiving bids and the opening, reading, and recording of bids. A record of this procedure should be placed in the official procurement file. Overall, the recipient did a good job in this area.

## **Corrective Actions and Implementation Schedule**

By June 20, 2011, the procurement procedures manual and standard practices will be amended to ensure bid opening documentation is maintained in the official contract file. Review of the contract files to ensure completeness will be an established standard practice and management control procedure.

Standard practices will include documentation of unusual actions during bid openings. The documentation will be maintained in the official contract file. Bid opening information is published in the legal notices, on HRT's website, and in the solicitation package. Bid results are read publically and recorded. Sign in sheets and bid opening records will be maintained in the official contract file.

### ***Element 38 – Sole Source if Other Award is Infeasible***

#### **“3. METHODS OF PROCUREMENT.**

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

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

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

**(b) Sole Source Justification.** If the recipient decides to solicit an offer from only one source, the recipient must justify its decision adequately in light of the standards of subparagraph 3.i.(1)(b) of this Chapter. FTA expects this sole source justification to be in writing.” [FTA C 4220.1F, ¶ VI,3.i.(3)(a)&(b)]

## **Discussion**

The recipient is "deficient" with respect to this element. We reviewed nine noncompetitive procurement files involving sole sources and found four procurement files deficient. We were unable in the first deficient file for “Spear” modules to find a sole source justification. In the last three deficient procurement files it was discerned by the recipient the situation was such under a prime contract that it became necessary to contract directly with several subcontractors under said prime contract. The procurement files failed to contain properly justified and approved sole source documents.

## **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop procedures and implement management controls consistent with the FTA Circular that avoid using sole source procurement except in circumstances where it is both necessary and in the best interest of the recipient. When a noncompetitive procurement is necessary in circumstances other than those in the FTA Circular paragraphs (VI, 3, I(1)(b), shown above, the recipient should ensure that FTA approval is obtained. Before using the sole source method of procurement, first determine that



the desired requirements cannot be obtained under small purchase procedures, sealed bids, or competitive proposals. If one of these three methods can be used (or is feasible), sole source is not an option. When the sole source procurement method is used, the files should provide justification for using this method of purchase and for using the particular vendor selected. The file should contain a proper and timely approved sole source justification, which reflects the requirements and periods of performance. Adding additional items or requirements or additional periods of time of performance require additional sole source justification.

### **Corrective Actions and Implementation Schedule**

By June 20, 2011, standard procedures and management controls will be implemented to ensure full and open competition in compliance with the FTA Circular 4220.1F, except in cases where it is determined both necessary and not in the agency's best interest. When non-competitive procurement is necessary and in HRT's best interest, a written sole source justification, supporting documentation, and required approvals will be maintained in the official contract file.

### ***Element 39 - Cost Analysis Required [Sole Source]***

#### **"3. METHODS OF PROCUREMENT.**

##### **i. Other Than Full and Open Competition.**

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

(c) Cost Analysis. Prepare or obtain a cost analysis verifying the proposed cost data, the projections of the data, and the evaluation of the costs and profits." [FTA C 4220.1F, ¶ VI, 3, i, (3), (c)]

### **Discussion**

The recipient is "deficient" with respect to this element. We reviewed nine noncompetitive procurement files and found six procurement files did not contain documentation to support that an adequate cost analysis had been performed. There was no element by element analysis or discussion of the cost or profit and no evidence of any negotiations being conducted. Detailed in-house cost estimates were not available to support cost comparisons. Lacking a cost analysis, the recipient must demonstrate price reasonableness by showing the prices were established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public. The recipient should require that the contractor offer a most favored customer clause stating the price is no more than that offered to others under like situations.

### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop procedures and implement management controls to ensure that an adequate cost analysis is performed for all sole source procurements. A contract file checklist and a review by the manager or supervisor are a good way of ensuring compliance with this element. The analysis should be documented in the contract or purchase order file. The cost analysis should include an evaluation of labor, materials, other direct costs, overhead rates, G&A rates, and a profit factor. When negotiations

take place, the file should be documented to reflect the results of the negotiations and the rationale behind the agreements reached.

### **Corrective Actions and Implementation Schedule**

By June 20, 2011, a cost analysis checklist will be developed and used to complete required analyses, as a standard procedure. The analyses and supporting documentation will be reviewed and approved by management upon completion, as part of the management control process. A record of negotiation will be included in the procurement summary and maintained in the official contract file. As standard practice, in all non-competitive awards, a most favored customer clause will be included. The procurement procedures manual will be amended to include completion guidelines for implementation of this requirement.

### ***Element 41 - Cost or Price Analysis***

"6. COST AND PRICE ANALYSIS. "The Common Grant Rules require the recipient to perform a cost or price analysis in connection with every procurement action, including, contract modifications. The method and degree of analysis is dependent on circumstances surrounding each procurement." ..."[FTA C 4220.1F, ¶ VI, 6]

### **Discussion**

The recipient is "deficient" with respect to this element. We reviewed 20 procurement files involving request for proposals, invitations for bids and small purchases and found seven deficient procurement files. Basically, the deficiency resulted from a general lack of detailed documentation to support the results of a cost or price analysis or whether a cost or price analysis had ever been performed. In those procurement files where adequate competition existed and award was made to the lowest offeror, the recipient was found not deficient; however, the procurement files should be documented to reflect this decision. In files where adequate competition exists and the selection is made, there always exists the possibility that negotiations may be necessary.

### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop procedures and implement management controls to ensure that cost or price analysis is conducted, consistent with Federal cost principles, for all applicable procurements and documented in the procurement files.

### **Corrective Actions and Implementation Schedule**

By June 20, 2011, standard procedures and management controls will be implemented to include the cost or price analysis checklist. The checklist, consistent with federal cost principles, will be implemented to conduct and manage cost or price analyses. Cost and price analyses will be reviewed by management to ensure compliance. Department training will include cost and price

analysis. The analyses and supporting documentation will be maintained in the official contract file.

