SECTION 5

PROCUREMENT

A. OVERVIEW

As discussed in previous sections, the principal agency that implements statutes and promulgates regulations pertaining to transit procurement is the FTA. FTA's specific powers (as opposed to those imposed generically on federal agencies) with respect to procurement come generally from three statutes and four regulations.[1] These seven principal legal instruments cover a smorgasbord of subjects, ranging from the conditions under which seat specifications for buses may be included in advertising for bids[2] to under what circumstances rolling stock may be purchased using federal funds without prior authorization from the Secretary of Transportation.[3] The subject is further complicated by the interplay of many other pieces of legislation, which while not specifically pertaining to transportation nevertheless have their own particular impact on U.S. transportation policy. For example, the Clean Air Act[4] and the Uniform Relocation Assistance and Real Property Acquisition Policies Act,[5] among others, all have effects on transit agencies or their contractors and suppliers. The dynamic interplay of these many disparate statutes and regulations serves to make procurement using federal funds not merely a pyramid, but a labyrinth as well.

B. THE PROCUREMENT PROCESS

1. Procurement Procedures

a. Best Practices Manual & FTA Master Agreement

FTA maintains a periodically-updated *Best Practices Procurement Manual* [Manual].[6] The Manual offers guidance to grantees as to the "best practices" for complying with laws, regulations, and other FTA policies for third party procurement contracts.[7] The practices outlined in the Manual are not explicitly mandatory.[8] However since these practices are essentially FTA's interpretations of the appropriate way to fulfill relevant legal obligations (including, in particular, 49 C.F.R. Part 18), procedures deviating from them could be subjected to additional scrutiny in the event of an investigation, Procurement System Review, or Triennial Review. Consequently, it is advisable to follow the Manual's recommendations unless they conflict with procedures mandated by state/local laws or regulations.[9] Conditions imposed by federal statutes, federal regulations, FTA Circulars, the FTA Master Agreement (MA), FTA memoranda, and explicit grant provisions are mandatory unless they specifically state that they are discretionary or superseded by state or local authority.[10]

b. Application of Grant Requirements

The specific requirements for any grants or other funds awarded by FTA will be found in the FTA MA, which is incorporated into the Grant Agreement or Cooperative Agreement grantees are obligated to execute as part of the funding process.[11] However, there are many general requirements that apply to the use of FTA funds in the absence of contraindications by the MA.[12] It is important to understand that many of these requirements "flow down" to "subgrantees" (i.e., other agencies that receive funds for procurements through the initial grantee).[13] The Manual identifies five distinct

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[1] The statutes are 49 U.S.C. § 5323 (2000), 49 U.S.C. § 5325 (2000), and 49 U.S.C. § 5326 (2000), while the regulations are 49 C.F.R. pt. 18, 49 C.F.R. pt. 19, 49 C.F.R. pt. 663, and 49 C.F.R. pt. 665.

[2] 49 U.S.C. § 5323(e) (2000).

[3] 49 U.S.C. § 5326(d) (2000).

[4] 42 U.S.C. §§ 7401 *et seq*. (2000).

[5] 42 U.S.C. §§ 4601 *et seq*. (2000).

[6] Although a printed copy is issued annually, the FTA provides the *Best Practices Procurement Manual*, with its most recent updates, through the FTA's Web site at http://www.fta.dot.gov/library/admin/BPPM (visited April 21, 2003). The edition with updates through October 2001 was used for preparation of this book. It is strongly urged that the reader obtain a copy of the most up-to-date edition, as this is effectively the only comprehensive listing of current FTA policy in this area. *See also* 49 C.F.R. pt. 18 (2002).

[7] U.S. DEP'T OF TRANSP., FEDERAL TRANSIT ADMINISTRATION, BEST PRACTICES PROCUREMENT MANUAL preface (1999) [hereinafter MANUAL]. *See also* 49 C.F.R. pt. 18 (2002).

[8] MANUAL.

[9] While the sorts of contracts to which the Best Practices would apply may seem obvious, the Manual points out that many agencies fail to recognize the full potential of applying its practices and recommends a careful assessment of the types of procurement that could benefit from a thorough application of the practices. In particular, many agencies fail to consider using competitive bidding for such things as utility services, mailing/shipping services, telephone service, and other historically monopolized services. MANUAL § 1.2.4.

[10] *See* 49 U.S.C. § 5325 (2001) and 23 U.S.C. § 112 (2000) for the source of the FTA's regulatory authority in procurement matters. When county and municipal laws, state regulations, case law, and internal procedures adopted by transit agencies are considered as well, the complexity of transit procurements becomes extraordinary. The Los Angeles County Metropolitan Transportation Authority's (LACMTA) procurement manual lists numerous sources for guidance and restrictions on procurement procedures. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY PROCUREMENT MANUAL §§ 1.5–1.6 (2003) (hereinafter LA MANUAL).

[11] MANUAL § 1.3. The Manual distinguishes between "grantees," which receive grants, and "recipients," which receive any sort of funding from the FTA. MANUAL § 1.3.1. However, in practice there is virtually no difference in the sorts of restrictions that grantees and recipients face. Thus the term "grantee" will be used for both except where there is a distinction made between the treatment of the two categories.

[12] MANUAL § 1.3.

[13] MANUAL § 1.3.1. Unless otherwise indicated, it is presumed that all requirements or best practices are applicable to subgrantees.

rules created by FTA Circular 4220.1D concerning the applicability of procurement requirements to grantees:

> 1. If a transit authority is both a grantee of federal funds and a sub-grantee of a state government, the state may permit the transit authority to follow applicable FTA procurement guidelines rather than state procurement requirements; however the state is not under an obligation to so permit;
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> 2. When a state government makes a procurement using FTA-provided funds, it must follow the same procedures that it ordinarily uses for such procurements, except where those procedures conflict with established FTA guidelines;
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> 3. Unless otherwise indicated, subgrantees of a state must follow state procedures when awarding or administering contracts;
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> 4. Regional transit authorities are not considered to be state agencies; and
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> 5. Subgrantees of states that are institutions of higher education, hospitals, or other nonprofit organizations, and all other FTA grantees must use the procurement procedures of their state/locality except where those procedures conflict with federal law.[14]

State governments must comply with five requirements: (1) the state may not enter into contracts for rolling stock or replacement parts with a performance period greater than 5 years;[15] (2) the state must use "full and open competition" to make the procurement;[16] (3) the state shall not discriminate against bidders on the basis of geographic preference unless federal law for the particular type of procurement being undertaken expressly mandates or encourages geographic preference;[17] (4) the state must comply with the requirements of the Brooks Act for the procurement of architectural or engineering services;[18] and (5) the state must include all clauses required by federal law, executive orders, or regulations within any contracts or purchase orders made by it or any subgrantees.[19]

In general, a transit agency may avoid FTA procurement requirements if it is engaged in making a procurement without federal funds.[20] However, there are certain situations in which FTA requirements must be met, even if it appears there is no direct use of federal funds.[21] The first is where the agency receives operating assistance from FTA, in which case it must apply all relevant federal requirements to procurements except for capital projects undertaken wholly without federal funds.[22] For example, even if the operating assistance funds are used only for paying salaries, a procurement of diesel fuel must still be in conformance with federal requirements. Second, where a transit agency enters into an FFGA with FTA for a capital project, it will be assumed that federal funds are part of all aspects of the project in the same ratio as federal funds are to the overall budget for the project.[23] Ultimately, this has a similar effect to the operating assistance provision, in that it transforms the entire project (unless otherwise segregable into discrete parts) into a completely federally-funded project, thereby subjecting all parts of it to the federal requirements. If a project can be divided into discrete parts, this leads to the final manifestation of the taint principle—the need to identify the "minimal segment that can be feasibly operated independently."[24] In the absence of an FFGA, federal funds may be confined to particular parts of a capital project, but those

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[14] MANUAL § 1.3.1.

[15] 49 U.S.C. § 5326(b) (2002). Other contracts no longer need be limited to a term of 5 years. *See* Dear Colleague Letter from Jennifer Dorn of May 29, 2002, available at http://www.fta.dot.gov/office/public/2002/c0802.html (visited April 21, 2003). *See also* Federal Transit Administration Circular 4220.1E para. 7.m (2003) [FTA C. 4220.1E].

[16] FTA C. 4220.1E para. 8.a.

[17] FTA C. 4220.1E para. 8.b. The only specific discriminatory exception permitted at this time is for architectural and engineering services (A&E), provided that a sufficient number of local bidders will be available to result in a truly competitive procurement. FTA C. 4220.1E para. 8.b. However, this does not preclude a state from requiring licensing of the bidders. FTA C. 4220.1E para. 8.b. Grantees sometimes attempt to justify the use of geographic preferences for contracts other than A&E work by arguing that they need parts or services on a short lead-time basis and must therefore rely on local suppliers. While FTA is sympathetic to this need, it is still not a permitted reason for employing geographic preferences. An approach that is allowable, however, is for the grantee to require that contractors be able to supply parts or services by a specific time or within a specific timeframe. As long as the deadline/timeframe is reasonable, this does not constitute a geographic preference. MANUAL § 2.4.2.2.3.

[18] FTA C. 4220.1E para. 9.e. Note that the Manual erroneously refers to this requirement as being under paragraph 9.d of the Circular. The requirements of the Brooks Act (40 U.S.C. § 541 (2001)) are: (1) an offeror's qualifications must be evaluated; (2) price must be excluded as an evaluating factor; (3) negotiations must be conducted only with the most qualified offeror; (4) if there is a failure to agree on price, negotiations with the next most qualified offeror must be commenced until the contract is awarded to the most qualified offeror whose price is fair and reasonable to the grantee. FTA C. 4220.1E para. 9.e. For more on the procurement of architectural, engineering, and related services, see § 5.01.09 below.

[19] MANUAL § 1.3.1. 49 C.F.R. § 18.36 (2003).

[20] MANUAL § 1.3.2.

[21] This is often referred to as the "taint principle," i.e., federal dollars "contaminate" other funds and projects, leading to a proliferation of federal control.

[22] MANUAL § 1.3.2. As the Manual says, "FTA maintains that, one dollar of Federal operating assistance converts the operating funds of the [transit agency] so that all such funds of the [agency] therefore become subject to Federal requirements." MANUAL § 1.3.2. Although operating assistance was eliminated for most purposes some years ago, funds made available under the system of Formula Grants for Other than Urbanized Areas may still be used for operating assistance. 49 U.S.C. § 5311(h) (2001).

[23] MANUAL § 1.3.2. 49 C.F.R. § 633.5 (2003).

[24] MANUAL § 1.3.2.

parts must have independent utility.[25] For example, if a light rail station is to be constructed, federal funds could not be confined solely to the roof of the station or to the surfacing of the passenger platforms. However, it would be possible to exclude federal funds from the landscaping around the station, as it is not essential to operations.

FTA requirements also extend to such purchases as legal services and expert witnesses, so these services must be procured competitively and in the approved manner.[26] Regular employment contracts, such as for clerical staff, do not fall under the federal requirements.[27] Therefore, the agency is free to devise whatever procedures it wishes within the confines of relevant state/local laws and federal statutes governing employment in general.[28]

c. The Three Stages of the Procurement Process

The Manual provides a number of recommendations and requirements for the general procurement process. The first point the Manual raises is the importance of autonomy in procurements.[29] While recognizing that there is no uniform solution, the Manual recommends that the overall procurement process be divided into three stages: "requiring," "procurement," and "payment."[30] The requiring stage is represented by the program manager, who is responsible for determining the procurement needs, establishing specifications, and acting as a technical representative or advisor to the contracting officer.[31] The procurement stage is represented by the contracting officer, who is responsible for ensuring that specifications are not needlessly restrictive, preparing and distributing the bid advertisement, awarding the contract, and monitoring performance.[32] The payment stage is represented by the accounts payable officer, who ensures that all necessary approvals are obtained and that payments are kept within the price limits of the contract.[33]

d. Employee Conduct

Regardless of how the grantee chooses to arrange its procurement process, it must adopt a written code of standards governing the performance of employees engaged in the award and administration of contracts.[34] The standards must include a provision barring employees, officers, agents, and board members of the grantee, or immediate family members of any of these groups, from participating in the selection, award, or administration of any FTA-financed contract if a conflict of interest would be involved.[35] The grantee's employees, officers, agents, or board members must neither solicit nor accept gifts, gratuities, favors, or anything of monetary value from potential contractors, active contractors, or other parties with agreements with the grantee.[36] The grantee must certify to FTA

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[25] MANUAL § 1.3.2.

[26] MANUAL § 1.3.3.2. However, where the grantee has pending litigation that might be compromised by a public procurement process, the grantee may validly seek to avoid using ordinary procurement procedures. In such an instance the grantee should submit a request to the FTA seeking a waiver of FTA requirements, particularly those governing the need to competitively select legal counsel in a formally advertised RFP MANUAL § 1.3.3.2.

[27] MANUAL § 1.3.3.3.

[28] MANUAL § 1.3.3.3.

[29] MANUAL § 2.1.2.

