

## **PROCUREMENT GUIDELINES**

### **For Grantees Receiving Federal Transit Funds via MDOT**

### **Revised September 2018**

#### **PURPOSE**

The purpose of these guidelines is to provide all grantees with an understanding of the requirements for bidding and contracting services required for federal and state funding provided by Michigan Department of Transportation (MDOT). It is important to emphasize that this is not an all-inclusive reference on Federal procurement and contracting requirements. Common deficiency areas from Procurement System Reviews (PSRs) conducted by the Federal Transit Administration (FTA) are included in the guidelines. The first section of the guidelines is an overview of procurement methods and the second section is an explanation of the deficiency areas identified in the PSRs.

The federal requirements are extensive, and FTA has prepared detailed guidance on these requirements:

- FTA Circular 4220.1F (Third Party Contracting Requirements)
- FTA Best Practices Procurement & Lessons Learned Manual

This guidance is available at: <https://www.transit.dot.gov/funding/procurement/procurement>

Grantees contracting for service operations or making capital purchases, such as vehicles or equipment, or facility construction, renovation or repair are subject to this guidance.

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## **OVERVIEW OF PROCUREMENT METHODS**

## **COMPETITION**

The primary purpose of any procurement is to obtain optimal quality and service at minimum cost through free and open competition. A secondary purpose is to guard against favoritism and profiteering at public expense and to provide equal opportunities to participate by every potential vendor. Your procurements should be designed to ensure that all qualified vendors have a fair opportunity to benefit from public funds.

Competition in procurement is the process in which three or more vendors attempt to secure business by the most favorable price, quality and service. Procurement practices should rule out vendors only for sound, documentable, business reasons. Exclusionary practices that limit competition for reasons other than business or bona fide policy goals will not be allowed. FTA will not fund procurements that restrict competition by using exclusionary or discriminatory specifications such as:

- Placing unreasonable requirements on firms in order for them to qualify to do business;
- Requiring unnecessary experience or excessive bonding;
- Allowing noncompetitive practices between firms (collusion, price fixing);
- Providing noncompetitive awards to any person or firm on retainer contracts;
- Allowing conflicts of interest within the agency;
- Specification of a name-brand product without listing its salient characteristics and not allowing an alternative product to be offered;
- Using any arbitrary action in the procurement process; and
- Including geographic preference. Geographic preference for local or state firms is prohibited, except in cases where federal statutes expressly mandate or encourage geographic preferences. Geographic location may be a selection criterion in the purchase of architectural and engineering services provided that an appropriate number of qualified firms compete for the contract.

## PROCUREMENT OPTIONS

A grantee may conduct its own procurement, join with other systems in a consortium procurement led by one of the participants, use a state-administered procurement conducted on behalf of transit systems, or use an existing contract from the state or another agency if the procurement process satisfies FTA requirements.

**Consortium** - A consortium is a competitive procurement involving more than one transit system. Each transit system must agree on the specifications and work together with one lead agency to develop common specifications. The lead agency needs to keep track of the number of items purchased under the resulting contract.

**Piggy-backing**– The post-award practice of allowing someone who was not included in the original procurement to purchase the same supplies or equipment through the original contract is allowed under specific situations:

- The original solicitation must include an assignability clause that provides for the assignment of all or part of the deliverables as originally advertised and competed;
- The original solicitation and contract must contain both a minimum and maximum quantity;
- No additional quantities can be added;
- Units must be as originally specified with no “cardinal changes”; and
- The lead agency needs to keep track of the number of items purchased by all participants.

**State-Administered Procurements** – MDOT in conjunction with the Michigan Department of Technology, Management and Budget (MDTMB) establishes contracts for revenue vehicles that follow FTA procurement requirements. Federal and state funds can be used only for items included in the state contracts. **Any non-cardinal changes to the state contract must be purchased with local funds. Cardinal changes are not permitted.**

MDTMB MiDEAL contracts for purchases of non-revenue vehicles, tires, radios, computers, and other items are not FTA-compliant. MDOT-administered federal and state funds cannot be used to procure items off these contracts.

## METHODS OF PROCUREMENT

The following table describes the available methods of procurement. The method of procurement is more restrictive and time-consuming as the dollar amount increases. You can always choose to use a more restrictive method than required. For example, for a procurement of \$24,000, the table shows that you typically would use the small purchase method; however, you can choose to use either an Invitation to Bid or a Request for Proposal but you cannot use the micro-purchase method. Your local procurement requirements may be more restrictive than the federal requirements shown in the following table; you must follow the strictest method required.

Procurement Method	Purchase Amount	Nature of Product/Service	Competitive	MDOT Pre- Approval*
<b>Micro-Purchase</b>	\$10,000 or less	Standardized Product/Service	No	No
<b>Small Purchase (Request for Quote (RFQ))</b>	More than \$10,000 up to \$250,000	Standardized Product/Service	Yes	Yes
<b>Invitation for Bid (IFB) or Sealed Bid</b>	Any dollar amount; Required for more than \$250,000*	Standardized Product/Service	Yes	Yes
<b>Request for Proposal (RFP)</b>	Any dollar amount; Required for more than \$250,000*	Services cannot be precisely defined and/or price is only one factor for evaluation	Yes	Yes
<b>Request for Qualification (RFQ)</b>	Any dollar amount	Architectural and Engineering	Yes	Yes
<b>Sole Source</b>	Any amount	When other method is not feasible	No	Yes

\* All procurements are subject to MDOT review at any time and MDOT can withhold payment for an improper procurement.