#### **Element 42 - *Written Record of Procurement History***

##### **“3. THIRD PARTY CONTRACTING CAPACITY**

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

(1) Procurement History. The Common Grant Rules require the recipient to maintain and make available to FTA written records detailing the history of each procurement, as follows:

(a) Procurement Method. A governmental recipient must (and a non-governmental recipient should) provide its rationale for the method of procurement it used for each contract, including a sole source justification for any acquisition that does not qualify as competitive, while a non-governmental recipient need only provide a justification for lack of competition when it does not obtain competitive bids or proposals for contracts exceeding the simplified acquisition threshold;

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

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

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

(e) Reasonable Documentation. The extent of documentation should be reasonable. Documents included in a procurement history should be commensurate with the size and complexity of the procurement itself. FTA recognizes that these written records will vary greatly for different procurements. For example, a receipt or bill accompanying a \$100 credit card purchase might contain all of the required information to support that procurement. Procurements that are more substantial may require extensive documentation.” [FTA C 4220.1F, ¶ III. 3, d. (1)]

#### **Discussion**

The recipient is "deficient" with respect to this element. We reviewed 29 procurement files involving request for proposals, invitation for bids, sole source procurements, and small purchases for evidence of a written record of procurement history and found nine files did not contain an adequate procurement history or file documentation. The recommendations for award resulting from the proposal evaluations should explain the basis for the contract price, and any tradeoffs between the technical and cost/price proposals, and why the recipient considers the final price to be fair and reasonable. In some procurement files, the reviewers were able to

locate enough documentation in the files to be able to piece together a reasonable history of the procurement and these procurements were not found deficient.

### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop procedures that facilitate management controls to ensure that procurement files are properly documented with evidence supporting the determinations made during each stage of the procurement process. A complete contract file checklist is a good management review tool to achieve this purpose. The documentation should include:

- (a) Rationale for the method of procurement;
- (b) Independent Cost Estimates;
- (c) Copies of published notices of proposed contract action;
- (d) The evaluations of bids and selections of firms for negotiations and award;
- (e) The costs negotiated by the parties and the determination that the price is fair and reasonable;
- (f) A cost or price analysis, as appropriate;
- (g) A summary record of negotiations, if appropriate; and
- (h) All correspondence and data in support of relevant contractual actions.

Procurement files should be a complete record of procurement actions and should fully support contractors' bid and price. If written quotes/bids are required, then these should become part of the file. If the procurement action is the result of a contract amendment or exercise of an option, sufficient data should be included to fully support the basis for the price and procurement action.

### **Corrective Actions and Implementation Schedule**

By June 20, 2011, standard procedures and management controls will be implemented. The procurement procedures manual will be amended to expand the explanation and requirement for a record of procurement history. A procurement summary checklist will be used to ensure complete and consistent development of the record of the procurement. The checklist will include rationale for the method of procurement; independent cost estimates; copies of published legal notices of the proposed procurement action; bid and proposal evaluation details; price reasonableness determinations; cost or price analyses; record of negotiations; and all supporting correspondence and data. The procurement summary will be maintained in the official contract file.

### ***Element 44 – Out of Scope Changes***

#### **“3. METHODS OF PROCUREMENT.**

##### **i. Other Than Full and Open Competition.**

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

(b) Sole Source. When the recipient requires supplies or services available from only one responsible source, and no other supplies or services will satisfy its requirements, the recipient

may make a sole source award. When the recipient requires an existing contractor to make a change to its contract that is beyond the scope of that contract, the recipient has made a sole source award that must be justified.” [FTA C 4220.1F, ¶ VI, 3, i, (1) (b)]

### **Discussion**

The recipient is deficient with respect to this element. We reviewed three contracts resulting from competitive procurements where the contracts were amended and found two procurement files deficient. The two deficient files were by the same contractor under two separate contracts (#30 & #40) for modifications which appeared to have been outside the general scope of the original contract. The contracts awarded after a sealed bid competition was amended to add requirements which were over and above the requirements outlined in the original request and the resultant contract. The added requirements called for work at two sites for communications ductwork. These amendments are considered “new work” and as such require compliance with FTA requirements for an approved sole source justification, a cost analysis, and cost and profit negotiations none of which were found in the procurement file.

### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop and implement management controls to ensure that all contract amendments and change orders are within the scope of the contract. If the change is not within the scope of the original contract, it is considered a cardinal change. Such changes are not properly processed as being within the authority of the Changes clause. Such changes are “a sole source” and must be processed and handled as “new work” and treated as sole source procurements whereby appropriate approvals are obtained and that the procurement files are adequately documented. In the event a sole source cannot be justified, a competitive procurement action must be initiated.

### **Corrective Actions and Implementation Schedule**

By June 20, 2011, a process and review procedure will be implemented to establish standard procedures and management controls to ensure proposed contract modifications and change orders are within the scope of the contract.

If the proposed change is outside the original scope, it will be treated as a sole source, with the required sole source justification, cost analysis, documentation of negotiations, and required approvals maintained in the official contract file.

### ***Element 45 - Advance Payments***

“2. FEDERAL REQUIREMENTS THAT MAY AFFECT A RECIPIENT’S ACQUISITIONS.

b. 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.

(5) Payment Provisions.

(b) Advance Payments. Advance payments are payments made to a contractor before the contractor incurs contract costs. The recipient may use its local share funds for advance

payments. However, if there is no automatic preaward authority for its project, then advance payments made with local share funds before FTA assistance has been awarded, or before a letter of no prejudice has been issued or other preaward authority has been provided, or before FTA approval for the specific advance payment has been obtained, are ineligible for reimbursement ...” [FTA C 4220.1F, ¶ IV, 2, b. (5) (b)]

### **Discussion**

The grantee is "deficient" with respect to this element. We reviewed 28 procurement files involving request for proposals, invitation for bids, and sole source procurements and found 26 to have complied regarding no payments to contractors prior to the incurrence of costs. However, we found two procurement files where advance payments had occurred. The first deficient file was the contract for the Light Rail Vehicles (LRVs). This particular deficiency was in the payment provisions for the basic contract, as well as for spare parts, tools, and test equipment described in the contract generally as follows:

<b>Milestone</b>	<b>Description</b>	<b>Milestone %</b>
A.	Written Notice to Proceed	10%
B.	Upon Approval of Project Target Schedules	10%
C.	Upon Approval of Quality Assurance Plan	10%
D.	Contractor’s award of sub-contracts for main systems	20%

The payments for milestones A through D represent 50% of the contract price of approximately \$36, 016,518 or about \$18,000,000. The issuance of the Notice of Award and the Submission of the various schedules and plans and the awarding of sub-contracts would automatically require the payment of 50% of the total contract price before the incurrence of a great deal of such costs, and would therefore be an advance payment. Substantial portions of these plans usually already exist or are accomplished during the proposal preparation phase. The same can be said for the lining up of subcontractors and parts suppliers.

The second deficient file was the contract for temporary shelters for Light Rail Vehicles. This contract provided for the payment of 50% of the contract price, or \$23,348, upon award of the contract.

### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the grantee should develop procedures and implement management controls to ensure that FTA approvals are obtained prior to entering into any contract, options under a contract, or into any task orders under a contract that contains advance payments where FTA funds are involved. The grantee must renegotiate the current progress payment provisions, eliminating the advance payments, before exercising any future options, or request and receive approval from the FTA to make advance payments.

## **Corrective Actions and Implementation Schedule**

1. By June 20, 2011, standard procedures and management controls will be implemented to ensure that FTA approval is obtained prior to entering into any contract where FTA funds are involved that contains an advance payment clause.
2. Before exercising any future options for rail cars, spare parts, tools, and test equipment, HRT will eliminate the advance payments clause through negotiations, or request and receive FTA approval to make advance payments.
3. The second contract which was found deficient provided for 50% upon award as a standard commercial practice for the product purchased. In the future, where standard commercial practice exists to support the action, the file will be so documented, in accordance with FTA guidelines, and required approvals obtained.

### ***Element 47 - Time and Materials Contracts***

#### **“2. SOLICITATION REQUIREMENTS AND RESTRICTIONS.**

##### **c. Contract Type Specified.**

##### **(2) Prohibited or Restricted Contract Types.**

**(b) Time and Materials - Restricted.** The Common Grant Rule for governmental recipients permits the use of time and material contracts only:

1. **When to Use.** After determining that no other contract type is suitable; and
2. **Firm Ceiling Price.** If the contract specifies a ceiling price that the contractor may not exceed except at its own risk.” [FTA C 4220.1F, ¶ VI, 2.c.(2)(b)]

## **Discussion**

The recipient is "deficient" with respect to this element. We reviewed seven procurement files involving request for proposals, invitations for bids, and small purchases and found six deficient procurement files. We found a failure to document the use of a time and materials type contracting and a failure to adequately control their cost liability with contract ceilings. These findings fall into two groupings; the first are entire contracts and the second is with contract changes within firm fixed price contracts. In the latter case, the finding is for a portion of these contracts and not the entire contract. Basically, the deficiency resulted from a general lack of written documentation to justify the use of a time and materials type of contracting within these contracts and failure to the use of ceiling prices to limit the cost liability within these contracts. Time and materials pricing without a ceiling price is essentially a cost-plus-percentage-of-cost arrangement.

## **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop procures and implement management controls to ensure that use of time and material type contracting is conducted consistent with Federal cost principles, contracts and change orders have cost ceilings, costs are negotiated and all is documented in the procurement file.

## **Corrective Actions and Implementation Schedule**

By June 20, 2011, standard procedures and management controls will be implemented. The procurement procedures manual will be expanded to implement detailed procedures for documenting the use of a time and material type contract. Time and material contract files will include detailed written justification for the use of the methodology. Written procedures will be developed and implemented to control cost liability with contract ceilings (not to exceed pricing) and documented price negotiations, to preclude cost plus percentage of cost arrangements.

### ***Element 50 - Piggybacking***

#### **“7. EXISTING CONTRACTS.**

a. Permissible Actions. Within the conditions set forth below, FTA permits a recipient to use existing contract rights held by another recipient:

##### **(2) Assignment of Contract Rights.**

(a) Acquisition through Assigned Contract Rights. Although FTA does not encourage the practice, a recipient may find it useful to acquire contract rights through assignment by another recipient. A recipient that obtains contractual rights through assignment may use them after first determining the contract price remains fair and reasonable, and that the contract provisions are adequate for compliance with all Federal requirements. The recipient need not perform a second price analysis if a price analysis was performed for the original contract. However, FTA expects the recipient to determine whether the contract price or prices originally established are still fair and reasonable before using those rights. The recipient using assigned contract rights is responsible for ensuring the contractor’s compliance with FTA’s Buy America requirements and execution of all the required preaward and post delivery Buy America review certifications.... Before proceeding with the assignment, however, FTA does expect the recipient seeking the assignment to review the original contract to be sure that the quantities the assigning recipient acquired, coupled with the quantities the acquiring recipient seeks, do not exceed the amounts available under the assigning recipient’s contract.” [FTA C 4220. IF, ¶ V, 7.a.(2); BPPM Appendix B.16]

## **Discussion**

The recipient is “deficient” with respect to this element. We reviewed two procurement files involving piggybacking; one for light rail cars from a City of Charlotte, North Carolina contract and the other for Gillig buses from a San Mateo County, California contract. The recipient’s deficient procurement file was the bus procurement which failed to contain a price reasonableness determination.

## **Best Practices/Advisory Comments**

Within 30 days of the date of this report, the recipient should develop procedures and implement management controls to ensure that a determination is made that contract prices remain fair and reasonable at the time the requirement is acquired. FTA has historically encouraged recipients to consider combining efforts in their procurements to obtain better pricing through larger



purchases. Recipients must ensure all federal requirements, required clauses, and certifications are properly followed and included in the resulting joint solicitation and contract documents.

### **Corrective Actions and Implementation Schedule**

By June 20, 2011, standard procedures and management controls will be implemented. The procurement procedures manual will be expanded to implement additional detailed procedures and management controls for piggybacking, including pre-award steps to determine that contract prices remain fair and reasonable.

A copy of the original contract will be reviewed to ensure that all federal requirements, required clauses and certifications are properly followed and included in the contract document.

Documentation of the review will be maintained in the official contract file.

### **C. PRE-AWARD AND POST-DELIVERY REVIEW REQUIREMENTS**

“A recipient purchasing revenue service rolling stock with funds obligated by FTA on or after October 24, 1991, must certify to FTA that it will conduct or cause to be conducted pre-award and post-delivery audits as prescribed in this part. In addition, such a recipient must maintain on file the certifications required under subparts B, C, and D of this part.” [49 CFR § 663.7]

#### ***Pre-Award***

“A recipient purchasing revenue service rolling stock with FTA funds must ensure that a pre-award audit under this part is completed before the recipient enters into a formal contract for the purchase of such rolling stock.” [49 CFR § 663.21]

“A pre-award audit under this part includes - (a) A Buy America certification as described in § 663.25 of this part; (b) A purchaser’s requirements certification as described in § 663.27 of this part; and (c) Where appropriate, a manufacturer’s Federal Motor Vehicle Safety certification information as described in § 663.41 or § 663.43 of this part.” [49 CFR § 663.23]

The recipient shall ensure before signing a contract with a supplier that the Buy American Certification has been reviewed and verified for both the 60% domestic content; and the proposed U.S. final assembly location, operations, and total costs. The recipient, before signing a contract with a supplier, shall have performed the “Purchaser’s Requirements Certification” and checked bid specification compliance with the solicitation specifications and completed the manufacturer capability study. The recipient before signing a contract with a supplier for buses shall have requested and received the manufacturer’s letter satisfying the “Federal Motor Vehicle Safety Standards (FMVSS) Certification”. In the event any of the foregoing has not been accomplished, the recipient has requested and received a waiver from FTA.