[30] MANUAL § 2.1.2. Using the major milestone event within each phase of a procurement as a point of reference, this could also be called "preparation of the IFB/RFP/Specifications," "selection and award to the successful vendor," and "contract administration."

[31] MANUAL § 2.1.2.

[32] MANUAL § 2.1.2. In LACMTA, the Chief Executive Officer (CEO) designates who will serve as contracting officers. *See* LA MANUAL § 2.1.B. The LA Manual provides a specific procedure for the appointment of contracting officers. *See* LA MANUAL § 2.5. The contracting officers have wide reaching powers and responsibilities on behalf of LACMTA, although the CEO may choose to limit the scope of their authority to less than that permitted by statute or regulation. The powers and responsibilities of a contracting officer include, but are not limited to: (1) entering into, administering, and terminating contracts; (2) ensuring that all applicable restrictions have been complied with and all requirements have been met; (3) ensuring contractors receive impartial and equitable treatment; (4) ensuring that there are sufficient funds to meet the terms of the contract; and (5) determining that offered prices are fair and reasonable prior to entering into a contract. *See* LA MANUAL § 2.4.A. The contracting officer is also responsible for: (1) soliciting bids and proposals and issuing amendments to those solicitations; (2) serving as the chairperson for prequalification hearings, pre-bid conferences, and proposal evaluation meetings; (3) conducting contract negotiations; (4) conducting investigations of contractors; (5) managing termination procedures where needed; and (6) managing nontechnical aspects of post-award contract administration, including maintaining all official contract files. *See* LA MANUAL § 2.4.A. Also assisting the contracting officer is the project manager, who is responsible for the day-to-day administration of the technical aspects of a contract, including monitoring the contractor's performance. The project manager should be familiar with the procedures and requirements of the department making the procurement. *See* LA MANUAL § 2.4.B. If the contractor fails to correct any problems in a timely or adequate manner, the project manager must notify the contract administrator that an apparent breach of the contract exists. The contract administrator and project manager must then take "any steps necessary and available" to enforce the Authority's rights under the contract. *See* LA MANUAL § 2.4.D.

[33] MANUAL § 2.1.2.

[34] FTA C. 4220.1E para. 7.c.

[35] The Circular defines "conflict of interest" as being when any of the following parties has a "financial or other interest" in the firm selected for the award: (1) an employee, officer, agent, or board member; (2) any member of his/her immediate family; (3) his/her partner (the Circular does not explain whether "partner" is intended in a business or relational sense); or (4) an organization that employs or is about to employ any of the above. FTA C. 4220.1E para. 7.c.

[36] FTA C. 4220.1E para. 7.c. Grantees may, however, set minimum rules where financial interests are not substantial or

that the standards are in place.[37] As a matter of best practices, the Manual recommends that the grantee require all employees to periodically sign a statement acknowledging that the employee has read and understood the grantee's code of conduct.[38] FTA has noted that despite requirements that grantees explicitly adopt penalties or sanctions for violations of their standards,[39] grantees consistently fail to do so.[40] A grantee should examine its disciplinary procedures and rectify this situation if it exists.[41] Issues of employee conduct are described in greater detail in Section 6—Ethics, below.

e. Written Record

Once standards and procedures are in place for making procurements, the grantee must begin building a written record of a procurement's history.[42] This is commonly called the "procurement file," "contract file," or "record of procurement."[43] At the very minimum, such a record is required to include:

1. The rationale for the method of procurement;
2. Selection of contract type;
3. Reasons for contractor selection or rejection; and
4. The basis for the contract price.[44]

The Manual also suggests a number of other items that, while not mandated by FTA, should be kept as part of the written procurement history.[45]

f. Full and Open Competition

Consistent with general federal procurement procedures, procurements using FTA funds must provide for "full and open competition."[46] Unlike state grantees where this term is largely undefined, other grantees are subject to a broad set of restrictions. Grantees must use sealed bids or competitive negotiations for procurements in excess of $100,000.[47] Practices that are barred as overly restrictive include:

1. Unreasonable qualifications requirements for firms to compete;

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the gifts are unsolicited items of "nominal intrinsic value." FTA C. 4220.1E para. 7.c.

[37] FTA C.4220.1.E para. 5.a.

[38] MANUAL § 2.1.3.

[39] FTA C. 4220.1E para. 7.c.

[40] MANUAL § 2.1.3.

[41] MANUAL § 2.1.3.

[42] MANUAL § 2.4.1; FTA Circular 4220.1E para. 7.i.

[43] *See, e.g.*, 49 C.F.R. § 19.45 (2003).

[44] FTA C. 4220.1E para. 7.i.; 49 C.F.R. § 18.36(b)(9).

[45] This includes, but is not limited to: (1) purchase requests, acquisition planning information, and other presolicitation documents; (2) evidence of availability of funds; (3) rationale for method of procurement; (4) list of sources solicited; (5) independent cost estimate; (6) statement of work/scope of services; (7) copies of published notices of proposed contract action; (8) copy of the solicitation, including all addenda and amendments; (9) liquidated damages determination; (10) an abstract of each offer or quote; (11) source selection documentation; (12) contractor's contingent fee representation and other certifications and representations; (13) contracting officer's determination of contractor responsiveness and responsibility; (14) cost or pricing data; (15) determination that the price is fair and reasonable including an analysis of the cost and price data and any required internal approvals for the award; (16) notice of award; (17) notice to any unsuccessful bidders and record of any debriefing; (18) record of any protest; (19) bid, performance, payment, or other bond documents, and notices to sureties; (20) required insurance documents; (21) notice to proceed. MANUAL § 2.4.1.

[46] MANUAL § 2.4.2.1.

[47] *Id*. This dollar amount is based on the federal government's own definition of "small purchases," as given at 41 U.S.C. § 403(11), but it is still established by the FTA itself, so a change in the statute will not necessarily herald a change in FTA guidelines.

By comparison, under state law (*see* CAL. PUB. UTIL. CODE §§ 130232 and 130050.2 (2001)), LACMTA is permitted to use simplified acquisition procedures for the procurement of supplies and equipment only where the aggregate cost of the procurement will be $40,000 or less, and for construction where the total dues do not exceed an aggregate amount of $25,000. LA MANUAL ch. 10. Within the simplified acquisition threshold of $25,000, different procedures apply for different cost levels and types of procurements. Where a procurement does not exceed $2,500, only a single price quotation is needed if the price is judged to be reasonable. LA MANUAL § 10.4.F. A procurement under $1,000 may also be made using a "check request" if the items to be procured are within the requesting department's regular budget (typically including books, trade publication subscriptions, conference/seminar registration fees, etc.). LA MANUAL § 10.21. Procurements that are greater than $2,500 and less than $40,000 and are of a nature that puts them under CAL. PUB. UTIL. CODE § 130232 may be obtained on the basis of three oral or written quotations. LA MANUAL § 10.7. One of the quotations must come from the previous supplier, if any (assuming that their performance record with LACMTA is acceptable and that they have not been debarred from bidding for federally-funded contracts). LA MANUAL § 10.9.A. Based on a variety of factors, the contracting officer may conclude that it is desirable to obtain quotes from more than three sources, and in any event should try to maximize the amount of competition. LA MANUAL § 10.10. The contracting officer has an affirmative duty to verify "price reasonableness" in two circumstances. The first is where the officer suspects, or otherwise has information, indicating the price may not be reasonable. The other is when there is no comparable pricing information readily available for the item or service to be procured, as when purchasing an item that is not the same as, or similar to, other items that have been recently procured using competitive procedures. LA MANUAL § 10.9.B. Regardless of whether the contracting officer has to investigate the pricing, he or she must make a finding in writing that the price to be paid is fair and reasonable. LA MANUAL § 10.11. If only one quotation is received or the quotations reflect a lack of price competition, the contracting officer must include in the procurement file a statement explaining the basis of the determination of fairness and reasonableness. LA MANUAL § 10.11. The determination may be based on competitive quotations, comparison of prices with previous purchases, price lists, catalogs, advertisements, the contracting officer's personal knowledge, or any other reasonable basis. LA MANUAL § 10.11. In event of inadequate competition or information for basing comparisons on, a cost analysis may be necessary to determine whether the offered price is reasonable.

2. Unnecessary experience and excessive bonding requirements;

3. Noncompetitive awards to any person or firm on retainer contracts;

4. Organizational conflicts of interest;[48] and

5. Any arbitrary action in the procurement process.[49]

This list is not definitive, and any other practice that interferes with full and open competition may also be found to have violated the terms of the FTA guidelines.[50] The grantee should always recall the two principal purposes of public procurements—to obtain the best quality and service at minimum cost, and to guard against favoritism and profiteering at public expense.[51] Thus, before adding any new requirements, specifications, or restrictions to a procurement, the grantee should question whether such changes are in harmony with those purposes.

g. Minimum Needs Doctrine

The Manual stresses the importance of the "minimum needs doctrine" in procurements.[52] The doctrine provides that in preparing specifications for a product or service to be procured, the grantee should limit the specifications to those criteria most essential to meet its requirements.[53] Under current FTA requirements, the minimum needs doctrine is only mandatory where specifications make reference to a brand name product. In such an instance, the specifications must also include descriptions of the product's function so as to facilitate product substitutions or allow potential contractors to submit an alternate product ("approved equal") for prebid consideration by the grantee.[54] However, the Manual exhorts grantees to apply the logic of the minimum needs doctrine to all procurements where possible.[55] The Manual also encourages grantees to participate in intergovernmental procurement contracts for the purpose of reducing costs and increasing efficiency in procurements.[56]

h. Leasing

Leases of equipment are considered to be third party contracts and thus fall under relevant federal laws, regulations, and FTA guidelines.[57] However, because leasing equipment is often less cost effective than purchasing the same sort of equipment, a lease versus purchase analysis should be made as part of the decision regarding the method of procurement.[58] The degree of analysis should be appropriate to the size and complexity of the procurement and must consider a wide range of factors.[59]

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[48] This is defined as a situation where because of other activities, relationships, or contracts, a contractor is unable, or potentially unable, to render impartial assistance or advice to the grantee; a contractor's objectivity in performing the contract is or might otherwise be impaired; or where a contractor has an unfair competitive advantage. FTA C. 4220.1E para. 8.a(5). The FTA considers the award of a transit management services contract as particularly susceptible to conflicts of interest. E.g., if the transit management firm will provide the general manager as part of its services, an organizational conflict of interest arises if any person who reports to the general manager is involved in the review of proposals, recommendation of the successful contractor, contract award, and/or contract administration. The reason is simple: the general manager will sign the reviewing employee's paycheck, have the authority to promote or terminate the employee, etc. To resolve the organizational conflict of interest, an outside government agency that does not report to the general manager may perform these procurement tasks, or the transit board can appoint a subcommittee to act as procurement staff to the board.

[49] FTA C. 4220.1E para. 8.a.

[50] FTA C. 4220.1E para. 8.a.

[51] MANUAL § 2.4.2.1.

[52] MANUAL § 2.3.

[53] *Id*.

[54] FTA Circular 4220.1E para. 8.c(1). Alternatively, if it would be too laborious or space consuming to describe the product's function fully, it is acceptable to follow the brand name product description with the words "or equal," "or approved equal," or "or similar in design, construction, and performance." However, the FTA strongly prefers that the function be described if at all possible. It should be noted that the use of brand names is strongly disfavored by the FTA. MANUAL § 2.4.2.2.1. An exception to this rule is where the grantee is obtaining an "associated capital maintenance item" from the original supplier. However, in that instance the grantee must first certify in writing to the FTA that the original supplier is the only source for the item and that the price of the item is no higher than that paid by similar customers. FTA C. 4220.1E para. 9.h(l)(e).

[55] MANUAL § 3.3.

[56] MANUAL § 1.3.3.5. However, before a grantee joins such a contract, it should take several steps to assure that it is not violating federal procurement requirements. The grantee should: (1) determine that the contract is still in effect or can be modified to permit sufficient lead time to make the required deliveries to the grantee; (2) determine that the specifications in the contract will meet its needs; (3) review the terms and conditions to determine that they are acceptable; (4) determine that the grantee's requirements will not exceed the scope of the existing contract, as modifying the scope of the contract may create a sole-source procurement situation that will need to be justified in accordance with federal procedures; (5) determine that the contract was awarded competitively, either through sealed bids or competitive proposals, as if it was a sole-source award then the grantee must justify the contract under the relevant federal procedures; (6) if original award was made some time ago, conduct a market survey or price analysis to determine whether the prices in the contract are reasonable; (7) determine that the award recipient has submitted all federally required certifications to the awarding agency (e.g., Buy America, etc.); and (8) prepare a "Memorandum for the Record" documenting the grantee's analysis of the items mentioned above. This will serve as the "Written Record of Procurement History" required by FTA guidelines. MANUAL § 1.3.3.5.

[57] MANUAL § 1.3.3.7.

[58] This decision should be documented in the procurement history. MANUAL § 1.3.3.7.