### MICRO-PURCHASE

Micro-purchases are procurements of \$10,000 or less and can be made without obtaining competitive quotations if the grantee determines the price is fair and reasonable. Documentation must include how the determination was made that the price is fair and reasonable. These purchases should be equitably distributed among qualified suppliers. Rotating through a list of the suppliers is one method to equitably distribute the micro-purchases among qualified suppliers. No purchases can be split to be under the dollar threshold to avoid competition. The Davis-Bacon Act applies to construction procurements greater than \$2,000.

### SMALL PURCHASE (REQUEST FOR QUOTE)

The price quote procedure may be used for goods or services costing more than \$10,000 up to \$250,000, but the upper threshold is \$100,000 for grants awarded before 12/26/2014. Small purchase solicitations must be reviewed and approved by MDOT before being issued. Quotes and award documents must also be approved by MDOT before making the award. For purchases of \$25,000 or greater, the third-party contract must also be approved by MDOT. Requests For Quotes must be sent to an adequate number of qualified sources. An adequate number is defined as enough to obtain three responsive quotes.

**Sealed Bids/Invitation for Bid (IFB) or Request for Proposals (RFP) – generally for procurements of more than \$250,000.**

The following methods of procurements require MDOT's review and approval of all bid/ proposal documents, including specifications and plans, the Invitation for Bid or Request for Proposal, a copy of each bid/proposal submitted, the bid/proposal evaluation, the award recommendation, and the third-party contract. The required documents are summarized in the MDOT Review of Procurements. MDOT approval must be obtained at certain points before continuing to the next step.

**IFB**

Bids are publicly solicited and a firm fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming to all the material terms and conditions of the IFB, is the lowest price. Other factors to be considered in an IFB:

- In order for an IFB to be feasible, the following conditions must be present:
  1. A complete, adequate and realistic specification or purchase description is available;
  2. Three or more responsible bidders are willing and able to compete effectively for the business;
  3. The procurement lends itself to a firm fixed-price contract and the selection of the successful bidder can be made principally on the basis of price; and
  4. No discussions with bidders are needed regarding price.
- If the IFB method is used, the following requirements apply:
  1. **MDOT must review and approve all IFBs and the required forms before advertising the IFB.** The IFBs must include specifications and any pertinent attachments, and must define the items or services sought in order for the bidder to properly respond;
  2. The IFBs must be publicly advertised and bids must be solicited from an adequate number of known suppliers, providing them sufficient time to prepare bids prior to the bid-opening date;
  3. All bids must be publicly opened at the time and place described in the IFB;
  4. A firm fixed-price contract award must be made in writing to the lowest, responsive and responsible bidder. When specified in the bidding documents, factors such as discounts, transportation costs and life-cycle costs must be considered in determining which bid is lowest;
  5. Payment discounts will be used to determine the low bid only when prior experience indicates that such discounts are usually taken advantage of;
  6. Any or all bids may be rejected if there is a sound, **documented** business reason; and
  7. The sealed-bid method is the preferred method for procuring construction if the conditions under the first bullet apply.
- **A copy of the approved IFB, the bid from the selected bidder, the required forms and a copy of the proposed contract must be forwarded to MDOT for its review prior to the award being made.**

## RFP

The competitive proposal method of procurement normally is conducted with more than one source submitting an offer, i.e., proposal. Either a fixed price or cost reimbursement type contract is awarded. This method of procurement is generally used when conditions are not appropriate for the use of an IFB. Typically grantees will use this method for the procurement of operating and consulting services. If this procurement method is used, the following requirements apply:

- RFPs must be publicly advertised, and proposals solicited from an adequate number of qualified sources in order to receive at least three responsible bidders.
- All evaluation factors must be identified along with their relative importance, but numerical or percentage ratings or weights need not be disclosed. **MDOT must review and approve the RFP and the required forms before the solicitation is advertised.**
- The RFP may be structured so that the cost information is submitted separately from the proposal itself.
- Grantees must have a method in place for conducting technical evaluations of the proposals received and for selecting awardees. The method of evaluation does not need to be included in the solicitation.
- Award recommendations must be made to the responsible firm whose proposal is most advantageous to the grantee's program with price and other factors considered. Qualitative considerations may include technical design, technical approach, quality of proposed personnel, and/or management plan.
- **A copy of the approved RFP, the proposal from the offeror selected, the required forms and a copy of the proposed contract must be forwarded to MDOT for its review prior to the award being made.**

## MDOT'S SMALL BUSINESS PROGRAM

FTA-assisted consultant projects and construction (including rehabilitation) projects over \$500,000 that must have a five percent small participation goal unless a waiver is granted by the MDOT Office of Passenger Transportation (OPT). This goal is required as part of MDOT's Small Business Program.

If an IFB method of procurement is being used the IFB must include the following:

Submissions that meet the five percent small business participation goal will be given a five percent price preference when determining the lowest qualified bidder. In determining the lowest bid amount of the qualified bids, the bid amount of those bids that meet the small business goal will be reduced by five percent. The contract will be awarded based on the approved bid amount of the selected bid.

If an RPB method of procurement is being used, the RFP must include the following:

Five percent of the total possible points will be assigned to meeting the five percent small business participation goal. The proposer must meet the five percent goal to get the associated points. The contract will be awarded to the proposer with the greatest number of points on all scored items.



## ARCHITECTURAL AND ENGINEERING SERVICES (A&E) – BROOKS ACT – ANY DOLLAR AMOUNT

If contracting for A&E services, the grantee must use competitive proposal procedures based on the Brooks Act as defined in 40 U.S.C. Part 541. Other services considered A&E include program management, construction management, feasibility studies, preliminary engineering, design, surveying, mapping, and services which require performance by a registered or licensed architect or engineer and lead to construction.