### **Discussion**

The recipient is “deficient” with respect to this element. We reviewed ten bus procurement files and one light rail car procurement file relative to the required reviews and certifications. Nine of the ten bus procurements were piggyback procurements and one was a joint procurement. None of the Buy America Certifications, the Purchaser’s Requirements Certifications, and the required

FMVSS Certifications were found in any of nine procurement files. It should be noted in the one light rail car file the Certifications were dated after the award date.

### **Best Practices/Advisory Comments**

Refer to the Best Practices/Advisory Comments following the Post-Delivery Review Element.

#### ***Post-Delivery***

“A recipient purchasing revenue service rolling stock with FTA funds must ensure that a post-delivery audit under this part is completed before title to the rolling stock is transferred to the recipient.” [49 CFR § 663.31]

“A post-delivery audit under this part includes - (a) A post-delivery Buy America certification as described in § 663.35 of this part; (b) A post-delivery purchasers certification as described in § 663.37 of this part; and (c) When appropriate, a manufacturer’s Federal Motor Vehicle Safety Standard self-certification information as described in § 663.41 and § 663.43 of this part.” [49 CFR § 663.33]

The recipient shall ensure before using the vehicles in transit service that the “Buy American Certification” has been reviewed and verified for both the 60% domestic content; and the actual U.S. final assembly location, operations, and total costs. In addition, the Purchaser’s Requirements Certification for procurements of rail vehicles or more than ten buses or modified vans is completed for the Resident Inspector’s report and the Visual Inspections and Road Tests or Performance Tests in the case of rail vehicles. Finally, the recipient has verified that the Federal Motor Vehicle Safety Standards (FMVSS) sticker is affixed to each bus. In the event that any of the foregoing has not been accomplished the recipient has requested and received a waiver from the FTA.

### **Discussion**

The recipient is “not deficient” with respect to this element. We reviewed ten bus procurement files and one light rail car procurement file relative to the required reviews and certifications. Nine of the ten bus procurements were piggyback procurements and one was a joint procurement. No Certifications were found in any of the procurement files.

### **Best Practices/Advisory Comments**

Within 30 days after the date of this report, the recipient should develop procedures and implement management controls to insure compliance with the Pre-Award and Post-Delivery requirements. The FTA Administrator’s *Dear Colleague Letter* C-97-03, dated March 18, 1997, and outlines the steps that a Recipient must take in performing pre-award and post-delivery reviews of rolling stock procurements to ensure their compliance with Buy America Act requirements. This *Dear Colleague Letter* may be found in Appendix A.2 of the Best Practices Procurement Manual. It must be stressed that Recipients are to document their reviews and include this documentation in their contract files as evidence that they have performed the required reviews. FTA has published manuals that provide detailed guidance to Recipients

concerning which Buy America certifications and documents are needed to support the procurement process from issuance of the solicitation to title transfer, as well as the procedures that the Recipient may follow when conducting the pre-award and post-delivery reviews. There are also examples of Buy America calculations and responses to frequently asked questions. The manuals are: *Conducting Pre-Award and Post-Delivery Reviews for Bus Procurements*; Document No: FTA DC-90-7713-93-1, Rev. B, dated May 1, 1995 and *Conducting Pre-Award and Post-Delivery Reviews for Rail Vehicle Procurements*; Document No: FTA DC-90-7713-94-1, Rev. B, dated May 1, 1995. It should be noted that in the previous procurement system review (March 2007) a similar finding was made and the recipient responded the Budget and Fiscal Services (BFS) procedures would be amended to ensure compliance.

### **Corrective Actions and Implementation Schedule**

By June 20, 2011, the procurement procedures manual will be expanded to include detailed procedures for ensuring compliance with pre-award and post-delivery requirements. Procedures will outline the steps to be taken in performing pre-award and post-delivery reviews of rolling stock procurements to ensure compliance. Documentation of the reviews will be maintained in the official contract file

#### **D. OTHER MATTERS**

1. Contract number: LR 46406 (Contract 60)  
Contractor: Truland Systems Corporation  
Notice of Award (NOA): September 3, 2008  
Initial Award: \$40,945,327  
Product: LR Transit System; Eastern VA Medical Center to Newton Road  
Procurement Type: Sealed Bid, Construction  
**PSR Findings: None**
2. Contract Number: LR 46408 (Contract 80)  
Contractor: W. M. Schlosser, Company Incorporated  
Notice of Award (NOA): November 7, 2008  
Initial Award: \$13,579,160  
Product: LR Transit Vehicle Storage and Maintenance Facility  
Procurement Type: Sealed Bid, Construction  
**PSR Findings: None**
3. Contract number: LR 46403 & LR 46404 (Contracts 30 & 40)  
Contractor: Skanska USA Civil, Inc.  
Notice of Award (NOA): January 31, 2008 & May 15, 2008  
Initial Award: \$41, 157, 367.89 & \$54, 322, 262.10  
Product: Double Track Construction (Norfolk & Civil Construction)  
Procurement Type: Sealed Bid, Construction

#### Reference:

- (a) HRT/Skanska Settlement Agreement dated January 26, 2010
- (b) PMOC Report, Evaluation of HRT Combining Contracts 30 and 40, dated March 22, 2010

## **PSR Findings:**

1. PSR findings as they relate to issues identified by the PMOC in reference (b) are as follows:
  - a. DBE Goals – HRT letter dated March 29, 2010, issued a revised DBE goal of 22.03% for the consolidated contract. Previously, the DBE goal under Contract #30 was 20% and under Contract #40, it was 24%.
  - b. Revised Insurance Coverage – Procurement and Risk Management worked to ensure that contract insurance was properly updated (copies of insurance certificates attached).
  - c. Warranty Coverage – HRT confirmed its position that Contract #30 warranty provisions remain valid under the consolidated contract and as iterated in the General Terms of the Settlement Agreement.
  - d. Revised Performance and Payment Bonds – Paragraph 4, page 2 of reference (a), in effect required that Skanska provide revised Performance and Payment Bonds by February 16, 2010. HRT requested the revised bonds by letter dated March 23, 2010. A Policy Rider, dated April 6, 2010, increased the consolidated contract bond amount to \$96,067,367.52 (copy attached).
  - e. Contract #30 Subcontracts – For administrative convenience, Skanska continued to manage subcontracts under Contract 30 and Contract 40 separately. Likewise, HRT managed the work as Contracts 40 and 40A (the former #30). Skanska iterated its position by letter dated April 5, 2010: “No Change Orders will be issued to any subcontractors, DBE or not, that combine the scope of C30 and C40.”