[59] The factors include: (1) estimated length of the period the equipment is required and the amount of time of actual equipment usage; (2) technological obsolescence of the equipment; (3) financial and operating advantages of alternative types and

i. Qualified Products and Bidders Lists

Grantees may opt to create lists of qualified products and/or qualified bidders to expedite and standardize their procurement processes.[60] A qualified products list catalogs products that have previously been tested and found to meet the grantee's requirements, while a qualified bidders list provides the names of bidders that manufacture complex items requiring sophisticated manufacturing and quality control procedures.[61] To be placed on a qualified bidders list, a firm should be reviewed carefully to ensure that its internal procedures and controls produce satisfactory end products.[62] Furthermore, the grantee must not prevent a supplier or bidder from qualifying for a list during the "solicitation period" (i.e., the time from the posting of the bid advertisement to the closing date).[63] Nevertheless, a grantee is neither expected nor required to delay an award

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makes of equipment; (4) total rental cost for the estimated period of use; (5) net purchase price; (6) transportation and installation costs; (7) maintenance and other service costs; (8) trade-in or salvage value costs; (9) imputed interest cost; and (10) availability of a servicing facility, especially for highly complex equipment. MANUAL § 1.3.3.7.

[60] MANUAL § 2.4.2.2.4.

In Los Angeles, LACMTA typically requires businesses interested in doing certain work for it to complete a prequalification procedure before being eligible to receive contracts from the Authority. LA MANUAL § 2.12.

Florida employs a prequalification process for SDOT contracts in excess of $250,000. FLA. STAT. § 337.14 (2000). To be eligible to bid on a contract, a contractor must annually file, in duplicate, with the SDOT an application for qualification accompanied by all required supporting documents. FLA. ADMIN. CODE ANN. 14-22.002(1)(a) (2000). The supporting documents include a financial statement (FLA. ADMIN. CODE ANN. 14-22.002(2) (2000), the financial statement must have been completed within the past 12 months in accordance with GAAP, FLA. ADMIN. CODE ANN. 14-22.002(2) (2000)); and a list of equipment (FLA. ADMIN. CODE ANN. 14-22.002(3) (2000)). The list must reflect each major item of equipment owned by the applicant that is utilized in performing the requested classes of work along with its book or salvage value, make, model, and description. Items held under capital lease agreements must be identified so that the book value of these items can be readily determined, FLA. ADMIN. CODE ANN. 14-22.002(3) (2000). Where the contractor has previously qualified within the past 2 years, the application must include a list of projects completed within the past 3 years as the prime or subcontractor stating the actual dollar amount of work executed and listing each class of work performed on those projects by its employees. The list may not include work sublet to others or performed with rented equipment and operators. Resumes must be submitted to show construction experience of personnel at superintendent level and above for each class of work for which the contractor is requesting qualification. FLA. ADMIN. CODE ANN. 14-22.002(4)(a) (2000). Newly established contractors, and contractors who last qualified more than 2 years previously, must provide letters of recommendation from at least two agencies or firms with direct knowledge of the contractor's key personnel and work performance in sufficient detail to assist in rating the applicant's ability to perform construction and related work. FLA. ADMIN. CODE ANN. 14-22.002(4)(b) (2000). The contractor must also indicate the classes of work for which it wishes to be qualified for. FLA. ADMIN. CODE ANN. 14-22.003(3)(a) (2000). The SDOT then applies a formula to the information to determine the contractor's "Maximum Capacity Rating" [MCR]. *See* FLA. ADMIN. CODE ANN. 14-22.003 (2000) for a complete discussion of the formula and how various elements are weighted. The MCR is the total aggregate dollar amount of uncompleted work that a bidder may have under contract as either a prime or subcontractor. FLA. ADMIN. CODE ANN. 14-22.003(2)(a) (2000). A bidder may increase its MCR if it furnishes a bond meeting certain requirements and exceeding its current MCR. FLA. ADMIN. CODE ANN. 14-22.003(2)(b) (2000). The SDOT will consider the contractor's MCR and other factors, such as prior convictions for contract crimes and the quality of past work done for the SDOT (*see* FLA. ADMIN. CODE ANN. 14-22.0041(1) (2000) for a complete listing of factors the SDOT must weigh in determining whether to qualify the contractor), and then make a determination as to whether to qualify the contractor. FLA. ADMIN. CODE ANN. 14-22.0041(2) (2000).

New York is unusual in that it is one of the few states to use a post-qualification system for evaluating bidders. Once a construction contractor has been notified that it was the lowest bidder for a contract, it must complete the New York State Uniform Contracting Questionnaire (NYSUCQ) to establish its ability to perform the contract. NEW YORK STATE DEP'T OF TRANSP., HOW TO DO BUSINESS WITH THE NEW YORK STATE DEPARTMENT OF TRANSPORTATION 11. (www.dot.state.ny.us/cmb/consult/files/howtodob.pdf) (visited Nov. 30, 2003). If the contractor has submitted a NYSUCQ within the past 12 months and its information has not changed in that time, a copy of the earlier NYSUCQ may be submitted along with an affidavit stating that there has been no change. NYSUCQ Preamble, available on-line at http://www.dot.state.ny.us/cmb/contract/files/cca1.pdf (visited Apr. 21, 2003). The completed NYSUCQ must include a financial statement (NYSUCQ § 15), prior work experience (NYSUCQ § 10–14), and a disclosure of previous criminal or regulatory actions against the contractor. NYSUCQ § 16. The completed form is evaluated by the Contract Management Bureau of the SDOT (NYSUCQ Preamble), which will notify the contractor of whether it has been successfully qualified.

[61] MANUAL § 2.4.2.2.4.

[62] MANUAL § 2.4.2.2.4. Grantees are not required to document the construction of a qualified list, nor are they required to justify the placement of a product or bidder on such a list, but the Manual recommends that written records be kept in case a decision is challenged. MANUAL § 2.4.2.2.4. Once a list is assembled, however, the FTA does mandate that the list be kept current and include enough qualified sources to ensure full and open competition. FTA C. 4220.1E para. 8.d.

[63] 49 C.F.R. § 18.36(c)(4) (2003). FTA C. 4220.1E para. 8.d. Under LACMTA's prequalification process, a business must submit a "completed, executed, and notarized application" containing all required information no later than the date of bid opening or the due date for proposals for the business's bid or proposal to be considered. LA MANUAL § 2.12.B. LA MANUAL § 2.12.B., prequalification. If a prequalification application is denied, the firm has 10 days from the date of notification to file a written appeal with the LACMTA Review Panel. LA MANUAL § 2.12.3. The appellant may present new evidence to the Review Panel for consideration. LA MANUAL § 2.12.B. The decision of the Review Panel is final and may not be appealed. LA MANUAL § 2.12.B.

merely to give an interested party an opportunity to qualify.[64] A grantee considering use of either a qualified products list or a qualified bidders list should first examine whether the product or service would customarily be prequalified. This consideration is important, as while pre-qualification can be a useful filtering technique, it makes it more difficult for new firms to enter the field, thereby reducing competition.

j. Procurement and Awards Process

At this stage, the grantee should consider what sort of process to use for making the procurement: micro-purchase, small purchase, sealed bid, competitive proposal, or sole source.

A micro-purchase is a procurement of $2,500 or less.[65] Competitive quotations are not required if the grantee determines an offered price is fair and reasonable.[66] The purchase is exempt from "Buy America" requirements.[67] (See Section 5.C.3 below for a further discussion of "Buy America".) There should be an effort to equitably distribute such procurements among suppliers.[68] The only required documentation is a determination that the price is fair and reasonable and a showing of how this determination was reached.[69]

The principles governing a small purchase procurement (i.e., one between $2,500 and $100,000)[70] are similar to those concerning a micro-purchase. The key exception is that price/rate quotations must be obtained from an "adequate number" of sources.[71]

The use of sealed bids is recommended where the anticipated price will exceed the small purchase threshold (currently $100,000)[72] and the intent is to award a "firm fixed-price contract."[73] FTA Circular 4220.1E states that for the use of sealed bids, the following conditions should be met:

1. A complete, adequate, and realistic specification or purchase description is available;
2. Two or more responsible bidders are willing and able to compete effectively for the business;
3. The selection of the successful bidder can be made primarily on the basis of price; and
4. No discussion with the bidders is needed.[74]

Once the grantee has decided to make the award through the sealed bids process, it is obligated to meet a number of FTA requirements. The invitation for bids (IFB) must be publicly advertised in a manner calculated to produce an adequate number of bidders from amongst known suppliers.[75] As a practical matter, this does not limit publication of the legal notice to a single publication. For example, it would be imprudent for most transit systems to publish advertisements for the procurement of rolling stock solely in the local newspaper, for publication in trade journals is ordinarily more effective.

The solicitation period is required to be sufficiently long to permit interested parties time to prepare their bids.[76] The IFB, which may include pertinent attachments, shall provide specifications for the items or services sought, and those specifications must be sufficiently precise for bidders to be able to properly formulate bids based on the specifications or sources incorporated by them.[77] All bids are required to be opened publicly at the time and place advertised.[78] The lowest responsive and responsible bidder will be given a firm fixed-price contract.[79] Factors such as discounts, transportation costs, and life-cycle costs may be considered in determining which bid is lowest if the bid advertisement has specified that those factors would be so considered.[80] Any or all bids may be rejected if there is a sound documented business reason.[81]

The use of competitive proposals is recommended where the anticipated price will exceed the small purchase threshold (currently $100,000), the procurement is of a complex nature requiring discussion with the offerors or otherwise does not fall within the suggested parameters of the sealed bid process above, and the intent is to award a firm fixed-price contact or a "cost reimbursement type contract."[82] Cost reimbursement

[64] MANUAL § 2.4.2.2.4.

[65] FTA C. 4220.1E para. 9.a.

[66] FTA C. 4220.1E para. 9.a.

[67] FTA C. 4220.1E para. 9.a.

[68] FTA C. 4220.1E para. 9.a. LACMTA also requires that noncompetitive small purchases be distributed equitably among available suppliers when possible or appropriate. LA Manual 10.4.E.

[69] FTA C. 4220.1E para. 9.a.

[70] FTA C. 4220.1E para. 9.b.

[71] FTA C. 4220.1E para. 9.b. Circular 4220.1E does not expressly state that small purchase procurements are exempt from "Buy America" requirements; however, FTA has recognized such an exemption as a general public interest waiver to "Buy America." *See* 56 Fed. Reg. 932 (1991), as amended at 60 Fed. Reg. 37,930 (1995) and 61 Fed. Reg. 6300 (1996).

[72] *See* Manual § 2.4.2.1.

[73] 49 C.F.R. § 18.36 (d)(2) (2003). A firm fixed-price contract establishes a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. It is appropriate for procurements of commercial items or supplies and services that can be clearly defined with either performance/functional specifications or design specifications, and where performance uncertainties do not impose unreasonably high risks on the contractor. MANUAL § 2.4.3.1.

[74] FTA C. 4220.1E para. 9.c(1).

[75] 49 C.F.R. § 18.36(d)(2)(ii)(A) (2003). FTA C. 4220.1E para. 9.c(2)(a).

[76] FTA C. 4220.1E para. 9.c(2)(a).

[77] FTA C. 4220.1E para. 9.c(2)(b).

[78] FTA C. 4220.1E para. 9.c(2)(c).

[79] FTA C. 4220.1E para. 9.c(2)(d).

[80] FTA C. 4220.1E para. 9.c(2)(d). Payment discounts may only be used to determine the low bid if previous experience indicates that such discounts are ordinarily taken advantage of. FTA C. 4220.1E para. 9.c(2)(d).

[81] FTA C. 4220.1E para. 9.c(2)(e).

[82] FTA C. 4220.1E para. 9.d. A cost reimbursement type contract is one in which the grantee does not contract for the performance of a specified amount of work for a predetermined price, but agrees instead to pay the contractor's reasonable,

type contracts may be of either completion form or term form.[83] If competitive proposals are to be used, the RFP must be publicized in a similar manner as the sealed bid process, and all evaluation factors and their relative importance must be identified in the advertisement.[84] The grantee shall have a procedure in place prior to the advertisement for conducting technical evaluations of the proposals submitted and selecting a winning proposal.[85] Proposals should be solicited in a way that will produce a response from a sufficient number of offerors to achieve full and open competition.[86] Finally, awards are to be made to the responsible offeror whose proposal is most advantageous to the grantee's program with price and other factors considered.[87]

The last form of award process is the sole source procurement, sometimes called "procurement by noncompetitive proposal."[88] As its name implies, a sole source award is usually made through solicitation of a single firm, although it may also be made in the context of a sealed bid/competitive proposal procedure where there is only one responsible respondent.[89] The sole source procurement procedure is also used in the event of contract amendments or change orders that exceed the scope of the original contract,[90] or where options that were not evaluated as part of a sealed bid/competitive proposal procedure are now being exercised.[91] A sole source procurement may only be used where a contract is not feasible under micro/small purchases, sealed bids, or competitive proposals, and at least one of the following circumstances apply:

1. The item is available only from a single source;
2. There is a public exigency or emergency[92] for the requirement that will not permit a delay resulting from competitive solicitation;
3. The FTA authorizes noncompetitive negotiations;
4. After solicitation of a number of sources, competition is determined to be inadequate;[93] or
5. The item is an associated capital maintenance item as defined by 49 U.S.C. § 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 that such manufacturer or supplier is the only source for the item and that the price to be paid is no higher than that paid by similar customers.[94] A cost analysis verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profits is required once the procedure has been justified.[95]

There is also a third form of contract, aside from the firm fixed-price and cost reimbursement varieties—the "time-and-materials" contract.[96] The Manual treats this form of contract separately, as FTA strongly discourages its use.[97] A grantee may only use a time-and-materials contract after making a determination that no other sort of contract is suitable.[98] Furthermore, the contract must specify a price ceiling the contractor may not exceed except at its own expense or with a written contract modification from the grantee.[99] If a time-and-

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allocable, and allowable costs of performance, regardless of whether the work is completed. The grantee will consequently assume a high risk of incurring cost overruns, while the contractor is veritably shielded from financial loss. Contracts of this sort are appropriate when the grantee is unable to accurately describe the work to be done or where there is an inability to accurately estimate the costs of performance. A cost reimbursement type contract is best suited to large projects with many complex requirements. MANUAL § 2.4.3.2.