- The Brooks Act requires that:
  1. An offeror's qualifications are evaluated;
  2. Price must be **excluded** as an evaluation factor;
  3. Negotiations must be conducted with only the most qualified offeror; and
  4. Failing to agree on price, negotiations are then conducted with the next most qualified offeror until a contract award can be made to the most qualified offeror whose price is fair and reasonable to the grantee.
- This "qualifications-based procurement method" can only be used for the procurement of A&E services. This method of procurement cannot be used to obtain other types of services even though a firm that provides A&E services is also a potential source to perform other types of services.
- If this procurement method is used, the following requirements apply:
  1. Request For Qualification (RFQs) must be publicly advertised and proposals solicited from an adequate number of qualified sources.
  2. All evaluation factors must be identified along with their relative importance, but numerical or percentage ratings or weights need not be disclosed. **MDOT must review and approve the RFQ and the required forms before the solicitation is advertised.**
  3. The RFP must be structured so that the cost information is submitted separately from the proposal itself.
  4. Grantees must have a method in place for conducting technical evaluations of the proposals received and for selecting awardees. The method of evaluation does not need to be included in the solicitation.
  5. 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.
  6. **For projects of \$25,000 or more, a copy of the approved RFQ, the proposal from the selected offer or, the required forms and a copy of the proposed contract must be forwarded to MDOT for its review prior to the award being made.**

## **NONCOMPETITIVE PROPOSALS (SOLE SOURCE) – ANY DOLLAR AMOUNT**

Sole-source procurements are accomplished through solicitation or acceptance of a proposal from only one source, or after solicitation of a number of sources, competition is determined to be inadequate. A contract amendment or change order that is not within the scope of the original contract is considered sole-source procurement.

- Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small-purchase procedures, IFB or RFP and at least one of the following circumstances applies:
  1. The item is available only from a single source;
  2. The public urgency or emergency for the requirement will not permit a delay resulting from competitive solicitation;
  3. FTA authorizes noncompetitive negotiations;
  4. After solicitation of a number of sources, competition is determined inadequate; or
  5. The item is an associated capital maintenance item as defined in 49 U.S.C. Section 5307(a) (1) that is procured directly from the original manufacturer or supplier of the item to be replaced. The grantee must first certify in writing to FTA: (1) that such manufacturer or supplier is the only source for such item; and (2) that the price of such item is no higher than the price paid for such item by like customers.
- A detailed cost analysis must be prepared to verify the proposed cost data, the projections of cost data, and the evaluation of the specific elements of costs and profit is required. **This information must accompany the grantee's award recommendation and the recommended bid/proposal when it is submitted to MDOT for review and concurrence prior to the award being made.**

**COMMON DEFICIENCY AREAS FROM FTA PSRs**

## WRITTEN PROCUREMENT SELECTION PROCEDURES (APPLIES TO ALL PROCUREMENTS)

Grantees must have written, selection procedures for procurement transactions. All solicitations must:

- Incorporate a clear, accurate description of the technical requirements for the material, product or service to be procured. Such description shall not, in competitive procurements, contain features that unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service and, when necessary, set forth the minimum essential characteristics and standards to which it must conform to satisfy its intended use. Detailed specifications should be avoided if possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a “brand name or equal” description may be used to define the performance or other salient characteristics of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated.
- Determine your independent cost estimate. Independent does not mean independent of your agency – it means independent of (and prior to) quotes, bids or proposals being received.
- Identify all requirements that offerors must fulfill and all other factors to be used in evaluating bids or proposals. The selection criteria generally are determined by the procurement method. Acceptable procurement methods are:

Procurement Method	Threshold	Written Selection Method
Micro-Purchase	\$10,000 or less	Equitably distributed among qualified suppliers in the local area
Small Purchase (Request for Quote (RFQ))	More than \$10,000 to \$250,000	Lowest quote from a responsive and responsible bidder
Invitation for Bid (IFB)/Sealed Bid	Generally more than \$250,000	Lowest offer from a responsive and responsible bidder
Request for Proposal (RFP)	Generally more than \$250,000	Based on evaluation factors or best value (price and other factors)
A & E (Request for Qualifications (RFQ))	Any Amount	Qualification based
Sole Source	Any Amount	Justification required

- Additional characteristics:
  1. IFB:
    - a) You have a complete, adequate and realistic specification or purchase description.
    - b) Three or more responsible bidders are willing and able to compete.
    - c) The procurement lends itself to a firm fixed-price contract and the selection can be made primarily on the basis of price.
    - d) No discussion with bidders is needed after receipt of offers.
  2. Noncompetitive proposals (sole source) procurement: Only if you can justify not soliciting additional competition as defined in C4220.1F.

**Grantees should complete Method of Procurement Decision Matrix for all procurements.**

## **UNREASONABLE QUALIFICATION REQUIREMENTS (APPLIES TO ALL PROCUREMENTS)**

All procurement transactions should be conducted in a manner providing full and open competition. One situation that is considered restrictive of competition is the placement of unreasonable requirements on firms in order for them to qualify to do business. This may be in the form of:

- Unreasonable business requirements;
- Unnecessary experience requirements;
- Improper prequalification procedures;
- Retainer contracts - making a noncompetitive award to any person or firm on a retainer contract with the recipient if that award is not for the property or services specified for delivery under the retainer contract;
- Excessive bonding;
- Brand name only - specifying only a brand-name product without allowing offers of an equal" product or allowing an equal product without listing the salient characteristics that the equal product must meet to be acceptable for award.