## **PSR Team Review of the Settlement Agreement**

1. The Settlement Agreement amount of \$7,352,583 was intended to compensate Skanska for over a hundred outstanding and unresolved Change Order requests and notices for additional and new work. This amount was also intended to settle Skanska claims resulting from alleged HRT delays, inefficiencies, and interferences associated with the aforementioned outstanding Change Order requests and notices. The review team did not find documentation in the contract files or with the Settlement Agreement that indicates that HRT conducted a cost analysis for each of the proposal amounts associated with work items that were eventually swept into the Settlement Agreement amount of \$7,352,583.
2. Under Part B of the Agreement, additional work (out-of-scope or new work) is compensable to Skanska on a Time and Materials (T&M) basis. There is no justification in the file for the blanket use of T&M as a basis for payment. Ceiling

prices were also not established for these T&M changes. In essence, T&M pricing without a ceiling price amounts to a “cost-plus-percentage-of-cost” type contract.

3. Other provisions of the Settlement Agreement:

- a. Paragraph 1 established a Project Contingency amount of \$2.5M and provides a non-exclusive list of project items. Paragraph 2 established that overhead OH/profit will not be applied to the first \$1M of the \$2.5M contingency. On the remaining \$1.5M, the applied OD/profit rate is 20 percent.
  - b. Paragraph 4 provides that Skanska will be reimbursed on a T&M basis at a 20% markup if the original \$2.5M contingency is depleted. This occurred and Change Order 40-117 added \$200,000 to increase the total Project Contingency to \$2.7M.
  - c. The Agreement’s applied OH/profit rate of 20% represents a reduction from the 22.1% rate established under contract C30 and the 24.1% rate established under contract C40. However, since the first \$1M is excluded from OH/profit, effectively the rate for the total combined \$2.7M contingency is 12.6%.
  - d. The first item listed under Part B, paragraph 1, Communications Ductwork, is the same item for which HRT sought proposals on a “sole source” basis via letter dated January 28, 2009, under both contracts C30 and C40. As discussed in the individual findings under those contracts, there was no sole source justification in the file for this change.
4. Skanska letter dated March 18, 2010, stated that Contract 30 work had reached Substantial Completion. Skanska letter dated Jun 16, 2010, stated that Contract 40 work had reached Substantial Completion. Pursuant to the Agreement’s Schedule Incentive (Part C of the Agreement), HRT authorized Skanska to invoice for the Schedule Incentive in the amount of \$500,000 (HT letter dated June 22, 2010, attached).

## REPORT SUMMARY TABLE

		Basic Requirement	ND	D	NA	Total	Corrective Actions
1	Written Standards of Conduct	FTA C 4220.1F, III, 1.a.b.c.		1			Establish Policies Develop Procedures
2	Contract Administration System	FTA C 4220.1F, III, 3.		1			Establish Policies Develop Procedures
3	Written Protest Procedures	FTA C 4220.1F, VII, 1.a.b.		1			Establish Policies Develop Procedures
4	Prequalification System	FTA C 4220.1F, VI, 1.c.	1				
5	Procedures for Ensuring Most Efficient and Economic Purchase	FTA C 4220.1F, IV, 1.b.c.e.	1				
6	Procurement Policies & Procedures	FTA C 4220.1F, III, 3.a.		1			Establish Policies Develop Procedures
7	Independent Cost Estimate	FTA C 4220.1F, VI, 6.	6	23		29	Establish Mgt Controls
8	A&E Geographic Preference	FTA C 4220.1F, VI, 2.a.(4) (g)	2			2	
9	Unreasonable Qualification Requirements	FTA C 4220.1F, VI, 2.a.(4) (a)	20			20	
10	Unnecessary Experience and Bonding	FTA C 4220.1F, VI, 2.a.(4) (e); BPPM §8.2	28			28	
11	Organizational Conflict of Interest	FTA C 4220.1F, VI, 2.a.(4) (h)	6		22	28	
12	Arbitrary Action	FTA C 4220.1F, VI, 2.a (4) (j)	29			29	
13	Brand Name Restrictions	FTA C 4220.1F, VI, 2.a (3) (4) (f)	3	2	24	5	Establish Mgt Controls
14	Geographic Preferences	FTA C 4220.1F, VI, 2.a.(4) (g)	29			29	
15	Contract Term Limitation	FTA C 4220.1F, IV, 2.e.(12)	29			29	
16	Written Procurement Selection Procedures	FTA C 4220.1F, III, 3.a.; VI, 2.e.	19			19	
17	Solicitation Prequalification Criteria	FTA C 4220.1F, VI, 1.c.(1) (2)(3)	1		18	1	
18	Award to Responsible Contractors	FTA C 4220.1F, VI, 8.b.	19	8	1	27	Establish Mgt Controls
19	Sound and Complete Agreement	FTA C 4220.1F, IV, 2.b (6) 2; IV, 2.b.(6) 4	27	1		28	Establish Mgt Controls
20	No Splitting [Micro-purchase]	FTA C 4220.1F, VI, 3.a.(2) (b)	11			11	
21	Fair and Reasonable Price Determination [Micro-purchase]	FTA C 4220.1F, VI, 3.a.(2) (c)	7	4		11	Establish Mgt Controls
22	Micro-Purchase Davis Bacon	FTA C 4220.1F, VI, 3.a.(1)			11		