[83] MANUAL § 2.4.3.2. The completion form describes the scope of work by specifying an end product or definite goal to be achieved. This form obligates the contractor to finish the work and deliver the final item as a condition for payment of the entire fee. Failure to do so will permit the grantee to reduce the amount paid. Conversely, the term form defines the work in general terms and obligates the contractor to expend a specified level of effort for a stated time period. The fee is payable at the expiration of the stated time period if the contractor has met the required level of effort. Extension of the time period, unless the contractor had failed to use the required amount of effort, will constitute a new procurement and require the process to be repeated. MANUAL § 2.4.3.2. In the case of either type of cost contract, the grantee should verify that the contractor has an adequate accounting system to segregate project costs and reasonably apportioned overhead from other company activities. MANUAL § 2.4.3.2.

[84] FTA C. 4220.1E para. 9.d(1).

[85] FTA C. 4220.1E para. 9.d(3).

[86] FTA C. 4220.1E para. 9.d(2).

[87] FTA C. 4220.1E para. 9.d(4).

[88] 49 C.F.R. § 18.36(d)(4) (2003).

[89] FTA C. 4220.1E para. 9.h.

[90] FTA C. 4220.1E para. 9.h.

[91] FTA C. 4220.1E para. 9.i(l).

[92] "Emergency" generally means imminent danger to persons or property of such a nature that insufficient time exists for a formally advertised sealed bid or competitive negotiation procurement. Poor planning does not constitute an emergency.

[93] 49 C.F.R. § 18.36(d)(4)(i) (2003).

[94] FTA C. 4220.1E para. 9.f(1).

[95] FTA C. 4220.1D para. 9.h(l).

[96] 49 C.F.R. § 18.36(10) (2003). A time-and-materials contract is used for obtaining supplies or services, with provisions for the payment of labor costs on the basis of fixed hourly billing rates that must be specified in the contract. The rates include wages, indirect costs, general and administrative expenses, and profits. While the hourly rates are similar to a fixed-price contract, the overall price of the contract is determined in a manner similar to cost-type contracts, as the number of hours worked is flexible. Materials are to be billed at cost, unless the contractor ordinarily sells materials of the type needed in the course of its business. In the latter case, the cost should reflect the price of the materials as listed in catalogs or price lists in effect at the time the material is supplied. MANUAL § 2.4.3.3.

[97] FTA C. 4220.1E para. 7.j. The FTA finds this form of contract undesirable because it creates a perverse incentive for the contractor to work as slowly as possible, thereby maximizing the number of hours worked, and consequently diminishing productivity. MANUAL § 2.4.3.3.

[98] FTA C. 4220.1E para. 7.j(1).

[99] FTA C. 4220.1E para. 7.j(2).

materials contract is required, care must be taken to avoid inadvertently converting it into an illegal "cost plus percentage of cost" form of contract.[100] For example, a time-and-materials contract may be innocently transformed into the illegal "cost plus percentage of cost" form by simply breaking out overhead and profit from labor costs and billing them at separate rates based on labor costs incurred.[101] Because FTA so strongly disapproves of the use of time-and-materials contracts, such contract could conceivably be a target for both a bid protest and scrutiny during Triennial Review. Thus, grantees should pay particular attention to careful documentation in the procurement file of the decision and justification for the use of a time-and-materials contract.

k. Payment Systems

Having determined the form of contract to be used, the grantee should then assess what sort of payment system should be employed. There are three principal payment systems: (1) advance payments, (2) partial payments, and (3) progress payments. FTA ordinarily will refuse to authorize, or participate in, the funding of payments to a contractor before the contractor has incurred any costs.[102] However, FTA may give permission to use advance payments if certain criteria are met:

1. The contractor is considered essential to the public interest;[103]

2. There are no other forms of financing available; and

3. The contractor is unable to perform without advance payments.[104]

The partial payments system is FTA's preferred method of paying contractors and should be used whenever the contract can be structured in terms of incremental stages or deliveries and there are appropriate acceptance criteria for the items or services to be obtained.[105] In effect, the grantee is making a "final" payment for each part of the contract and the parts are treated as though they are quasi-independent.

The progress payments system may be appropriate if the contractor will not be able to bill for the first deliveries or performance milestones for a substantial period after beginning work, or where the contractor's expenditures prior to such "firsts" will have a significant impact on its working capital.[106] A grantee choosing to use progress payments must follow two major requirements:

1. Progress payments are to only be made to the contractor for costs incurred in the performance of the contract; and

2. The grantee must obtain title to property (materials, vehicles, etc.) for which the payments are made. Alternative security for progress payments by irrevocable letter of credit or equivalent means to protect the grantee's interests may be used in lieu of obtaining title.[107]

There are two types of progress payments—those based on costs and those based on completion of work.[108] While FTA does not impose specific restrictions on the use of the respective types of progress payments, the Manual does make a number of recommendations based on federal rules. Where the progress payments are to be conditioned on costs, the payment rate is usually 80 percent of costs for large businesses and 85 percent for small businesses, with total payments not to exceed 80 percent of the total contract price prior to completion.[109] While the method of conditioning payments on the percentage of work completed is permissible in most federal contracts,[110] FTA cautions grantees against using it, as there is a risk that the grantee may make payments to the contractor in excess of actual costs incurred to that point in time, creating a *de facto* advance payment.[111] Thus a grantee should use the cost-based type of progress payments unless it can ensure that the percentage of work completed will have a strong correlation to the contractor's actual costs.[112]

2. Advertisement for Bids and Proposals

FTA requires that all advertisements include a "clear and accurate description" of the requirements for the item or service sought, and may not contain any features that will unduly limit competition.[113] Furthermore, the advertisement may set forth the qualitative

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[100] A cost plus percentage of cost contract is generally defined as one where the contractor's compensation (or some fraction thereof) is calculated as a percentage of the cost of performance. This results in directly rewarding the contractor for cost overruns. MANUAL § 2.4.3.5.

[101] MANUAL § 2.4.3.3.

[102] FTA C. 4220.1E para. 12.a.

[103] *E.g.*, where it is essential to keep the contractor in operation for the purpose of maintaining a competitive market and the contractor is likely to fold without advance payment for the work.

[104] 49 C.F.R. §§ 18.3, 18.20(b)(7), 18.21, 18.52 (2003). MANUAL § 2.4.4.2. *E.g.*, where a contractor must incur substantial out-of-pocket expenses for supplies or must retool its factory prior to commencing work.

[105] As the Manual states

> Partial payments…*should be used* whenever the contract can be structured in terms of incremental stages or deliveries and there are appropriate acceptance criteria for the supplies, services or completed subsystems of a larger system. In other words, when the Agency can safely inspect, test and accept these units and make a "final" payment for those items delivered, without having to worry about their functioning as part of a larger system still under construction, then partial payments *should be established* in the contract.

MANUAL § 2.4.4.1 (emphasis added).

[106] MANUAL § 2.4.4.3.

[107] FTA C. 4220.1E para. 12.b.

[108] MANUAL § 2.4.4.3.

[109] *Id.*

[110] It is in fact standard for federal construction contracts. 48 C.F.R. § 52.232-5 (2001).

[111] MANUAL § 2.4.4.3.

[112] *Id.*

[113] FTA C. 4220.1E para. 8.c(1).

nature of the item or service and also give the minimum essential characteristics and standards to which it must conform to be satisfactory.[114] However, "[d]etailed product specifications should be avoided if at all possible."[115] If it is "impractical or uneconomical" to give clear and accurate descriptions of the requirements, a "brand name or equal" description may be used instead.[116] The bid advertisement may not contain any "exclusionary or discriminatory specifications."[117] Finally, there is also the peculiar provision enabling grantees to establish specifications for bus seats that exceed federally established standards, provided that such specifications are premised on a finding by a governmental authority of local requirements for safety, comfort, maintenance, and life-cycle costs.[118] While this summarizes the entire body of FTA bid advertising requirements,[119] the Manual has many recommendations on the subject.[120]

Generally, the more design details included in the advertisement, the more the grantee becomes responsible for the performance of the product. Conversely, the more the advertisement describes the performance or purpose of the product, the more responsible the contractor becomes for the functionality of the ultimate product.[121] Thus, a grantee should carefully consider what sort of specifications to include in the advertisement.[122] Unless a contract contains performance criteria that are shown to be impossible to attain, the grantee will not be liable for the additional costs a contractor incurs in attempting to meet those criteria.[123] Furthermore, if a specification is couched in terms of minimum performance (e.g., "must tolerate temperatures of at least 50° Celsius"), this does not convert the performance specification into one of design.[124] It is therefore desirable for the grantee to use performance, or minimum performance, criteria to the greatest extent feasible so as to diminish the risk of being forced to accept an unsatisfactory product that, nonetheless, meets the advertisement's design specifications. (However, the transit attorney must research state law on this topic prior to the specification being issued.) Advertisements may be posted generally and/or be sent directly to potential contractors as IFBs/Request for Proposals (RFPs), but must in either case be publicized in a manner calculated to encourage open competition.[125]

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[114] *Id*.

[115] *Id*.

[116] *Id*. See the "minimum needs doctrine" in § 5.01.01 above for a more complete discussion of the "brand name or equal" principle.

[117] FTA MA § 15.d (2000).

[118] 49 U.S.C. § 5323(e) (2001). Where a state or local government authority is using federal funds obtained under Title 49, Chapter 53 to acquire buses, the bid advertisement may feature passenger seat specifications that are equal to, or greater than, performance specifications prescribed by the Secretary. These specifications must be based on a finding by the state or local government authority about "local requirements" for safety, comfort, maintenance, and life-cycle costs. 49 U.S.C. § 5323(e) (2001).

[119] With respect to bids for vehicles, see 49 C.F.R. § 665.3 (2003).

[120] For purposes of comparison, LACMTA employs several different standards for bid advertisements, depending on the type of procurement being made. The general rule is that where a competitive procurement is being made, the advertisement must simply be made "in a manner reasonably likely to attract prospective bidders or proposers." LA MANUAL § 4.3.1.Q. This may be satisfied by advertising once or more in at least one newspaper of general circulation in the Los Angeles metropolitan area at least 10 days before bids or proposals are to be received. LA MANUAL § 102.1. Where an emergency situation exists, the 10-day minimum may be waived as long as proper justification is recorded in the procurement file. LA MANUAL § 11.9.

[121] MANUAL § 3.1.

[122] MANUAL § 3.1.1. Desired specifications should be divided into "design specifications" and "performance specifications," i.e., those that describe the actual product or service and those that describe the purpose/goal of the product or service. Wherever possible, performance specifications should be used, as this diminishes the likelihood of the grantee being found to have created an implied warranty that a particular design is satisfactory in and of itself. MANUAL § 3.1.1.

[123] MANUAL § 3.1.2.

[124] *Id*.