Agencies should review specifications in advance of the bid/proposal request to ensure that restrictive requirements are not included in order to optimize the level of competition.

## **GEOGRAPHIC PREFERENCES (APPLIES TO ALL PROCUREMENTS)**

Agencies should conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-state or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. This ensures the maximum amount of competition for federally funded programs.

There are some exceptions:

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

Agencies should review specifications in advance of the bid/proposal request to ensure that geographic preferences are not included in order to optimize the level of competition.

## **SOUND AND COMPLETE AGREEMENT (APPLIES TO ALL PROCUREMENTS)**

All third party contracts should include provisions adequate to form a sound and complete agreement. The following items should be included in third party contracts.

- If there is a Notice to Proceed (NTP) requirement, ensure that the contractor does not begin work until the NTP requirement has been met. Several of the transit agencies' third party contracts included an NTP requirement where the contractor was not to begin to work until receipt of the NTP. However, no NTPs were issued and the contractors began work upon the receipt of the executed third party contract.
- There should be payment and delivery date provisions, if applicable.
- Contracts should either include referenced documents or be very clear in the description of the document, including the name and date of the document. The third party contract should also describe the order of precedence if there is a conflict between the contract and any of the referenced documents.
- If a transit agency is procuring an item such as buses from another recipient's contract, the transit agency's third party contract should include the terms and conditions of the other recipient's contract.

Agencies should review third party contracts to ensure that it is a sound and complete agreement.

**CLAUSES (APPLIES TO ALL PROCUREMENTS)**

The matrix below summarizes the clauses required for the different types of procurements.

TYPE OF PROCUREMENT (excluding micro-purchases, except Davis-Bacon requirements apply to construction contracts over \$2000)						
Clause	Professional Services/A&E	Operations/ Management	Rolling Stock Purchase	Construction	Materials & Supplies	Research & Development
No Federal Government Obligations to Third Parties (by Use of a Disclaimer)	All	All	All	All	All	All
False Statements or Claims Civil and Criminal Fraud	All	All	All	All	All	All
Access to Third-Party Contract Records	All	All	All	All	All	All
Changes to Federal Requirements	All	All	All	All	All	All
Termination (Threshold is \$150,00 for nonprofit organization and institutions of higher learning)	>\$10,000	>\$10,000	>\$10,000	>\$10,000	>\$10,000	>\$10,000
Civil Rights (Title VI, EEO, ADA)	All	All	All	All	All	All
Disadvantaged Business Enterprises (DBEs)	All	All	All	All	All	All
Incorporation of FTA Terms	All	All	All	All	All	All
Suspension and Debarment	>\$25,000	>\$25,000	>\$25,000	>\$25,000	>\$25,000	<\$25,000
Buy America			>\$150,000	>\$150,000	>\$150,000	
Resolution of Disputes, Breaches, or Other Litigation	>\$150,000	>\$150,000	>\$150,000	>\$150,000	>\$150,000	>\$150,000
Lobbying	>\$150,000	>\$150,000	>\$150,000	>\$150,000	>\$150,000	>\$150,000
Clean Air	>\$150,000	>\$150,000	>\$150,000	>\$150,000	>\$150,000	>\$150,000
Clean Water	>\$150,000	>\$150,000	>\$150,000	>\$150,000	>\$150,000	>\$150,000
Cargo Preference			For property transported by ocean vessel.	For property transported by ocean vessel.	For property transported by ocean vessel.	
Fly America	For foreign air transport or travel.	For foreign air transport or travel.	For foreign air transport or travel.	For foreign air transport or travel.	For foreign air transport or travel.	For foreign air transport or travel.
Davis-Bacon Act*				>\$2,000 (excluding ferry vessels)		
Contract Work Hours and Safety Standards Act		>\$150,000 (except transportation services)	>\$150,000	>\$150,000 (excluding ferry vessels)		

TYPE OF PROCUREMENT						
(excluding micro-purchases, except Davis-Bacon requirements apply to construction contracts over \$2,000)						
CLAUSE	Professional Services/A&E	Operations/ Management	Rolling Stock Purchase	Construction	Materials & Supplies	Research & Development
Copeland Anti-Kickback Act				>\$2,000 (excluding ferry vessels)		
Bonding				>\$150,000**		
Seismic Safety	A&E for New Buildings & Additions			New Buildings & Additions		
Transit Employee Protective Arrangements		Transit Operations				
Charter Service Operations		All				
School Bus Operations		All				
Drug And Alcohol Abuse And Testing		Operational Service Contracts				
Patent and Rights In DATA	All					All
Energy Conservation	All	All	All	All	All	
Recycled Products		Contracts for items designated by EPA, when procuring \$10,000 or more per year		Contracts for items designated by EPA, when procuring \$10,000 or more per year	Contracts for items designated by EPA, when procuring \$10,000 or more per year	
Federal Privacy Act	All	All	All	All	All	All
Prompt Payment	All	All	All	All	All	All



\* Davis-Bacon Act: The Davis-Bacon Act provides that contracts in excess of \$2,000 for construction, renovation, or repair (including painting and decorating) of public buildings or public works within the United States shall contain a clause that no laborer or mechanic employed directly upon the site of the work shall receive less than the prevailing wage rates as determined by the Secretary of Labor. Once the contract is awarded, the transit agency must ensure that the contractor complies with the provisions of the contract clause. This means ensuring that the appropriate signs are available and posted, as well as ensuring that the appropriate payrolls and certificates are submitted not less frequently than weekly. The transit agency is required to check certified payroll records and compare the hourly rate with the wage determination to ensure compliance with Davis-Bacon. The transit agency will submit in writing to MDOT their concurrence with the certified payroll records. MDOT will review one week of payroll records for each construction project during our triennial review. For small urban agencies receiving funds directly from MDOT, you should include with your first payment request one week of certified payroll records for MDOTs review, along with your concurrence of compliance with Davis-Bacon in writing. You may obtain the prevailing wages at: <https://www.wdol.gov>.