## REPORT SUMMARY TABLE

		Basic Requirement	ND	D	NA	Total	Corrective Actions
23	Price Quotations[Small Purchase]	FTA C 4220.1F, VI, 3.b.(2)	1			1	
24	Clear, Accurate, and Complete Specification	FTA C 4220.1F, III, 3.a.(1) (b) (d); VI, 2.a.; VI, 3.c.(2) (c)	28	1		29	Establish Mgt Controls
25	Adequate Competition - Two or More Competitors	FTA C 4220.1F, VI, 3.c.(b); VI, 3.d.(2) (c)	17	2		19	Establish Mgt Controls
26	Firm Fixed Price [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(1) (c)	9			9	
27	Selection on Price [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(1) (d)	9			9	
28	Discussions Unnecessary [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(1) (e)	9			9	
29	Advertised/Publicized	FTA C 4220.1F, VI, 3.c.(2) (a)	19			19	
30	Adequate Solicitation	FTA C 4220.1F, VI, 3.c.(2) (b)	17	2		19	Establish Mgt Controls
31	Sufficient Bid Time [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(2) (d)	9			9	
32	Bid Opening [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(2) (e)	7	2		9	Establish Mgt Controls
33	Responsiveness [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(2) (f)	9			9	
34	Lowest Price [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(2) (d)	1		8	1	
35	Rejecting Bids [Sealed Bid]	FTA C 4220.1F, VI, 3.c.(2) (g)	3		6	3	
36	Evaluation [RFP]	FTA C 4220.1F, VI, 3.d.(2) (b)(d)	10			10	
37	Price and Other Factors [RFP]	FTA C 4220.1F, VI, 3.d.(2) (e)	9		1	9	
38	Sole Source if Other Award is Infeasible	FTA C 4220.1F, VI, 3.i.(1); VI, 3.i (b); VI	4	5		9	Establish Mgt Controls
39	Cost Analysis Required [Sole Source]	FTA C 4220.1F, VI, 6.a.	3	6		9	Establish Mgt Controls
40	Evaluation of Options	FTA C 4220.1F, IV, 1.d. VI, 7.b; V, 7.a.(1) (c) 1	7	1	20	8	Establish Mgt Controls
41	Cost or Price Analysis	FTA C 4220.1F, VI, 6.a.(2); VI, 6.b.; VI, 6.a.(3)	13	7		20	Establish Mgt Controls
42	Written Record of Procurement	FTA C 4220.1F, III, 3.d.	20	9		29	Establish Mgt Controls
43	Exercise of Options	FTA C 4220.1F, V, 7.a.(1) (a)(b)(c)2	2	1	25	3	Establish Mgt Controls
44	Out of Scope Changes	FTA C 4220.1F, VI, 3.i.(1) (b)	1	2	25	3	Establish Mgt Controls

## REPORT SUMMARY TABLE

		Basic Requirement	ND	D	NA	Total	Corrective Actions
45	Advance Payments	FTA C 4220.1F, IV, 2. b.(5) (b) 1, 2; IV, 2.b.(5) (b) 2, b; IV, 2.b.(5) (b) 2 b	25	3		28	Establish Mgt Controls
46	Progress Payments	FTA C 4220.1F, IV, 2.b.(5)(c)	7		21	7	
47	Time & Materials Contracts	FTA C 4220.1F, VI, 2.c.(2)(b)	1	6	21	7	Establish Mgt Controls
48	Cost Plus Percentage of Cost	FTA C 4220.1F, VI, 2.c.(2)(a).	28			28	
49	Liquidated Damages Provisions	FTA C 4220.1F, IV, 2.b.(6)(b)1	12		16	12	
50	Piggybacking	FTA C 4220.1F, V, 7.a.(2)	1	1	26	2	Establish Mgt Controls
51	Qualifications Exclude Price [A&E]	FTA C 4220.1F, VI, 3.f.(3); VI, 3.f.(3)(b); VI, 3.h.	2			2	
52	Serial Price Negotiations [A&E]	FTA C 4220.1F, VI, 3.f.(3)	2			2	
53	Bid Security [Construction Over \$100,000]	FTA C 4220.1F, IV, 2.h.(1)(b)	4			4	
54	Performance Security [Construction Over \$100,000]	FTA C 4220.1F, IV, 2.h.(1)(b)	4			4	
55	Payment Security [Construction Over \$100,000]	FTA C 4220.1F, IV, 2.h.(1)(c); IV, 2.h.(1) (e)	4			4	
56	Clauses	FTA C 4220.1F, IV, 2.	26	1		27	Establish Mgt Controls



## DESCRIPTION OF NOT DEFICIENT ELEMENTS

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### **Element 4 – *Prequalification System***

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

- (1) Lists. The recipient ensures that all prequalification lists it uses are current.
- (2) Sources. The recipient ensures that all prequalification lists it uses include enough qualified sources to provide maximum full and open competition.
- (3) Qualification Periods. The recipient permits potential bidders or offerors to qualify during the solicitation period (from the issuance of the solicitation to its closing date). FTA, however, does not require a recipient to hold a particular solicitation open to accommodate a potential supplier that submits property for approval before or during that solicitation. Nor must a recipient expedite or shorten prequalification evaluations of bidders, offerors, or property presented for review during the solicitation period. Prequalification should not be confused with reviews of technical qualifications that are an essential process in two-step procurements and qualifications-based procurements, as discussed further in subsections 3.e. and 3.f. of this Chapter, respectively.” [FTA C 4220.1F, ¶ VI, 1.c.]

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

“Proposed procurements should be reviewed to avoid the purchase of property and services the recipient does not need (including duplicative items and unnecessary options).... Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase... [FTA C 4220.1F, ¶ IV, 1.b.c.e.]

### **Element 8 – *A&E Geographic Preference***

“Geographic location may be a selection criterion [in procurements for architectural and engineering (A&E) services] provided an appropriate number of qualified firms are eligible to compete for the contract, given the nature and size of the project.” [FTA C 4220.1F, ¶ VI, 2.a.(4) (g); BPPM § 6.5]

### **Element 9 – *Unreasonable Qualification Requirements***

“Unreasonable requirements placed on bidders or offerors in order for them to qualify to do business” [FTA C 4220.1F, ¶ VI, 2.a.(4) (a); BPPM § 2.4.2.1]

### **Element 10 – *Unnecessary Experience and Excessive Bonding***

“Unnecessary experience” and “excessive bonding requirements... FTA does not require any bonding for rolling stock, services, maintenance operations, or any contracts other than construction....” [FTA C 4220.1F, ¶ IV, 2.b.h.(1); BPPM § 2.4.2.1.]

