

Comments to the
Federal Transit Administration (FTA)
Docket No. FTA- 2007-29125

Third Party Contracting Guidance
Proposed Circular

This Notice of Proposed Program Guidance seeks comments on changes to the Federal Transit Administration's (FTA) guidance for third party contracting. The Texas Department of Transportation's (TxDOT) remarks stem from its status as a designated recipient of multiple FTA grant programs. Estimated SAFETEA-LU apportionments for TxDOT- administered programs are in excess of \$69 million per year.

We commend FTA for integrating, in one document, the various statutory, regulatory, policy and guidance statements, and best practices impacting third party procurement. FTA has long noted that this is an area where even the most experienced recipients can err. We believe a consolidated document will be beneficial to all - recipients, subrecipients and contractors.

General Comments

In the final version, we recommend FTA give some consideration to adding a section that deals with the FTA/designated recipient/subrecipient relationship. We believe the circular could be strengthened by more precisely describing when and where circular references to FTA decision-making/approval is passed to the designated recipient when interacting with its subrecipients. Such a discussion would also be helpful to metropolitan planning organizations that are becoming designated recipients for Job Access and Reverse Commute and New Freedom programs and others who are not familiar with the nuances of this relationship.

We note little attention is given to contracts with private businesses. A word search of the circular finds only two references, excluding #61 in Appendix A. Throughout the circular there are many references to actions that depend on whether the recipient is governed by Part 18 or 19 of the Common Rule but no guidance for dealing with private business.

Chapter by Chapter Comments

Chapter I - Introduction and Background

Page I-4 m. Non-Governmental Recipient. This definition excludes private businesses (except at FTA's discretion) and there is no definition that defines these entities or references FAR 32.1 as the cost principle guidance.

Page I-4 o. Recipient. To further clarify this definition, we recommend that FTA also include the following important statement from Chapter II. "Neither third party contractors nor third party subcontractors are "recipients" for purposes of this circular."

Chapter II - Applicability

Page II-2 b.(1)(d). Real Property. We recommend that the text regarding real estate acquisition that begins on Page IV-4 of proposed Grants Management Circular be moved to this location.

Page II-3 (2)(b). Operations Contracts...w/o FTA Assistance. On page 55632 of the September 28, 2007 *Federal Register* announcing the draft version of the circular, FTA requested comments as to whether grantees who can allocate operations to a non-federal funding source should be exempt from competitively securing these services. TxDOT offers the following observations.

The sophistication of accounting/bookkeeping capabilities is so vast among the universe of recipients that our recommendation is that the practice should be permitted upon petition to FTA by the designated recipient. The designated recipient will be required to document how it will track and ensure that costs from the subject operations contract are entirely reimbursed with local funds. This approach achieves several objectives.

- ◆ Designated recipients can develop a segregation method that most easily meshes with their accounting practices rather than responding to a federal mandate that may difficult or expensive to implement.
- ◆ FTA can consider the recordkeeping history of a designated recipient, as well as its segregation plan to determine if such latitude is warranted.
- ◆ FTA will be alerted as to which designated recipients are availing themselves of this option and may chose to monitor the financial aspects of grant management responsibilities more frequently than the triennial or state management review period.
- ◆ Where states are the designated recipients, each state (after approval from FTA) can make its own determination of whether or not to allow this, and in what programs.

Another possible consideration is to limit this option to contracts below the \$100K threshold to ensure there is competition for high dollar procurements.

FTA should also consider the doors to coordination that can be opened if there is an opportunity to secure operations assistance without competitive procurement, at least in some situations. There are several instances in Texas where, after much discussion, a particular third-party contractor offers the best solution to a problem, but loses out in the competitive process. This becomes a disincentive to invest time in meetings that have no "satisfying" outcomes.

Chapter IV - The Recipient's Property and Services Needs...

Page IV-13. (g) In-State Dealers. At this point in the circular, the statutory text 49 USC 5325(i) is cited in which procurements of buses may not be limited to in-state dealers. Then on Page VI-13 the circular states that state licensing laws may be enforced.

Current guidance to Texas transit operators, which is in the form of "general instructions" for bid processes, requires that a prospective bidder provide a copy of the Texas Dealer's license with the

bid. This practice supports TxDOT Motor Vehicle Division enforcement activity. The Public Transportation Division which is charged with FTA grant administration can not implement a practice (such as rescinding the requirement for a Texas Dealer's license) that would violate Texas law or the administrative code; therefore, TxDOT will continue to require Texas dealer licenses as a condition of bid award.

Chapter V - Sources

Page V-1. 3. Joint Procurement and 4. State Purchasing Schedules.

The new circular changes the description of solicitation and contracting requirements associated with joint procurement and intergovernmental procurement.

The current version of the circular clearly describes how FTA's requirements are met using a state or a local intergovernmental agreement (handling state and local intergovernmental agreements identically), and makes a clear distinction between state/local intergovernmental agreements and joint procurements involving a group of transit agencies. The current language permits state and local cooperatives ("co-ops") to conduct solicitations without addressing any FTA requirements, provided that the FTA requirements are applied during the contracting phase, usually with the issuance of the purchase order by the co-op customer. In the case of a joint solicitation issued by a lead transit agency, the FTA requirements must be addressed during both the solicitation and the contracting phases.

On page 55632 of the September 28 *Federal Register*, FTA states that it has clarified differences between state managed and other purchasing groups. We respectfully disagree and feel the requirements set forth in the new circular are unclear. The new circular only mentions local intergovernmental agreements in the context of a joint procurement in Section 3, but a local intergovernmental agreement is different than a joint solicitation. As written, a local co-op would have the same requirements as a joint procurement, that is, to include FTA certifications, assurances, and requirements during both the solicitation and contracting phases. If this change is carried-forward into the final version of the circular, transit program commodities and services could no longer be sourced from non-state cooperatives, such as those operated by a council of governments or a municipal league's intergovernmental risk pool, as these programs do not endorse current FTA certifications and assurances nor include such in their respective solicitations.

The new circular also misapplies the term "joint solicitation" to "state purchasing schedules"; and due to the way Section 4 is written, it technically betrays the intent of the circular to permit purchasers using state purchasing schedules to append the FTA requirements upon issuance of the purchase order in order to meet FTA's requirements. One could argue that the state procurement programs currently operated by the Texas Comptroller's Office and the Texas Department of Information Resources do not legally accommodate the new provision, so recent progress to include transit commodities would be nullified.

Recommendation – Rewrite Sections 3 and 4 of Chapter V to make distinct the handling of the FTA requirements in the following scenarios:

- ◆ state intergovernmental agreement;
- ◆ local intergovernmental agreement; and
- ◆ joint procurement.

Appendix A - References

Will the dates of the circulars referenced at #85-87 be updated to include the 2008 revisions?

Index

FTA's decision to delete the terms "piggybacking" and "tag on" from the formal definitions is understandable. However, since the terms are in common use and do appear in Chapter V, we recommend they be added to the Index.

Use of the Index would be facilitated by using some technique to make the topic headings stand out more clearly. For example, there are three sublevels to "Procurement Methods" covering two pages. A greater distinction than a two-space indent would make finding the next term easier.

Underlining "Office of Management and Budget" appears to be a minor formatting error.