\*\* Bonding (Construction over \$150,000)

- Bid Guarantee. Both FTA and the Common Grant Rules require a bid guarantee from each bidder equivalent to 5 percent of the bid price. The “bid guarantee” shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will honor its bid upon acceptance of his bid.
- Performance Bond. Both FTA and the Common Grant Rules require a performance bond on the part of the contractor for 100 percent of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor’s obligations under such contract.
- Payment Bond. Both FTA and the Common Grant Rules generally require the third party contractor to obtain a standard payment bond for 100 percent of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all people supplying labor and material in the execution of the work provided for in the contract. FTA has determined the following payment bond amounts are adequate to protect FTA’s interest and will accept a local bonding policy that meets the following minimums:
  1. 50% of the contract price if the contract price is not more than \$1 million;
  2. 40% of the contract price if the contract price is more than \$1 million but not more than \$5 million; or
  3. \$2.5 million if the contract price is more than \$5 million.

**Grantees should include the appropriate clauses in third party contracts of \$25,000 or greater. For procurements under \$25,000, grantees should complete: Certification of Compliance with Federal Contract Clauses unless the item is purchased off-the-shelf. Off-the-shelf means the item was not made specifically for the agency. For instance, purchasing a copier from an office supply store or buying a car directly off a dealership lot is an off-the-shelf procurement. However, if the car is specially ordered for the agency, it is no longer considered off-the-shelf and the Certification of Compliance.**

## **WRITTEN RECORD OF PROCUREMENT HISTORY (APPLIES TO ALL PROCUREMENTS)**

A properly documented procurement file provides an audit trail from the initiation of the procurement to the beginning of the contract. The *Best Practices Procurement Manual* recommends the following procurement file documentation where appropriate:

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

Grantees must maintain a file for all procurements. Include this list in the file and document which items are not applicable. **Written Record of Procurement History Checklist** can be used to help determine the contents of procurement files.

## **PROGRESS PAYMENTS (APPLIES TO ALL PROCUREMENTS)**

Progress payments are payments for costs incurred by the contractor in the performance of the contract before the contract work has been completed. FTA assistance may be used to support progress payments provided:

- The recipient obtains adequate security for those payments, and
- The recipient has sufficient documentation to substantiate the work performed for which payment is requested.
- Progress payments for construction contracts must be made on a percentage of completion basis (as described in the Common Grant Rules). This payment method may not be used in non-construction contracts.

Agencies should review third party contracts to ensure any progress payments are supported by adequate security.

## **FAIR AND REASONABLE PRICE DETERMINATION (APPLIES TO MICRO-PURCHASES)**

Micro-purchases (under \$10,000) do not require more than one price or quote, as long as you determine that the price paid is fair and reasonable. The procurement file must include a statement certifying that the price paid is fair and reasonable and how this determination was derived.

Some acceptable ways to determine that a price is fair and reasonable:

- Compare the quoted price to the price paid recently for the same type of item.
- Published advertisement that shows regular and sale prices.
- Item is a standard commercial item sold in the open marketplace.
- Purchase was made from an existing blanket purchase agreement for which competition was obtained.

**Grantees should complete Fair and Reasonable Price Determination.**

## **ASSIGNMENT OF RIGHTS OR PIGGYBACKING (APPLIES TO ALL PROCUREMENTS EXCEPT MICRO-PURCHASES)**

Although FTA does not encourage the practice, a recipient may assign its contractual rights to purchase property and services to other recipients if the original contract contains an appropriate assignability clause that provides for the assignment of all or a portion of the specified deliverables as originally advertised, competed, evaluated, and awarded, or other appropriate assignment provisions. Some refer to this process as “piggybacking.”

- If the supplies or services were solicited, competed and awarded through the use of an indefinite-delivery-indefinite-quantity (IDIQ) contract, then both the solicitation and contract award must contain both a minimum and maximum quantity that represent the reasonably foreseeable needs of the party(s) to the solicitation and contract.
- An FTA recipient that obtains these contractual rights through assignment may exercise them after first determining the contract price remains fair and reasonable, and all Federal requirements have been addressed in the contract’s clauses. The recipient is not required to perform a second price analysis if a price analysis was originally performed. However, the recipient must determine the contract price or prices originally established are still fair and reasonable.
- The recipient is responsible for Buy America compliance with the transaction and assuring that they execute all of the required pre-award and post-delivery Buy America audit certifications.

**Grantees should obtain appropriate procurement documents from the original contracting agency or obtain information from that agency to complete the appropriate documents as outlined in the matrix “MDOT Review of Procurements”.**

**Grantees must also demonstrate how it was determined the prices are still fair and reasonable depending on the type of procurement:**

**Small purchases: Quotations**

**IFB/RFP: Price Analysis or Cost Analysis**

**ADEQUATE COMPETITION – THREE OR MORE RESPONSIBLE  
BIDDERS/PROPOSERS  
(APPLIES TO ALL PROCUREMENTS EXCEPT MICRO-PURCHASES)**

An acceptable level of competition requires at least three responsible bidders/proposers with responsive bids/proposals. To determine whether a contractor is a responsible bidder, the agency must consider contractor integrity, compliance with public policy (e.g., EEO record, not debarred or suspended), record of past performance, and financial and technical resources. A determination of responsibility may be affected by new information up to the time of contract award.