[125] For LACMTA, where sealed bidding is being used to make the procurement, an IFB must be issued. LA MANUAL § 7.2. An advertisement must be placed in accordance with the general advertising rule. LA MANUAL § 7.2.C. The user department and project manager will develop technical specifications for the IFB, which are subsequently reviewed by the contracting officer for completeness and accuracy prior to issuing the IFB. LA MANUAL § 7.2. The IFB must include instructions to bidders concerning submission requirements (including the time and date for delivery and the address to which the bids are to be delivered), the purchase description, delivery, or performance schedule, and a statement indicating whether the lowest bid price or lowest evaluated bid price will be used to determine the award. LA MANUAL § 7.4. If the lowest evaluated bid price will be used for the basis of the award, the criteria for determining the final price must be included in the IFB. LA MANUAL § 7.4.1 ("Lowest evaluated bid price" weighs price-related factors such as discounts, transportation costs, and life-cycle costs when determining which bid is lowest. LA MANUAL § 7.2.) Certain specifications must be included in all IFBs as appropriate for purchase (including quantities of items, quality assurance, warranty requirements, etc.) or public works contracts (including contact milestones, liquidated damages, and California prevailing wage and apprenticeship requirements). *See* LA MANUAL §§ 7.4.1, 7.5. Because of the more informal nature of competitively negotiated contracting, LACMTA's advertising requirements for RFPs are simpler than for sealed bids. The contracting officer has the discretion to determine whether a general advertisement prior to issuing a RFP is necessary. Factors that the contracting officer may consider in making this decision include: (1) developing or identifying interested sources; (2) requesting preliminary information from interested sources based on a general description of the supplies and services involved; (3) explaining complicated specifications and requirements; or (4) aiding interested sources in submitting proposals. LA MANUAL § 8.4. If a general advertisement is made, it must be made in a newspaper of general circulation and trade publications, if deemed appropriate. LA MANUAL § 8.4.8. The contracting officer must provide a copy of

While FTA does not specifically discourage grantees from using consultants to prepare specifications,[126] it imposes significant restrictions on the practice because doing so poses a potential risk of a prohibited "organizational conflict of interest."[127] If a consultant must be used, the grantee should determine whether the consultant has a financial or organizational relationship with a potential supplier, which could result in a slanting of specifications calculated to benefit that supplier.[128] If the consultant could compete for the grantee's procurement for which it designed the specifications, the consultant should be barred from doing so.[129] The Manual also recommends that the grantee obtain from the consultant a listing of all its past, present, or planned interests with any organizations that may compete directly or indirectly for the procurement or any related/similar procurements for which the consultant is providing services.[130] If the consultant does have such an interest, it is not immediately barred from rendering its services, but must explain why this will not result in an organizational conflict of interest, and the grantee shall carefully examine the consultant's subsequent work and interests to ensure that no such conflict is developing.[131]

As a matter of best practice, the transit attorney must keep three points in mind. First, the transit attorney should caution the grantee that selection of the consultant for the initial contract could result in the consultant being ineligible to submit a proposal for the primary project. Second, the transit attorney should carefully examine FTA's decisions as to conflicts of interest. Finally, the transit attorney must also consult state conflict of interest decisions (e.g., by state attorney general) and ethics statutes to ensure compliance by both the consultant and the grantee. These issues are developed in greater detail in Section 6—Ethics.

The Manual suggests that prior to drafting the actual advertisement, the grantee should conduct a market survey to determine what sources can potentially meet its essential requirements and prepare the advertisement's specifications in such a manner as to maximize the number of sources that could compete for the contract.[132] The market survey should be conducted as circumspectly as possible so as to avoid disclosing any information that could give a supplier an unfair advantage in bidding for the contract.[133] Having made a determination as to the possible sources for the procurement and the performance or design criteria that will be used, the grantee should consider various supplemental specifications that are normally advisable to include in bid advertisements.[134] For the actual drafting of the advertisement, the Manual recommends the use of concise sentences, decimals in place of fractions, and avoidance of colloquialisms or unfamiliar "jargon."[135] While not specifically mentioned in the Manual, the advertisement should consistently use the same measurement system (i.e., all specifications should be in metric or in standard units).[136] The Manual gives special, albeit very brief, consideration to the preparation of advertisements for construction projects.[137]

If a bidder believes the performance criteria are unrealistic, the bidder should notify the agency before the bids are due in; accordingly, the agency should have language in the bid package requesting that the bidders submit questions/requests for clarification by a certain date so that issues like this can be addressed before the bids are submitted.

Finally, where the advertisement includes services, the advertisement should feature a "statement of work."[138] The statement should include, but is not limited to, a detailed list of all data, property, and services that will be provided by the grantee to the contractor for assisting its performance; schedules for completion/submission of work; and all applicable standards with which the contractor must comply.[139] If the contract will be for services on a "level of effort basis," the statement should define the categories of labor sought, the number of hours for each, and the minimum years of experience and licensing requirements for each.[140]

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the RFP to all parties responding to the general advertisement and to any other parties upon their request, as well as contact an adequate number of prequalified suppliers to have maximum competition. LA MANUAL § 8.4.C.

[126] *Cf.* MANUAL § 3.2.

[127] FTA C. 4220.1E para. 8.a(5). The Circular defines an "organizational conflict of interest" as being where, because of other activities, relationships, or contracts, a contractor is potentially unable to render impartial assistance or advice to the grantee; a contractor's objectivity in performing the contract work is or might be otherwise impaired; or a contractor has an unfair advantage. FTA C. 4220.1E para. 8.a(5).

[128] MANUAL § 3.2.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] MANUAL § 3.3.

[133] *Id.*

[134] These include, but are not limited to: (1) reliability and quality assurance requirements; (2) criteria for inspecting/testing of product prior to acceptance; (3) comprehensive spare parts list; and (4) training services and/or maintenance manuals. MANUAL § 3.3.

[135] *Id.*

[136] The use of the metric system is, in fact, required for procurements made with FTA funds. FTA MA § 30.

[137] MANUAL § 3.4. After first characterizing construction contracting as "forbidding and exotic," the Manual recommends obtaining the text *Construction Contracting* and the *Construction Contract Administration Manual* (specifically written for transit agencies) before attempting to draft an advertisement for a construction contract. MANUAL § 3.4. Interested readers may also wish to consult volume 1 of SELECTED STUDIES IN TRANSPORTATION LAW.

[138] MANUAL § 3.5.

[139] *Id.*

[140] *Id.*

3. Submission of Bids and Proposals

The Manual recommends that first and foremost when considering bid submissions a grantee should establish procedures for dealing with the late submission of bids.[141] However, state and local law may control this determination and must be consulted by the grantee. The general rule is that late bid submissions should not be considered at all.[142] Yet, absent state and local provisions to the contrary, there may be certain circumstances where acceptance of late bids that have not been delayed by the bidder itself may be necessary in the interests of equity.[143] Where such exceptions are permitted (such as accepting a bid delivered by certified mail, which was sent some amount of time prior to the due date), the bid advertisement must clearly state what those exceptions are and how they may be applied.[144] Regardless of whether such exceptions are permitted, the Manual advises that in any instance where a late bid is received, the grantee's contracting officer should contact its legal advisor, as a significant risk of protest or litigation usually accompanies any decision that concerns a late bid.[145] The transit attorney should notify the contracting officer to consult with the attorney before accepting a late bid.

To be complete and responsive, a bid must contain all required pieces of information and certification requested in the bid advertisement or incorporated therein.[146] Most of these will be contingent upon the specifics of the particular contract (such as time for performance or price), while others are required by federal law (such as "Buy America" certification).[147] Those that are contingent upon the specifics of particular contracts are of course outside the scope of this volume, while those required by federal law are discussed elsewhere herein. However, there is one federal requirement that specifically concerns the submission phase: the bid guarantee[148] for a construction contract.

FTA regulations require that for all construction contracts that exceed the federal government's simplified acquisition threshold,[149] a bidder must supply three types of bonds: a bid guarantee, a performance bond, and a payment bond.[150] The latter two are discussed below, in conjunction with bonding issues. However, the bid guarantee is truly a creature of the submission process. Each bidder must include a bid guarantee equal to 5 percent of the bid price for the contract.[151] The bid guarantee serves as assurance that if the bid is accepted, the bidder will execute all contractual documents as may be required within the time specified by the grantee.[152] The bidder may provide the bid guarantee in the form of a bid bond, a certified check, or other negotiable instruments.[153] The grantee may elect to follow its state bid guarantee requirements provided that they offer at least as much protection as FTA's regulations.[154]

The Manual notes that any requirement for a bid guarantee must be stated in the bid advertisement.[155] If the contract is being awarded through competitive bidding, failure to include the bid guarantee is a fatal defect in the bid, as the bidder could always choose not to submit the guarantee if the award would be on terms unfavorable to it.[156] If, however, competitive proposals are used to make the award, the absence of a guarantee is of little significance, as the contractors have many opportunities to withdraw from the process prior to the award.[157] Indeed, the Manual suggests that bid guarantees are not even necessary in a competitive proposals award process, even if performance and payment bonds will be required upon award.[158] The Manual, however, does not forbid the use of bid guarantees in a competitive proposal award process and, if the project is complex or technically difficult, inclusion of a bid guarantee may be a prudent practice for a grantee utilizing the competitive proposal award method. Once bid guarantees have been received, they should be securely stored pending the award.[159] Guarantees may represent a substantial monetary inconvenience to the bidders, and as such they should be returned to unsuccessful bidders as soon as possible.[160] Once the low bidder has met all contingencies, such as providing the performance and payment bonds or obtaining any required insurance, its bid guarantee should be returned as well.[161]

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[141] MANUAL § 4.3.3.1.

[142] *Id*.

[143] *Id*.

[144] *Id*.

[145] *Id*.

[146] *Id*.

[147] MANUAL § 4.3.3.2.

[148] 49 C.F.R. § 18.36(h)(1) (2003) uses the spelling "guarantee." The Circular and the Manual use the spelling "guaranty."

[149] Currently $100,000. MANUAL § 4.3.3.3.2. Individual states and localities may have lower thresholds, which would have the effect of lowering the dollar level at which one or more of these bonds may be required. The FTA's requirements do not preempt more stringent state and local requirements in this area of procurement.

[150] 49 C.F.R. § 19.48 (2003).

[151] 49 C.F.R. § 18.36(h)(1) (2000).

[152] *Id*.

[153] *Id*. Interestingly, cash cannot be used for the bid guarantee, unlike in some states.

[154] MANUAL § 4.3.3.3.2.

[155] *Id*.

[156] *Id*.

[157] *Id*.

[158] *Id*.

[159] *Id*.

[160] *Id*.

[161] *Id*.

4. Bid Mistakes and Withdrawals [162]

The Manual identifies four general categories of bid mistakes common to all forms of bids:[163]

1. Minor informalities or irregularities in bids discovered prior to award;

2. Obvious or apparent clerical mistakes discovered prior to award;

3. Mistakes other than the first two categories discovered prior to award; and

4. Mistakes discovered after award.[164]

Minor informalities or irregularities are typically those that are merely a matter of form and not of substance.[165] They are immaterial defects[166] that can be corrected or waived without being prejudicial to other bidders. A proper remedy is for the contracting officer to either give the bidder an opportunity to correct the defect or to waive it, whichever is in the best interests of the agency.[167]

Obvious or apparent clerical mistakes are the most common form of error that will be encountered in procurement situations, including such things as transposed numbers and typographical errors.[168] If a contracting officer knows or has reason to know that a mistake of this sort has been made, then it may not be possible to accept the bid in good faith.[169] The contracting officer should notify the bidder and request that it verify the terms of its bid, but the contracting officer should disclose as little information as possible to make sure the bidder does not "tailor" any correction to fit the award criteria.[170] Once verification has been received, the contracting officer may correct the mistake.[171] However, because of the risk of a bid protest, it is recommended that the contracting officer attach the verification to the original bid, reflect the correction in any award document, and place a note in the procurement file explaining the action.[172] A correction should only be allowed if the bid was otherwise responsive, and a correction may only permit displacing a lower bid if the evidence of the mistake and the "bid actually intended" are substantially determinable from the advertisement and bid itself, as opposed to evidence supplied by the bidder with the benefit of hindsight.[173] It is important that any "correction" or "supplemental information" be strictly limited to information that existed as of the due date for bids, so as to minimize the risk of a protest based upon a claim that the bidder had an unfair competitive advantage. Unless internal procedures have already been adopted by the grantee to define the scope of the contracting officer's authority in this situation, the grantee's legal advisor should notify all contracting officers that they should request legal guidance before undertaking any of the above actions.

Mistakes other than those described above that are discovered prior to award may give grounds for the award to be withdrawn.[174] The bidder should be allowed to withdraw if the mistake is clearly evident, but the intended correct bid is not, or if the bidder submits proof that clearly and convincingly demonstrates a mistake was made.[175] The contracting officer may decide to correct the bid and not permit it to be withdrawn if the mistake is clearly evident and the bid actually intended is evident as well, or where the bid, both as originally submitted and as corrected, is the lowest bid received.[176] Again, in the absence of preexisting policies defining the contracting officer's authority, the grantee's legal advisor should be contacted before the contracting officer proceeds.

The topic of mistakes discovered after award is particularly problematic, and the contracting officer should always contact the grantee's legal advisor before proceeding.[177] Both FTA requirements and state and local law will have bearing on the decision. Aside from that, the contracting officer is faced with two major options. In the first option, no correction may be permitted except where the contracting officer makes a written determination that it would be unconscionable not to allow the bidder to make the correction.[178] In the second option, a correction may be made by a contract amendment if correcting the mistake would be favorable to the grantee without changing the essential requirements of the contract.[179] However, a contract amendment under the guise of "correcting a mistake" cannot be used to award the contract to a bidder other than the low bid-

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[162] The Manual helpfully comments, "It may not be as certain as death and taxes, but inevitably and unfortunately, a mistake may be discovered in your low bid." MANUAL § 4.4.5.

[163] *Id*.

[164] *Id*.

[165] *Id*.

[166] A defect is "immaterial" when its effect on price, quantity, quality, or delivery is negligible when compared with the total cost or scope of the requirement being procured. MANUAL § 4.4.5. Examples would include failing to provide the proper number of copies of the bid or submitting the bid on legal-sized paper rather than letter-sized if the advertisement so instructed.

[167] MANUAL § 4.4.5.

[168] *Id*.

[169] *Id*.

[170] *Id*.

[171] *Id*.

[172] *Id*.