## DESCRIPTION OF NOT DEFICIENT ELEMENTS

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### **Element 11 – *Organizational Conflict of Interest***

Example of situation restrictive of competition: “Organizational Conflict of Interest. An organizational conflict of interest occurs when any of the following circumstances arise:

- a. Lack of Impartiality. When the contractor is unable, or potentially unable, to render impartial assistance or advice to the recipient due to other activities, relationships, contracts, or other circumstances.
- b. Impaired Objectivity. When the contractor’s objectivity in performing the contract work is or might be otherwise be impaired due to other activities, relationships, contracts, or other circumstances.
- c. Unfair Competitive Advantage. The contractor has an unfair competitive advantage.” [FTA C 4220.1F, ¶ VI, 2.a. (4) (h); BPPM § 2.4.2.2.2]

### **Element 12 – *Arbitrary Action***

“Taking any arbitrary action in the procurement process” [FTA C 4220.1F, ¶ VI, 2.a.(4) (j); BPPM § 2.4.2.1]

### **Element 14 – *Geographic Preferences***

Example of situation restrictive of competition: “Specifying statutorily or administratively imposed in-State or local geographical preferences or evaluating bids and proposals in light of such in-State or local geographical preferences. Specifically, an FTA recipient is prohibited ...from limiting their bus purchases to in-State dealers.” [FTA C 4220.1F, ¶ VI, 2. a. (4) (g)]

### **Element 15 – *Contract***

- (a) “To comply with 49 U.S.C 5325 (e)(1), a multi - year third party contract to purchase additional rolling stock and replacement parts may not have options that extend more than five years after the date of the original contract.”
- (b) “FTA interprets this five-year period as covering the recipient’s rolling stock and replacement needs from the first day when the contract becomes effective to those at the end of the fifth year. This means that the contract may not encompass more rolling stock and replacement parts than the recipient needs within five years. The five-year rule does not mean delivery, acceptance, or even fabrication must be completed in five years – only that a contract is limited to purchasing no more than the recipient’s rolling stock or replacement parts needs for five years based on the effective date of the contract. [FTA C 4220.1F, ¶ IV, 2.e.(12)]

### **Element 16 – *Written Procurement Selection Procedures***

The Common Grant Rule...requires the recipient to have written procurement procedures...FTA expects the recipient to consider all evaluation factors specified in its solicitation documents, and

## DESCRIPTION OF NOT DEFICIENT ELEMENTS

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evaluate the bids or offers only on the factors included in those solicitation documents.” [FTA C 4220.1F, ¶ III, 3.a & VI, 7, a ]

### **Element 17 – *Solicitation Prequalification Criteria***

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

- (1) “Lists. The recipient ensures that all its prequalification lists used in acquiring property and services are current. [FTA C 4220.1F, ¶ VI, 1.c.(1)]
- (2) “Sources. The recipient ensures that all its prequalification lists include enough qualified sources to ensure maximum full and open competition.” [FTA C 4220.1F, ¶ VI, 1.c.(2)]
- (3) “Qualification Periods. The recipient permits potential bidders or proposers to qualify during the solicitation period) from the issuance of the solicitation to its closing date).” [FTA C 4220.1F, ¶ VI, 1.c.(3)]

### **Element 20 – *No Splitting [Micro-purchases]***

“...there should be ... no splitting of procurements to avoid competition.” [FTA C 4220.1F, ¶ VI, 3.a.; BPPM § 4.1]

### **Element 22 – *Micro-Purchase Davis Bacon***

“Davis - Bacon prevailing wage and hour restrictions apply to construction contracts exceeding \$2,000.” [FTA C 4220.1F, ¶ VI, 3.a.; BPPM § 4.1]

### **Element 23 – *Price Quotations [Small Purchase]***

“Price or rate quotations shall be obtained from an adequate number of qualified sources” [FTA C 4220.1F, ¶ VI, 3.b.; BPPM § 4.2]

### **Element 24 – *Clear, Accurate, and Complete Specification***

- (a) “Each solicitation must provide a clear and accurate description of the technical requirements for the property or services to be procured.” [FTA C 4220.1F, ¶ VI, 2.a.; BPPM § 3]
- (b) “In competitive procurements, the description may not contain features that unduly restrict competition.” [FTA C 4220.1F, ¶ III, 3.a.(1) (b)]
- (c) “The Common Grant Rule ... advises the recipient to describe technical requirements in terms of ‘functions to be performed or performance required, including the range of acceptable characteristics or minimum acceptable standards.’” [FTA C 4220.1F, ¶ III, 3.a.(1) (d)]
- (d) “In order for sealed bidding to be feasible, the following conditions should be present: A complete, adequate, and realistic specification or purchase description is available.” [FTA C 4220.1F, ¶ VI, 3.c. (1) (a)]

## DESCRIPTION OF NOT DEFICIENT ELEMENTS

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- (e) “If this procurement method is used . . . the invitation for bids will include any specifications and pertinent attachments...in order for the bidder to properly respond.” [FTA C 4220.1F, ¶ VI, 3.c. (2) (c)]

### **Element 26 – *Firm Fixed Price [Sealed Bid]***

“...the procurement lends itself to a firm fixed price contract.” [FTA C 4220.1F, ¶ VI, 3.c.(1) (c)]

### **Element 27 – *Selection on Price [Sealed Bid]***

“...the selection of the successful bidder can be made on the basis of price and those price - related factors included in the solicitation.” [FTA C 4220.1F, ¶ VI, 3.c.(1) (d)]

### **Element 28 – *Discussions Unnecessary [Sealed Bid]***

“No discussion with bidders is needed” [FTA C 4220.1F, ¶ VI, 3.c.(1) (e)]

### **Element 30 – *Adequate Number of Sources Solicited [Sealed Bid] [RFP]***

- (a) “Bids shall be solicited from an adequate number of known suppliers....” [FTA C 4220.1F, ¶ VI, 3.c. (2) (b)]
- (b) “Procurement Procedures. The following procedures apply to procurements by competitive proposals: (c) Adequate Sources. Proposals are solicited from an adequate number of qualified sources.” [FTA C 4220.1F, ¶ VI, 3.d. (2) (c)]

### **Element 31 – *Sufficient Bid Time [Sealed Bid]***

“The Common Grant Rule for governmental recipients acknowledges sealed bidding to be a generally accepted procurement method...Procurement using sealed bids is appropriate if: ...Bidders are allowed sufficient time to prepare bids before the date of bid opening.” [FTA C 4220.1F, ¶ VI, 3, c.(2) (d)]

### **Element 33 – *Responsiveness [Sealed Bid]***

“The Common Grant Rule for governmental recipients acknowledges sealed bidding to be a generally accepted procurement method...Procurement using sealed bids is appropriate if: ...A firm fixed price contract is...awarded to the lowest responsive and responsible bidder” [FTA C 4220.1F, ¶ VI, 3, c.(2) (f)]

### **Element 34 – *Lowest Price [Sealed Bid]***

“A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder.”