**Fewer than Minimum Offers (Three)**

When fewer than three responsive offers from responsible offerors have been received, the following actions will apply:

- **Use Fewer Than Three Offers Received Evaluation Form to document the evaluation result.**
  1. Determine if there was adequate competition. Talk to those firms solicited to find out why they did not submit bids/proposals. If the reason is a restrictive specification or a delivery requirement that fewer than three offerors could meet, you have inadequate competition. Determine if the method of advertising was adequate. Re-advertise the procurement to increase competition if competition is deemed to be inadequate.
  2. Perform price analysis. If the competition is deemed to be adequate, perform price analysis to determine the reasonableness of the offer. Proceed with award if the price is determined as fair and reasonable and MDOT approves.
  3. Perform cost analysis. If the reasonableness of the bid on the basis of a price analysis cannot be determined, request a detailed breakdown of costs and profit from the offeror and perform a cost analysis. Proceed with award if price is determined as fair and reasonable and MDOT approves.
  4. If only one responsive offer is received, process the award as sole source with your project manager. If competition is deemed to be inadequate, and MDOT agrees to process the award as a sole source, perform a cost analysis following steps as recommended in FTA's Best Practices Procurement Manual, 4.4.3, Single Bid.
  5. If MDOT agrees to process as a sole source, negotiate with the offeror. If grantee is unsuccessful in determining through a price or cost analysis that the offer is fair and reasonable, enter into negotiations with the offeror to attempt to establish a different price that can ultimately be determined to be reasonable.
  6. Document file so there is a clear audit trail for reviewers to understand how the determinations were reached and what processes were involved.

**Grantees should complete appropriate forms for type of procurement:**

**Small purchases: Quotations**

**IFB: Bid Opening**

**RFP: Proposal Tabulation**

**And if applicable Fewer Than Three Offers Received Evaluation.**

## **COST AND PRICE ANALYSIS (ALL PROCUREMENTS EXCEPT MICRO-PURCHASES)**

Grantees must perform a cost or price analysis in connection with every procurement action, including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. The purpose of the cost or price analysis is to ensure a fair and reasonable cost is being paid. Grantees must evaluate and state its justification for the contract cost or price.

**Cost Analysis** - A cost analysis must be performed when the offeror is required to submit the elements (i.e., labor hours, overhead, materials, etc.) of the estimated cost; e.g., under professional consulting and architectural and engineering services contracts. A cost analysis will be necessary whenever adequate price competition is lacking and for sole-source procurements, including contract modifications or change orders, unless price reasonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or on the basis of prices set by law or regulation.

**Price Analysis** - A price analysis may be used in all other instances to determine the reasonableness of the proposed contract price.

**Profit** - Grantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and, in all cases, where cost analysis is performed.

**Cost Estimate** - Before issuing a solicitation, develop an independent estimate of the proper price level for the supplies or services to be purchased. The estimate can then assist in a determination of reasonableness or unreasonableness of price and/or the estimated costs to do the job.

If an RFP is used and the price of the selected vendor is higher than expected, a grantee should negotiate with the selected vendor and document the negotiations.

**Grantees must complete Independent Cost Estimate before solicitation (at the time they submit their verification forms) and either Price Analysis. Price Analysis for MiDeal, or Cost Analysis after solicitation for each procurement except micro-purchases.**

## **AWARD TO RESPONSIBLE CONTRACTORS (APPLIES TO IFB OR RFP)**

Grantees shall make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration shall be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources. Grantees must maintain a written record of the procurement history, including reasons for contractor selection or rejection; the responsibility determination is part of that record.

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

- Financial resources adequate to perform the contract, or the ability to obtain them;
- Ability to meet the required delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments;
- A satisfactory performance record;
- A satisfactory record of integrity and business ethics;

- The necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them;
- Compliance with applicable licensing and tax laws and regulations;
- The necessary production, construction, and technical equipment and facilities, or the ability to obtain them;
- Compliance with Affirmative Action and Disadvantaged Business Program requirements;
- Other qualifications and eligibility criteria necessary to receive an award under applicable laws and regulations.

You may have a particular procurement or class of procurements which, due to the complexity of the products being acquired, requires that prospective contractors meet special standards of responsibility. These procurements will require that contractors have specialized expertise or facilities to perform the contract adequately. These special standards of responsibility must be set forth in the solicitation. Failure to meet the special standards will disqualify a bidder from consideration for award. An example of a Special Responsibility Standard would be the Special Quality Assurance requirement concerning measuring and testing facilities and manufacturing controls which must be met by prospective bus manufacturers.

#### **Obtaining Information for Determination of Responsibility**

Before making a determination of responsibility, you must possess or obtain information sufficient to satisfy yourself that a prospective contractor meets the applicable standards and requirements for responsibility set forth in this section. Sources of information available to you for your determinations could include:

- General Services Administration publication titled List of Parties Excluded from Federal Procurement or Nonprocurement Programs (<https://www.sam.gov/portal/public/SAM>);
- Records and experience data, including verifiable knowledge of your agency's personnel;
- Information supplied by the prospective contractor, including bid or proposal information, questionnaire replies, financial data, information on production equipment, and personnel information;
- Pre-award survey reports; and
- Other sources, such as publications, suppliers, subcontractors, and customers of the prospective contractor, financial institutions, government agencies, and business and trade associations.