[173] *Id*.

[174] *Id*.

[175] *Id*. The term "clear and convincing" has a specific meaning in a legal context. It is unclear whether the FTA intends to suggest that grantees should rely on the legal definition or if it simply means the proof must be very strong. Thus it would be advisable to contact the appropriate regional FTA office for confirmation before proceeding on this matter.

[176] *Id*.

[177] *Id*.

[178] *Id*. "Unconscionable" is a very strong standard that leaves little room for doubt in the eyes of the objective reviewer.

[179] *Id*. This is the approach recommended in the Federal Acquisition Regulations, 40 C.F.R. §14.604–4 (a) and (b).

der or to make an otherwise nonresponsive bid into a responsive one. The Manual holds there is no "best practice" in this category of mistake.[180]

Other than for mistakes, bidders may have numerous other reasons for wishing to withdraw their bids. Where the bidder wishes to withdraw its bid before opening, it should be permitted to do so unless the bid advertisement has included a provision barring withdrawals after submission.[181] A provision barring withdrawals after submission should also specify a time range after the bid opening in which the grantee will accept one of the bids or reject all of them.[182] This precludes bidders from attaching "escape clauses" to their bids, whereby they dictate the circumstances under which they may withdraw a bid.[183]

5. Contract Awards and Rejections of Bids and Proposals

FTA's best practices for the award of contracts are quite basic. Where sealed bidding is employed, and a fixed-price contract is to be used, the contract must be awarded to the responsible bidder[184] whose bid is lowest in price and conforms to the terms and conditions of the invitation or advertisement.[185] If the advertisement has so stated, price-related factors may be considered, such as discounts and transportation costs, in determining the lowest priced bid.[186] If competitive proposals are used, the award must be made to the responsible offeror whose proposal is "most advantageous" to the grantee, considering price and all other factors that were identified in the advertisement for proposals.[187] Where possible, debriefings of unsuccessful offerors should be conducted in the same manner as is used for federal contracts.[188] For both forms of contracts, a cost or price analysis is required by FTA prior to award.[189] (This is in addition to the preparation of any independent estimates of the contract prior to receipt of bids or proposals.)[190] FTA Circular 4220.1E requires that if a public announcement of any procurement (including construction projects) having a value of $500,000 or more is made, the grantee must include the amount of federal funds used and the percentage of the total procurement cost those funds represent.[191] In practice, such information is usually only given where announcements are part of a regular procedure, although the Circular makes no allowance for that.

Despite the elaborate web of FTA regulations, for all intents and purposes there are virtually no court cases truly dealing with transit procurements in a federal context,[192] as FTA's procurement regulations do not give

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[180] *Id*.

[181] MANUAL § 4.4.6.

[182] *Id*. An example of such a clause is, "All bids shall remain in effect for sixty days following opening and may only be withdrawn upon one of the following occurrences: 1)…"

[183] For example, if the advertisement contains no reference to how long the grantee has to decide whether to accept a bid, a bidder may include a provision that states that its bid is only effective if accepted within 24 hours of being opened. If the grantee lets that time lapse, then under the principle of common law contracts, instead of being an acceptance, the grantee's response becomes a counter-offer, which the bidder is free to accept or reject at will.

[184] A bidder is generally considered responsible if it "possesses the ability to perform successfully under the terms and conditions of the proposed procurement." MANUAL § 4.4.4. This may include: (1) adequate financial resources to perform the contract; (2) the ability to meet the required delivery or performance schedule; (3) a satisfactory performance record; (4) a satisfactory record of integrity and business ethics; (5) the necessary organization, experience, accounting, and technical skills; (6) compliance with applicable licensing and tax laws; (7) the necessary production, construction, or technical equipment and facilities; (8) compliance with affirmative action and disadvantaged business program (DBE) requirements; and (9) any other qualifications or eligibility criteria necessary. MANUAL § 5.1.1. DBE requirements are discussed below, in Section 10.

[185] MANUAL § 4.4.0.

[186] *Id*. *See also* FTA C. 4220.1E para. 9.c.(2)(d) (stating "A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. When specified in bidding documents, factors such as discounts, transportation costs, and life cycle costs shall be considered in determining which bid is lowest.")

[187] MANUAL § 4.5.1.

[188] MANUAL §§ 4.5.8 and 5.3.2.

[189] FTA C. 4220.1E paras. 10.a and b. A "cost analysis" is the review and evaluation of the separate cost elements and proposed profit of a bidder's cost data. It is generally performed to determine the degree to which the proposed cost, including profit, represents what the performance of the contract should cost, assuming reasonable economy and efficiency. "Price analysis" concerns the examination and evaluation of a proposed price without evaluating its separate cost and profit elements. It is based on data that is verifiable independently from the bidder's data. MANUAL § 5.2. Cost analysis must be used whenever "adequate" price competition is lacking or for sole source procurements, including contract modifications, unless the rationality of the price can be determined on the basis of a catalogue or market price of a commercial product "sold in substantial quantities to the general public" or on the basis of a price fixed by statute or regulation. MANUAL § 5.2. The expenses must be allowable under federal guidelines. FTA C. 4220.1E para. 10.d. (See § 5.01.12 for more on allowable costs.)

[190] *See* Manual § 5.2 *and* FTA C. 4220.1E para. 10.

[191] FTA C. 4220.1E paras. 14.a and b.

[192] The exception is the Washington Metropolitan Area Transit Authority (WMATA), which, as an entity of Washington, D.C., is considered by courts to have a "special federal interest" that allows it to be treated as a federal agency whose procurement actions are therefore reviewable under the Administrative Procedure Act (APA). *See, e.g.*, Seal & Co., Inc. v. Washington Metro. Area Transit Auth., 768 F. Supp. 1150, 1155 (E.D. Va. 1991). *But see* Elcon Enterprises, Inc. v. Washington Metro. Area Transit Auth., 977 F.2d 1472, 1479 (D.C. Cir. 1992), where the court expressed doubts about whether WMATA truly should be treated as a federal agency, but that issue was not adequately disputed on appeal to be the subject of the court's decision. Some other courts have suggested that

rise to a federal private cause of action.[193] The most often cited case for the proposition that no such private cause of action exists is *24 Hour Fuel Corp. v. Long Island Railroad Co*.[194] In May 1995, the plaintiff, 24 Hour Fuel Corp., received an invitation to bid on a contract to supply the Long Island Railroad (LIRR) with diesel fuel for a 3-year period.[195] In preparing its bid advertisement, LIRR relied on an industry publication to establish the base prices it was willing to accept.[196] After bids were opened, and the plaintiff was found to have the low bid, another bidder discovered that the industry publication used by LIRR was improperly prepared.[197] Instead of giving an average price (as is ordinarily done), the publication quoted a single firm's price.[198] Concerned that the price was not representative and could expose it to unexpected price changes, LIRR cancelled the bidding process prior to formally awarding the contract to the plaintiff, recalculated the acceptable base price, and readvertised the contract.[199] The plaintiff won the second bid, but as a result of the recalculation of the base price, received the contract on less favorable terms.[200] Subsequently, the plaintiff filed suit against LIRR requesting that its original bid be reinstated on the grounds that LIRR violated FTA regulations, specifically 49 C.F.R. § 18.36 (1995), requiring an award to the low bidder, and for failing to give "a sound documented reason" for rejecting the original bids.[201]

The court assumed that federal question jurisdiction existed as the complaint was predicated on the alleged violation of a federal regulation.[202] From there the court had to determine whether a private right of action existed under the applicable regulation.[203] The court noted that rights to private causes of action must either be explicitly stated in a statute or regulation or implicit in that "the apparent intent of Congress or administrative agencies is to have individuals use them to litigate."[204] Since 49 C.F.R. Part 18 does not explicitly allow for a private cause of action, the court found it necessary to apply the four pronged *Cort v. Ash* test in order to determine whether a private cause of action existed:[205]

1. Is the plaintiff a member of the class for whose special benefit the statute was enacted?
2. Is there any indication of legislative intent to either create such a remedy or to deny one?
3. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy?, and
4. Is the cause of action one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law?[206]

Furthermore, the second question must be the focus of the court's "central inquiry."[207]

The court found that the plaintiff failed the first question, as the regulations were created for the protection of FTA and the federal government, not other bidders.[208] Next, the court found the plaintiff also failed the second and most determinative question, as the regulation specifically states that grantees are to use their own procurement procedures as proscribed by state and local law.[209] The court also found that there was nothing in the "underlying purposes of the legislative scheme" to suggest a private cause of action under the third question.[210] Indeed, the only time the regulation even referred to remedies for violations was in the context of describing what actions FTA may take against a grantee that violates regulations.[211] Finally, the court found the plaintiff failed the fourth question as well, as it could have brought a state law claim or filed a com-

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suits under APA could be brought in other instances against the FTA in conjunction with a grantee's actions (*see, e.g.,* Coalition for Safe Transit, Inc. v. Bi-State Dev. Agency, 778 F. Supp. 464, 467 (E.D. Mo. 1991)); however no such suits appear in the reporters.

[193] *See, e.g.*, GFI Genfare v. Regional Transp. Auth., 932 F. Supp. 1049 (N.D. Ill. 1996), failure to use competitive bidding in violation of FTA regulations does not give right of action to excluded bidder; *see also* Razorback Cab of Ft. Smith, Inc. v. Flowers, 122 F.3d 657 (8th Cir. 1997), failure to comply with notice and hearing regulations does not give right of action to impacted party; Rapid Transit Advocates, Inc. v. Southern California Rapid Transit Dist., 752 F.2d 373 (9th Cir. 1985), failure to comply with planning regulations does not give right of action to impacted party; A.B.C. Bus Lines, Inc. v. Urban Mass Transp. Admin., 831 F.2d 360 (1st Cir. 1987), failure to comply with regulations restricting competition with private transportation companies does not give right of action to a private transportation company so affected; Allandale Neighborhood Ass'n v. Austin Transp. Study Policy Advisory Comm., 840 F.2d 258 (5th Cir. 1988), failure to comply with planning regulations does not give right of action to impacted party; Evanston v. Regional Transp. Auth., 825 F.2d 1121 (7th Cir. 1986), failure to comply with regulations requiring public hearings does not give right of private action to the impacted parties; and Tulacz v. Federal Transit Admin., 1992 U.S. Dist. LEXIS 12511 (D. Or. 1992); failure to comply with regulations concerning public hearings and development planning does not give right of action to impacted party. However, see discussion *infra* of FTA-mandated protest procedures.

[194] 24 Hour Fuel Corp. v. Long Island R.R. Co., 903 F. Supp. 393 (E.D. N.Y. 1995).

[195] *Id*. at 394.

[196] *Id*. at 395.

[197] *Id*. at 395.

[198] *Id*. at 395.

[199] *Id*. at 395.

[200] *Id*. at 396.

[201] *Id*. at 397.

[202] *Id*. at 397.

[203] *Id*. at 397 (citing 49 C.F.R. § 18.36).

[204] *Id*. at 397.

[205] *Id*. at 397.

[206] *Id*. at 397 (quoting Cort v. Ash, 422 U.S. 66, 78 (1975)).

[207] *Id*. at 397–98 (quoting Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979)).

[208] *Id*. at 398, noting that 49 C.F.R. § 18.1 (1995) specifically states that the purpose of the regulations is to establish uniform administrative rules for federal grants.

[209] *Id*. at 398 (quoting 49 C.F.R. § 18.36(b)(1) (1995)).

[210] *Id*. at 398.

[211] *Id*. at 398 (quoting 49 C.F.R. § 18.43(a)(5) (1995)).

plaint with FTA, which would have investigated LIRR's conduct.[212] In concluding the case, the court refused to take supplemental jurisdiction of any possible state claims on the grounds that it did not believe the plaintiff could prevail on them.[213] The court therefore granted summary judgment in favor of LIRR.[214]

With respect to the *24 Hour Fuel Corp.* court's comment about a disappointed party filing a complaint with FTA, the procedure for such complaints is found at 49 C.F.R. § 18.36(b)(12) (2001).[215] Grantees and subgrantees must have written protest procedures to handle and resolve disputes relating to their procurements and must notify FTA of any such protests.[216] A protestor is obligated to "exhaust all administrative remedies" with the grantee and subgrantee before filing a complaint with FTA.[217] FTA will review only complaints that allege violations of federal law or regulations and those that allege violations of the grantee's or subgrantee's own protest procedures for failure to review a protest.[218] Any other complaints will be referred to the grantee or subgrantee.[219] In the event that FTA concludes that a remediable violation has occurred, it may impose a wide variety of sanctions on the grantee or subgrantee.[220]

6. Indemnification and Suretyship

In contracting, particularly for construction or other high-value work, it is a common practice for the party letting the contract to require the party performing the work to provide some form of security against the possibility that the work will not be completed.[221] The security is typically given through the provision of an instrument that represents all or part of the agreed value of the work. This creates a trilateral relationship between the party that assumes liability for the performance (the surety), the party that owes the duty to perform (the principal), and the party to which the duty is owed (the obligee).[222] The instrument that creates this relationship and represents the surety's liability may be referred to generally as a "bond."[223]

A different yet allied concept is that of indemnification, which exists as a two-party agreement to cover losses or costs suffered from misperformance of the contract, rather than to complete the contract, as with a surety.[224] Thus while a surety is directly and immediately liable for nonperformance of the contract, an indemnitor becomes liable only after efforts to avoid or recoup losses have been unsuccessful.[225] The instrument of indemnification may also be known as a "bond"; however, in most instances of public contracting where a method of securing a contract is required, the use of a surety bond is mandated,[226] so the term "indemnity bond" will be used to distinguish it here.