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- (a) “When specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest;”
- (b) “Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of.”  
[FTA C 4220.1F, ¶ VI, 3.c.(2) (f)]

### **Element 35 – *Rejecting Bids [Sealed Bid]***

“Any or all bids may be rejected if there is a sound, documented business reason” [FTA C 4220.1F, ¶ VI, 3.c.(2) (g)]

### **Element 36 – *Evaluation [RFP]***

“The Common Grant Rule for governmental recipients acknowledges the use of competitive proposals to be a generally accepted procurement method when

- (a) All evaluation factors and their relative importance are specified in the solicitation...
- (b) A specific method is established and used to conduct technical evaluations of the proposals received and to determine the most qualified offeror.” [FTA C 4220.1F, ¶ VI, d.(2)(b)(d)]

### **Element 37 – *Price and Other Factors [RFP]***

“If this procurement method is used the following requirements apply: . . . Award will be made to the responsible firm whose proposal is most advantageous to the recipient’s program with price and other factors considered.” [FTA C 4220.1F, ¶ VI, 3.d.(2) (e)]

### **Element 40 – *Evaluation of Options***

“Options may be included in contracts to assure the future availability of property or services. An option is a unilateral right in a contract by which, for a specified time, a recipient may elect to purchase additional equipment, supplies, or services called for by the contract, or may elect to extend the term of the contract.” [FTA C 4220.1F, ¶ IV, 1.d.]

- (a) “In awarding the basic contract ... the recipient shall evaluate offers for any option quantities or periods contained in a solicitation when it has been determined prior to soliciting offers that the recipient is likely to exercise the options.” [FTA C 4220.1F, ¶ VI, 7.b.]
- (a) “When options have not been evaluated as part of the award, the exercise of such options will be considered a sole source procurement.” [FTA C 4220.1F, ¶ V, 7.a. (1) (c) 1]

## DESCRIPTION OF NOT DEFICIENT ELEMENTS

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### **Element 43 – *Exercise of Options***

“Options may be included in contracts to assure the future availability of property or services. An option is a unilateral right in a contract by which, for a specified time, a recipient may elect to purchase additional equipment, supplies, or services called for by the contract, or may elect to extend the term of the contract.” [FTA C 4220.1F, ¶ IV, 1. d.]

- (a) “Consistency with the Contract. A recipient must ensure that the exercise of an option is in accordance with the terms and conditions of the option stated in the initial contract awarded.” [FTA C 4220.1F, ¶ V, 7. a. (1) (a)]
- (b) “Price. An option may not be exercised unless the recipient has determined that the option price is better than prices available in the market or that the option is the more advantageous offer at the time the option is exercised.” [FTA C 4220.1F, ¶ V, 7. a. (1) (b)]
- (c) “Negotiating a Lower Option Price. Exercising an option after a lower price has been negotiated constitutes a sole source procurement.” [FTA C 4220.1F, ¶ V, 7. a. (1) (c) 2]

### **Element 46 – *Progress Payments***

“Progress payments are payments for costs incurred by the contractor in the performance of the contract before the contract work has been completed. [FTA C 4220.1F, ¶ IV, 2.b. (5) (c)]

### **Element 48 – *Cost Plus Percentage of Cost***

“The Common Grant Rules expressly prohibit the use of the cost plus a percentage of cost and percentage of construction cost methods of contracting.” [FTA C 4220.1F, ¶ VI, 2.c. (2) (a)]

### **Element 49 – *Liquidated Damages Provisions***

“Delay. FTA has determined that a recipient may use liquidated damages if the recipient reasonably expects to suffer damages through delayed contract completion and the extent or amount of such damages would be difficult or impossible to determine. The rate and measurement period must be specified in the third party contract and may not be excessive. The assessment for damages is usually established at a specific rate per day for each day beyond the contract’s delivery date or performance period, but a measurement period other than a day may be established if appropriate. Any liquidated damages recovered shall be credited to the project account involved unless the FTA permits otherwise.” [FTA C 4220.1F, ¶ IV, 2.b. (6) (b)1]

### **Element 51 – *Qualifications Exclude Price [A&E]***

“When Required. Qualifications-based proposal procedures are required for projects related to or leading to a construction project. These procedures must be used not only when contracting for architectural and engineering services, but also for program management, construction management, feasibility studies, preliminary engineering, design, architectural, engineering, surveying, mapping, and related services. Recipients shall use qualifications-based competitive

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proposal procedures [i.e. Brooks Act Procedures when contracting for A&E services as defined in 40 U.S.C. Sections 1212-1214 and 49 U.S.C. Section 5325(b)(1)]. When this procurement method is used, the following requirements apply: [FTA C 4220.1F, ¶ VI, 3.f.(3)]

### **Element 52 – *Serial Price Negotiations [A&E and Other Services]***

When this procurement method is used, the following requirements apply:

- (a) Most Qualified. Negotiations are conducted with only the most qualified offeror; and
- (b) Next Most Qualified. Failing agreement on price, negotiations with the next most qualified offeror and, if necessary, negotiations with successive offerors in descending order must be conducted until a contract award can be made to the offeror whose price the recipient believes is fair and reasonable.” [FTA C 4220.1F, ¶ VI, 3.f.(3)]

### **Element 53 – *Bid Security [Construction over \$100,000]***

“Bonding. The Common Grant Rules require bonds for all construction contracts except to the extent FTA determines that the Federal interest is adequately protected through other arrangements. [FTA C 4220.1F, ¶ IV, 2.h.(1)(a)]

### **Element 54 – *Performance Security [Construction over \$100,000]***

“Bonding. The Common Grant Rules require bonds for all construction contracts except to the extent FTA determines that the Federal interest is adequately protected through other arrangements. [FTA C 4220.1F, ¶ IV, 2.h.(1)(b)]

### **Element 55 – *Payment Security [Construction over \$100,000]***

“Bonding. The Common Grant Rules require bonds for all construction contracts except to the extent FTA determines that the Federal interest is adequately protected through other arrangements. [FTA C 4220.1F, ¶ IV, 2.h. (1) (e)]

### **Element 56 – *Clauses***

#### **“FEDERAL REQUIREMENTS THAT MAY AFFECT A RECIPIENT’S ACQUISITIONS.**

Before FTA assistance may be used to support an acquisition of property or services, all applicable Federal requirements, whether or not addressed in the Common Grant Rules, must be fulfilled.” [FTA C 4220.1F, ¶ IV, 2.]

[FTA Circular 4220.1F, Appendix D, contains a matrix of Federally-required clauses and contractor certifications for various dollar values and types of procurements, such as construction, A&E, rolling stock, materials, etc. Instructions for these clauses and suggested clause language may be found in the FTA “Best Practices Procurement Manual,” Appendix A.1]

## **APPENDIX III**

### **HAMPTON ROADS TRANSIT RESPONSE DATED MAY 12, 2011**