You may wish to include a bidder's questionnaire with the solicitation to provide information from bidders to assist in your evaluation. For an example, refer to the FTA Best Practices Procurement Manual, Appendix B.11.

#### **Grantees should complete Determination for all IFB or RFP procurements**

## **ADVERTISED/PUBLICIZED AND SOLICITATION (APPLIES TO IFB OR RFP)**

All IFBs and RFPs, including those for A&E, will be publicly advertised and publicized in order to cost-effectively notify the greatest feasible number of competitors and maximize competition. Bids/proposals also should be solicited from an adequate number of known suppliers.

Agencies need to use diverse advertising outreach media to increase competition and advertise procurements to a national audience, e.g. trade associations, commercial procurement listing services, as well as Internet sites (APTA online newsletter, CTAA, Craigslist, MDOT Disadvantage Business Enterprise (DBE) website, etc.). Agencies should develop and use a solicitation mailing list as a critical part of the procurement process. The mailing list will include all known responsible suppliers for a service or commodity that will receive the solicitation.

Recommended methods to advertise/publicize:

- Post transit projects at BPT's website and link to the MDOT DBE website.
- Use a variety of media sources, which include, but are not limited to, advertisements in newspapers, notices in places where the city and county usually post their public notices, solicitation list, and agency's website home page.
- Document the process of what media sources have been used for which type of solicitations and why such sources were used.

Recommended methods to utilize solicitation list:

- Develop a solicitation mailing list that contains the names, addresses and the point of contact for entities that will receive the solicitation. Keep the list on file.
- Use various sources to develop the list as recommended in FTA Best Practices Procurement Manual, Chapter 4.3.2.2 Solicitation Mailing List.
- Manage/update solicitation mailing list.
- Document the process on how the mailing list is developed, distributed and managed.

Common Solicitation Content (For Sealed Bid/Invitation for Bid only):

- Develop a form that acts as the solicitation document. This form will contain the following information:
  1. A solicitation number for reference;
  2. Date, time and location for bid opening;
  3. Whom to contact for questions;
  4. If there will be a pre-bid or pre-proposal conference and where and when it will be held;
  5. The date, time and place bids or proposals are to be received;
  6. What additional documents are included in the solicitation and what documents will be included in the contract;
  7. Space for the price (offer) to be included;
  8. Space where amendments to the solicitation can be acknowledged;
  9. Space where the firm can be identified; and
  10. Space for the firm official to sign and date the bid or proposal.

Pre-Bid and Pre-Proposal Conferences (For RFPs)

- Use pre-bid and pre-proposal conferences for complex acquisitions, such as facility construction, or acquisitions that will likely receive a single bid, such as recent MDOT procurements for the MichiVan Program and intercity services. Conferences can be used as a means of briefing prospective offerors and explaining complicated specifications and



requirements to them as early as possible after the solicitation has been issued and before offers are received.

**Grantees should complete Advertisement and Solicitation for all IFBs and RFP procurements.**

**BID OPENING  
(APPLIES TO IFB)**

When an IFB is used, all bids must be publicly opened. The time and place must be stated in the IFB. Grantees using an IFB should complete **Bid Opening Template** during the bid-opening session including having the attendees sign the form.

**PRICE AND OTHER FACTORS  
(APPLIES TO RFP)**

In this type of procurement, the award is not based exclusively on price or price-related factors. The award is made to the responsible offeror whose proposal is most advantageous to the grantee with price and other factors considered. In different types of negotiated acquisitions, the relative importance of cost or price may vary. When the material requirements are clearly definable, and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in selection. The less definitive the requirements, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in the selection and supersede low price.

There are two different approaches to use when evaluating proposals. Both approaches will require technical evaluations and price analysis, and both will require the solicitation to clearly inform the prospective offerors of how the selection decision will be made:

- *Best value* - requires tradeoffs between price and non-price factors to select the best overall value to the grantee. The solicitation must inform potential offerors that the award will be made on a best-value basis. The award selection is based upon consideration of a combination of technical and price factors to determine (or derive) the offer deemed most advantageous and of the greatest value to the procuring agency. This is a one-step evaluation and the offeror with the highest combined score of price and technical factors is selected. Best-value selection methodology affords the agency an opportunity to structure the source selection process in a way that is suitable for the nature of the agency's requirements.
- *Lowest price technically acceptable proposal* - requires selection of the lowest price proposal meeting the minimum RFP requirements. This approach is used when the grantee decides that its requirements are sufficiently defined. The evaluation factors that establish the requirements of acceptability must be stated in the solicitation. Solicitations must specify that award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-price factors. This is a two-step evaluation, first scoring the technical factors and determining which offerors have met the minimum score, and secondly selecting the lowest price of the offerors that met the minimum score in step one.