FTA imposes bonding requirements on its grantees through regulations, the MA, and FTA Circular 4220.1E.[227] At first glance, FTA's bonding standards appear to be in a state of disrepair, with its regulations providing one standard, while the Circular prescribes another.[228] Current FTA regulations require that a payment bond be issued for 100 percent of the contract price for all construction or facility improvement contracts over the federal government's simplified acquisition threshold.[229] However, the Circular states that a

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[212] *Id* at 398.

[213] *Id*. at 399–400.

[214] *Id*. at 399–400.

[215] *See* FTA C. 4220.1E para. 7.l for a brief description of the protest procedure as described by the FTA to grantees.

[216] 49 C.F.R. § 18.36(b)(12) (2002). http://www.fta.dot.gov/library/admin/BPPM/ch11.html#fn1 (visited April 21, 2003).

[217] 49 C.F.R. § 18.36(b)(12) (2002).

[218] 49 C.F.R. §§ 18.36(b)(12)(i) and (ii) (2002).

[219] 49 C.F.R. § 18.36(b)(12)(ii) (2002).

[220] These include, but are not limited to: (1) temporarily withholding payments pending correction of the deficiency; (2) disallowing (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance; (3) wholly or partly suspending or terminating the current award for the program; or (4) withholding further awards from the program. 49 C.F.R. § 18.43(a)(1) through (4) (2000).

[221] Aside from the potential direct cost to government agencies of incomplete or misperformed contracts, the requirement of bonds also arose to address the equitable issues presented by the fact that subcontractors and suppliers could not impose liens on government property. Consequently, if a contractor whose assets were largely bound up in government contracts defaulted on its payments, there was a significant risk that its creditors would be unable to recover the monies owed. *See generally,* SELECTED STUDIES IN TRANSPORTATION LAW, Volume 1.

[222] 74 AM. JUR. 2D *Sureties* § 3 (2001).

[223] The instrument may also sometimes be referred to as a "surety bond," a "liability bond," or a "statutory bond." *See* BLACK'S LAW DICTIONARY 171, 1158 (7th ed. 1999). There are technical distinctions between these different categories of bonds, e.g., a "statutory bond" refers to a form of surety bond required to be issued by a statute; the terms, however, are often used imprecisely and interchangeably. The term "bond" will be used for all purposes here, except where a distinction between types is made by a statute, regulation, or case.

[224] SELECTED STUDIES. *See* Leatherby Ins. Co. v. City of Tustin, 76 Cal. App. 3d 678, 687, 143 Cal. Rptr. 153 (1977).

[225] SELECTED STUDIES. *Id*.

[226] SELECTED STUDIES. *See*, *e.g*., 40 U.S.C. § 3131 (2003).

[227] MANUAL § 8.2.1; FTA C. 4220.E.11. The MA does not have specific language on bonding amounts. It merely states,

> To the extent applicable, the Recipient agrees to comply with the following bonding requirements: (1) Construction Activities. The Recipient agrees to provide bid guarantee, contract performance, and payment bonding to the extent deemed adequate by FTA and applicable federal regulations, and comply with any other bonding requirements FTA may issue. (2) Other Activities. The Recipient agrees to comply with any other bonding requirements or restrictions FTA may impose.

FTA MA § 15.m.

[228] The Circular's standard mirrors the language of the Miller Act prior to its amendment in 1999. Act of August 17, 1999, Pub. L. No. 106-49, § 1, 113 Stat. 231 (1999). The Manual reiterates the Circular's standard. MANUAL § 8.2.1.

[229] 49 C.F.R. § 18.36(h)(3) (2001) and 49 C.F.R. § 19.48(c)(3) (2001), respectively for governmental units and for institutions

payment bond must at least be issued in the following amounts:

1. 50 percent of the contract price if the price is not more than $1 million;

2. 40 percent of the contract price if the 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.[230]

Obviously this difference between the regulations and the Circular could produce very dissimilar results in the size of payment bonds that would be required. The solution to this conundrum is found in a close reading of the relevant regulations (49 C.F.R. § 18.36(h) and 49 C.F.R. § 19.48(c), for governmental units and nonprofit organizations, respectively). Both regulations require the use of their standards (including the 100 percent payment bond), except "the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected."[231] FTA's interpretation of this permissive language is that the bonding requirements of the Circular are adequate to protect its interests. Therefore the more stringent requirements of the regulation only apply where a grantee is not otherwise subject to the Circular.[232]

Aside from the aforementioned payment bond, under the federal regulations, the contractor must also execute a performance bond for 100 percent of the contract price.[233] The regulations also require the contractor provide a "bid guarantee."[234]

The Manual recognizes that bonding serves a useful purpose in government contracting.[235] However, it discourages unnecessary or excessive bonding, for that raises contracting costs and may deter some businesses from competing for the award.[236] The Manual suggests that grantees should consider whether they are "seriously concerned" about one or more of the following points before employing bonding in any situations where it is not mandatory:

1. The financial strength and liquidity of the offerors;

2. The inadequacy of legal remedies for contractor failure and the effect that failure could have on the grantee; and

3. The difficulty and cost of completing the contractor's work if it is interrupted.[237]

If the grantee decides to use bonding in a contract where it would not otherwise be required, it should consider using a lower level of bonding, as it is rare that a full 100 percent of the contract price will actually be required to deal with any failure on the contractor's part.[238] The only situation where the Manual suggests requiring a bond in excess of 100 percent is where a delay or failure on the part of the contractor could have a major impact on the grantee's entire transit system, rather than simply the particular project the contract concerns.[239] If bonding issues persistently complicate the grantee's bidding process, it may be advisable to adopt a more stringent prequalification process for bidders or use competitive negotiations instead.[240]

7. Collusive Bidding and RICO

The Racketeer Influenced and Corrupt Organizations Act (RICO) may at first blush appear to be an unusual legislative provision to discuss in the context of transit procurement, given its strong association with the prosecution of organized crime.[241] However, RICO has significant implications for certain illicit practices in

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of higher education, hospitals, and other non-profit organizations. The payment bond is a form of indemnity bond to protect "all persons supplying labor and material" for the purpose of fulfilling the contract. 40 U.S.C. 3131(b)(2) (2003). The simplified acquisition threshold is currently $100,000. 41 U.S.C. § 403(11) (2001).

[230] FTA C. 4220.1E para. 11.c.

[231] 49 C.F.R. § 18.36(h) (2001). *See* 49 C.F.R. § 19.48(c) (2001) for substantially similar language as applied to non-profit organizations other than governmental units.

[232] The regulation and Circular:

> can be read consistently with each other. The C.F.R. provision says we can accept grantee bond policies if we determine our interests are adequately protected. It is only if we DON'T make that determination that the 100% rule kicks in.
>
> The [Circular] provision says we can (read "will") accept grantee bond policies if they hit the scaled minimums. You can't look to (h)(3) of the C.F.R. passage without reading the basic language in (h) itself that puts a condition on the 100% requirement. Make any sense at all?

E-mail from Susan Martin, Regional Counsel, FTA Region 8, and James LaRusch, Attorney-Advisor, Office of Chief Counsel for FTA, to author (Dec. 5, 2001) (on-file with author) (emphasis in the original).

[233] 49 C.F.R. § 18.36(h)(2) (2001) and 49 C.F.R. § 19.48(c)(2) (2001), respectively, for governmental units and for institutions of higher education, hospitals, and other non-profit organizations. The performance bond is a form of surety bond that guarantees the completion of the contract. *See* 40 U.S.C. § 3131 (2002).

[234] 49 C.F.R. § 18.36(h)(1) (2001) and 49 C.F.R. § 19.48(c)(1) (2001), respectively, for governmental units and for institutions of higher education, hospitals, and other non-profit organizations.

[235] MANUAL § 8.2.1.

[236] *Id.*

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Id.*

[241] Indeed, RICO was enacted as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 922 (1970).

the transit industry. RICO creates four general categories of violations when committed by a "person:"[242]

> 1. The use of income derived from a pattern of racketeering activity or collection of unlawful debts to invest in the acquisition of an interest, or the establishment or operation of, any enterprise that is engaged in or otherwise affects interstate or foreign commerce;
>
> 2. The use of a pattern of racketeering activity or collection of unlawful debts to acquire or maintain any interest in, or control of, any enterprise which is engaged in or otherwise affects interstate or foreign commerce;
>
> 3. Conducting or participating through a pattern of racketeering activity or collection of unlawful debt in the conduct of the affairs of any enterprise which is engaged in or otherwise affects interstate or foreign commerce;
>
> 4. Conspiring to violate any of the previous provisions.[243]

Underlying these categories are four elements that are required to find a RICO violation in any category: a "person," an "enterprise," a "pattern," and "racketeering activity." The element "person" is broadly construed, meaning any individual or entity capable of holding a legal or beneficial interest in property.[244] An "enterprise" is any individual, partnership, corporation, association, or other legal entity, as well as any group of individuals associated in fact, even if not a legal entity.[245] Government agencies and public entities have been found to be "enterprises" within the meaning of the statute, including the Illinois DOT, the Tennessee Governor's office, and a division of the Construction and Building Department of the Baltimore Department of Housing and Community Development.[246] "Pattern" is defined as at least two acts of "racketeering activity," which have occurred within 10 years of each other.[247] The U.S. Supreme Court has pared down this extremely broad scope by borrowing the definition of "pattern" from another statute. Thus a "pattern" exists if "it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events."[248] "Racketeering activity" includes a vast array of federal and state crimes, most of which are irrelevant to transit procurement,[249] but several may potentially be present. These would include state bribery and extortion charges that may be punished by imprisonment for more than 1 year,[250] and federal charges of bribery, extortion, mail and wire fraud, and numerous forms of interfering in federal or state investigations.[251] It is critical to note that proof of commission of these acts alone is sufficient to meet the requirements of RICO; the party need not have been convicted of the act.[252] Mail and wire fraud are the two offenses most likely to create a possible RICO violation in the transit procurement context, as the passage of bids, notices of acceptance, and checks through the mails (including the use of clearinghouses by banks), or the discussion of competitive proposals by telephone or videoconference, can form the basis for a single fraudulent bid to create multiple violations of federal statutes.[253] Indeed, 18 U.S.C. § 1346 implicitly puts collusive bidding practices and the corruption of public officials within the context of the mail and wire fraud statutes[254] by defining "fraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."[255]

In addition to its criminal implications,[256] RICO also creates a civil remedy, including a private right of action. The Act gives federal courts the power to prevent and restrain violations of RICO by issuing appropriate orders, including, but not limited to:

> 1. Ordering a person to divest any interest in any enterprise;
>
> 2. Imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise which is engaged in, or otherwise affects, interstate or foreign commerce; or
>
> 3. Ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.[257]

Furthermore, when a private party brings a successful RICO action it may collect treble damages and trial costs, including reasonable attorney's fees.[258]

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[242] 18 U.S.C. § 1962 (2000).

[243] 18 U.S.C. §§ 1962(a) through (d) (2000).

[244] 18 U.S.C. § 1961(3) (2000).

[245] 18 U.S.C. § 1961(4) (2000).

[246] *See* United States v. Hocking, 860 F.2d 769 (7th Cir. 1988); United States v. Thompson, 685 F.2d 993 (6th Cir. 1982); and Maryland v. Buzz Berg Wrecking Co., 496 F. Supp. 245 (D. Md. 1980), respectively.

[247] 18 U.S.C. § 1961(5) (2000).

[248] Sedima, S.P.R.L. v. Imrex Co. Inc., 473 U.S. 479, 497 n.14 (1985) (quoting 18 U.S.C. § 3575(e) (1985)).

[249] Despite hyperbolic statements by some in the industry, it is unlikely that RICO provisions for crimes such as murder, "white slave traffic," and "peonage" (18 U.S.C. § 1961(1)(B) (2001)) will be raised in investigations of procurements even in the most hardened transit agencies.

[250] 18 U.S.C. § 1961(1)(A) (2000).

[251] 18 U.S.C. § 1961(1)(B) (2000).

[252] 18 U.S.C. § 1961(1) (2000).

[253] Note that mailings do not have to be fraudulent in and of themselves, they merely need to be "incident to an essential part of the scheme." Pereira v. United States, 347 U.S. 1, 8 (1954).

[254] 18 U.S.C. §§ 1341 and 1343 (2000), respectively.

[255] 18 U.S.C. § 1346 (2000).

[256] A criminal RICO conviction is punishable by up to 20 years imprisonment (or life if one of the racketeering activities is separately punishable by life imprisonment), and forfeiture of all assets relating to, or procured with proceeds from, the crime. 18 U.S.C. § 1963(a) (2000).