There is a *tradeoff process* that is used when selecting a proposal other than the lowest price technically acceptable proposal, as well as the process to be used when the lowest price technically

acceptable proposal method is appropriate. Several important principles may be noted on source selection that grantees should consider in their acquisitions:

- Best-value selection methodology affords the agency an opportunity to structure the source selection process in a way that is suitable for the nature of the agency's requirement. No longer is the emphasis on defining one's "minimum needs," with its corollary selection process of choosing the lowest price technically acceptable proposal. While that approach will probably be the one most often used by grantees, agencies are encouraged to structure selection procedures based on the realities of their requirements, and they are not expected to force-fit all acquisitions into a lowest-price-technically-acceptable-proposal mold when that may result in unacceptable performance risks or preclude the agency from selecting products that are a *better value* to them than the lowest price products or services.
- When the agency decides that its requirements are sufficiently defined to use the lowest price technically acceptable selection process, *the evaluation factors that establish the requirements of acceptability must be stated in the solicitation*. Solicitations must specify that award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-price factors.
- When the agency decides that its requirements are not defined with sufficient precision, or where there are performance risks, so that selection of the lowest priced proposal is not necessarily in the best interests of the agency, then a tradeoff process should be used to select the best-value proposal. In this case, the importance of the non-price evaluation factors that will affect the contract award must be stated in the solicitation. The Federal approach in the solicitation is to state whether all evaluation factors other than price, when combined, are significantly more important than, approximately equal to, or significantly less important than price. This permits the agency to make tradeoffs between price and technical merit. It also permits the offerors to know what is important to the agency - whether to focus on higher quality at the expense of cost, or lower cost at the expense of quality. It is not necessary to publish the specific weights (numerically) of the individual evaluation factors, only their relative importance (i.e., conceptually or adjectivally). Some Federal agencies have found through practice that the approach which gives the greatest degree of flexibility in selecting the best value proposal is to place equal weight on the price and technical factors. This then allows a choice in either direction as circumstances warrant.
- It is important to note that the perceived benefits of the higher-priced proposal must merit the additional cost, and the rationale for tradeoffs must be documented in the file. It is not sufficient to say in the file that company X received a higher total score than company Y, and therefore deserves the award. Scores, without substantive explanations of the relative strengths and weaknesses of the competitive proposals, including the perceived benefits to the agency, are an insufficient basis for paying a higher price. The file must explain why company X represents the best value to the agency. The necessity of documenting the specific reasons why proposal X offers a better value to the grantee than proposal Y is why a mathematically driven selection decision is not appropriate.

## CRITERIA

The evaluation process begins with the identification of the criteria that will be most meaningful in assessing the relative advantage of the proposals to the grantee. The evaluation criteria must be listed in order of importance in the RFP and the RFP must state that the evaluation criteria are listed in order of importance. You will generally include the following (these are not necessarily listed in

the order of importance – an agency will need to determine the criteria and the order of importance for each of its procurements):

- **Past Performance** – The solicitation should advise offerors of your approach in evaluating past performance, including evaluating offerors that have no relevant performance history, and also should advise offerors to identify past relevant contracts for efforts similar to your requirement. The solicitation also should allow offerors to provide information on problems encountered on the identified contracts and corrective measures taken. This evaluation also should consider the past performance of key personnel and subcontractors that will perform major or critical aspects of the work.
- **Technical Criteria** – Technical factors regarding the specific methods, designs and systems proposed to be used by the offeror will be considered and they must be tailored to the specific requirements of your solicitation. These factors must represent the key technical areas of importance that you intend to consider in the selection decision. *Technical factors should be chosen to support meaningful comparison and discrimination between competing proposals.* If the agency has established minimum standards for determining technical acceptability of proposals, these standards must be clearly set forth in the solicitation.
- **Key Personnel** – An evaluation of key personnel often is suggested when the procurement involves services or requirements where management of the work is a critical factor in determining its success. Qualifications and experience of key personnel may be an important evaluation factor. Some agencies have required oral presentations by key personnel during which the agency officials may ask these key personnel relevant questions to determine the depth of their knowledge in critical areas.
- **Cost or Price** – Cost or price must be considered in every procurement, even those for professional services (e.g., legal, accounting, etc.), unless the services are those defined by Federal statutes as requiring a qualifications-based selection. Competition normally establishes price reasonableness. Therefore, when contracting on a fixed-price basis, comparison of the proposed prices will normally satisfy the requirement to perform a price analysis and no cost analysis will be necessary.
- **Relative Importance of Price and Non-Price Factors** - The solicitation must advise offerors if the selection is to be made on a best-value basis. As already noted, the solicitation also must advise offerors if price is approximately equal to, less than, or greater in importance than the technical evaluation factors as a whole.

**Grantees should complete Proposal Tabulation for all RFP procurements.**

## **QUALIFICATIONS EXCLUDE PRICE AND SERIAL PRICE NEGOTIATIONS (APPLIES TO ARCHITECTURAL AND ENGINEERING)**

Qualifications-based proposal procedures (Brooks Act Procedure) 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. The dollar amount of the project does not affect whether the Brooks Act is required. **An offeror's qualifications must be evaluated, and price is excluded as an evaluation factor.**

- **Qualifications-Based Procurement Procedures Prohibited:** Grantees 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, directly related to, or do not lead to construction, alteration, or repair of real property. Even if a contractor has performed services 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 is actual construction, alteration, or repair to real property the type of services for which qualifications-based procurement procedures may be used.

The following procedures apply to qualifications-based procurements:

**Qualifications.** Unlike other two-step procurement procedures in which the price is an evaluation factor, an offeror's qualifications are evaluated to determine contract award.

**Price.** Price is excluded as an evaluation factor.

**Most Qualified.** Negotiations are first conducted with only the most qualified offeror. Negotiation on price is required for A & E procurements.

**Next Most Qualified.** Only after failing to agree on a fair and reasonable price may negotiations be conducted with the next most qualified offeror. Then, if necessary, negotiations with successive offerors in descending order may be conducted until contract award can be made to the offeror whose price the recipient believes is fair and reasonable.

**Grantees should complete the required documents that apply to an RFP for all A & E procurements.**