[257] 18 U.S.C. § 1964(a) (2000).

[258] 18 U.S.C. § 1964(c) (2000).

More than half of the states have enacted legislation modeled on the federal RICO statutes.[259] However, unlike some areas of legislation where states have taken federal statutes almost word for word, RICO has inspired far more creativity on the part of state governments, leading to many permutations on the general theme.[260] Different types of crimes may be considered "racketeering activity"; what constitutes a "pattern" may be broader or narrower; and the right to civil action (public or private) may be broadened, curtailed, or even eliminated.[261]

For example, California's version of RICO extends to "criminal profiteering activity," which is defined as any act committed, attempted, or threatened for financial gain or advantage, where that act may be charged as crime within the statute's scope,[262] including bribery, extortion, false or fraudulent schemes and activities, and conspiracy to commit any of the aforementioned crimes.[263] The criminal profiteering activity must have been committed in a "pattern," defined as committing two acts within the statute's scope that "have the same or a similar purpose, result, principals, victims, or methods of commission, or are otherwise interrelated by distinguishing characteristics," were not isolated events, and were "committed as a criminal activity of organized crime."[264] This of course places a much higher hurdle before a prosecutor than the federal RICO statute, where it is merely necessary to prove as part of the racketeering prosecution that the earlier bad act was committed. Finally, while criminal property forfeiture is permitted under California's statute,[265] there is no provision for civil action, either by the state or a private party.[266]

Forms of collusive bidding may be divided into two general classes: those perpetrated by the bidders themselves and those perpetrated by the bidders acting in conjunction with an employee of the contracting agency.

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[259] KATHLEEN F. BRICKEY, CIVIL RICO (RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT) APPLICATIONS IN THE HIGHWAY CONSTRUCTION INDUSTRY (NCHRP Legal Research Digest No. 18 (1990)).

[260] *Id*.

[261] *Id*.

[262] CAL. PENAL CODE § 186.2(a) (2000).

[263] CAL. PENAL CODE § 186.2(a)(2), (6), (21), (25) (2000). Notably, obstruction of investigations and obstruction of justice have not been included. New York State's RICO statute (which terms racketeering "enterprise corruption") sets a higher bar for a successful criminal RICO prosecution than either California's act or the federal act, although it does include obstruction of justice as one possible predicate crime. N.Y. PENAL LAW § 460.10 (2000). The requisite pattern of predicate crimes to give rise to a charge of enterprise corruption is significantly more complex than either the federal or California RICO variants: (1) there must be at least three criminal acts; (2) the acts must have been committed within 10 years of the charge being brought; (3) the acts must have neither been isolated events, nor "so closely related and connected in point of time and circumstance of commission" so as to constitute a single criminal offense or transaction; (4) the acts must have been related to each other either through a common scheme or were committed by persons acting with the requisite mental culpability and associated with the criminal enterprise; (5) two of the criminal acts must be crimes other than conspiracy; (6) two of the criminal acts, one of which must be a felony, occurred within 5 years of the charge being brought; and (7) each of the criminal acts occurred within 3 years of another one of the criminal acts. N.Y. PENAL LAW §§ 460.10(4)(a) to (c) and 460.20(1) and (2)(a) to (c) (2000). Further complicating matters for prosecutors under the New York State version of the RICO Act is the requirement that a jury may diminish the amount of assets forfeited if that forfeiture would be "disproportionate to the conduct" the defendant committed. N.Y. PENAL LAW § 460.30(1)(a) through (c) (2000). For example, a defendant may own 100 million dollars of stock in a major automotive manufacturer. The defendant uses his influence over the company to induce it to bribe several state officials in exchange for a five million dollar bus procurement contract. The defendant is subsequently arrested and convicted of enterprise corruption. If obliged to forfeit his entire holding in the automotive manufacturer, he would be losing at least 20 times the value of his illicit gains, a clearly disproportionate loss. There is no provision for a right of action to bring a private civil suit for enterprise corruption; however, if it is determined in the criminal trial that the defendant caused personal injury or property damage to another party, the court may assess a fine up to three times the gross value the defendant gained or three times the gross value of the loss the defendant caused. N.Y. PENAL LAW § 460.30(5) (2000). The money collected from the fine will be used to pay restitution to victims of the defendant's crimes for medical expenses, lost earnings, or property damage, with any excess being paid to the state treasury. N.Y. PENAL LAW § 460.30(5) (2000). It is thus questionable whether a transit system in New York that suffered losses by virtue of a RICO conspiracy would be eligible to recover a portion of the fine/restitution. If the defendant is convicted of enterprise corruption, then the state may bring a civil action against the defendant to obtain such injunctions as are necessary to prevent future acts of enterprise corruption. N.Y. C.P.L.R. § 1353(1) (2000). The injunctive actions are mostly similar to the federal RICO Act (N.Y. C.P.L.R. §§ 1353(1)(a) through (c) (2000)); however, the court may also suspend licenses or permits issued by any state agency, and revoke the state certificate of incorporation of a business in which the defendant has a controlling interest (if the corporation is chartered in another state, the court may revoke its authorization to do business in New York). N.Y. C.P.L.R. §§ 1353(1)(d) and (e) (2000).

[264] CAL. PENAL CODE §§ 186.2(b)(1) to (3) (2000). The acts must have been committed within 10 years of each other, and any prior acts used to support a criminal profiteering charge must not have resulted in an acquittal. CAL. PENAL CODE § 186.2(b) (2000).

[265] CAL. PENAL CODE § 186.3(a) (2000).

[266] The LA Manual does not specifically address RICO concerns, but it does contain guidelines for the reporting of suspicious bidder behavior that may be within the scope of both the federal and California RICO statutes. Contracting officers must report to the Executive Officer of the OP&D all incidences of identical bids being proffered. LA MANUAL § 2.8. Contracting officers must also report any bids that appear to have been made in violation of antitrust laws, but which may also be within the scope of RICO, such as simultaneous price increases by bidders. *See* LA MANUAL § 2.8.B.

In the former class, cost-plus bidding,[267] rotation bidding,[268] and geographical bidding[269] are the most common forms of bid rigging. Rotation bidding and geographical bidding are relatively easy to detect over time, as a consistent pattern of winning contractors will appear.[270] Cost-plus bidding is more insidious, as the pattern of winners will likely remain as random as it was before the bid rigging began. However, if an agency takes the precaution of preparing an independent estimate of a project's cost prior to the receipt of bids and then comparing it to the submitted bids, the bid rigging can often be discovered. If many or most of the bids for each project exceed the estimated cost, there is a possibility a cost-plus bidding scheme may be in effect or the procurement cost estimate may have been inadequately prepared.

In the latter class of collusive bidding, the tailor bid[271] and the discretionary award[272] are the most frequently practiced. Here too, the agency must look for a pattern of awards, but it must pay particular attention to who the contracting personnel were in each instance, as well as who the winners were. The tailor bid presents particularly difficult problems for the transit agency as self-monitor. It is common for personnel to prefer a particular brand or product, often for understandable reasons of product satisfaction, ease of use, and ease of maintenance. The personnel submitting the technical specifications to the procurement office will in some instances attempt to write requirements that favor the preferred product or service. Over time, while the overall pattern of winners will appear random, it may be discovered that in every project where Company Y was awarded the contract, Mr. Z within the user department prepared the technical specifications. The discretionary award is more easily spotted than the tailor bid, but still presents a challenge.[273]

[267] Where the bidders agree to simply add a certain fixed percentage to their bids (e.g., all prices will be increased by 10 percent), but otherwise still engage in competitive bidding.

[268] Where the bidders agree to take turns winning contracts. *See* BRICKEY, *supra* note 259, at 13–14.

[269] Where the bidders agree to divide a geographic region into exclusive territories. *See id*.

[270] A particularly egregious instance of geographical bidding occurred in Connecticut, where a pair of road tar suppliers divided the state in two, with one company winning all contracts in the eastern half of the state, while the other won all contracts in the western half. Amazingly, it took 6 years for this pattern to be noticed. United States v. Koppers Company, 652 F.2d 290 (2d Cir. 1981).

[271] Where the specifications for a bid advertisement are drafted in a manner designed to guide the contract to a particular bidder. *See* BRICKEY, supra note 259, at 15.

[272] Where an employee of the agency has the power to "throw" an award to a particular bidder by making decisions about what constitutes a "responsible" bidder or other judgments independent of raw numbers. *See id*.

[273] *E.g.*, while the overall pattern of winners still appears random, it may be discovered that in every project where Company A was awarded the contract, Ms. B was the contracting officer.

8. Environmental Requirements

FTA itself does not directly impose environmental standards through regulation;[274] however, it does incorporate by reference the standards of NEPA,[275] and the FTA MA also places certain environmental obligations on grantees.[276] The MA requires that grantees include in all third party contracts and subgrants greater than $100,000 "adequate provisions" to ensure that the recipients of those funds report the use of facilities placed, or likely to be placed, on the EPA's "List of Violating Facilities,"[277] refrain from using such facilities, and report violations to FTA and EPA.[278] Furthermore, third party contractors and subgrantees must comply with Section 114 of the Clean Air Act,[279] Section 308 of the Federal Water Pollution Control Act,[280] and all other applicable parts of those acts.[281] Grantees are also obligated to comply with EPA's "Comprehensive Procurement Guidelines for Products Containing Recovered Materials"[282] where possible, and otherwise provide "a competitive preference" for goods and services that con-

[274] Some authorities have argued that 23 C.F.R. § 771.101 represents such an imposition. However, the regulations encapsulated by that C.F.R. part are for the implementation of "the National Environmental Policy Act of 1969 as amended (NEPA), and the regulation of the Council on Environmental Quality (CEQ), 40 C.F.R. parts 1500 through 1508." *See* 23 C.F.R. § 771.101 (2002). Thus it does not represent direct regulation by the FTA.

[275] 49 C.F.R. § 622.101 (2000).

[276] FTA MA §§ 15.f and g.

[277] The EPA no longer releases the "List of Violating Facilities" as an independent document. It is now incorporated into the General Services Administration's "Lists of Parties Excluded from Federal Procurement or Non-procurement Programs," which identifies all parties excluded from receiving federal government contracts. The electronic version of this list is called the Excluded Parties Listing System, and is available at http://epls.arnet.gov (visited April 21, 2003). Alternatively, a printed copy can be obtained from the U.S. Government Printing Office.

[278] FTA MA § 15.f.

[279] The statute mainly requires subject entities to maintain records and conduct testing on atmospheric emissions within the scope of the act and follow appropriate certification guidelines. 42 U.S.C. § 7414(a)(1) (2000).

[280] The statute principally requires subject entities to maintain records and conduct testing on effluent discharge within the scope of the act. 33 U.S.C. § 1318 (2000).

[281] 42 U.S.C. §§ 7401 *et seq.* (2000) and 33 U.S.C. §§ 1251 *et seq.* (2000), respectively.

[282] 40 C.F.R. §§ 247.1 *et seq.* (2000). The guidelines apply to all procurements made with federal funds with a fiscal year total of $10,000 or more where the item being procured has been designated by the EPA as being within the scope of the regulation. 40 C.F.R. § 247.2(a)(1) (2000). The $10,000 total is for an entire organization, not specific departments or groups within an organization. 40 C.F.R. § 247.2(a)(3) (2000). The list of items subject to the regulation can be found at 40 C.F.R. §§ 247.10 *et seq.* (2000).

serve natural resources, protect the environment, and are energy efficient.[283] Section 3—Environmental Law provides a more complete discussion of environmental issues pertaining to transit.

9. Architectural, Engineering, or Related Services

The procurement of architectural and engineering services[284] at the federal level is governed by Title IX of the Federal Property and Administrative Services Act of 1949, more commonly known as the Brooks Act.[285] While the Comptroller General has found the terms of the Brooks Act to not be legally compulsory for grantees,[286] FTA requires grantees to abide by the Act's requirements unless there is a comparable state act in place.[287] The Act effectively operates as an exemption to ordinary rules of competitive bidding, instead assessing the bidders on the basis of "demonstrated competence and qualification" at "fair and reasonable prices."[288]

In accordance with the requirements of the Brooks Act, the grantee must encourage licensed firms to annually submit a statement of qualifications and performance data.[289] Subsequently, for each project that is expected to require architectural or engineering services, the grantee will evaluate the statements on file, along with any new submissions delivered in response to an advertisement, and then conduct discussions with at least three firms regarding the anticipated needs of the project.[290] Based on these discussions, the grantee will then rank the firms on the basis of which are the most highly qualified to render the needed services.[291] The grantee must first attempt to negotiate a contract with the most qualified firm at the level of compensation the grantee determines to be reasonable and fair, based on the nature, scope, and complexity of the services required.[292] In the event the grantee is unable to reach a mutually satisfactory agreement with the most highly qualified firm, the grantee must formally terminate the negotiations with it and then approach the second-place firm about the work.[293] The grantee will proceed in this manner until it reaches a firm on its list that is willing to undertake the work at a fair and reasonable price.[294] If the grantee exhausts its initial list, it must reconsult all available statements of qualifications, compile a new list of qualified firms, and repeat the negotiation process until a firm is selected.[295]

10. Grants and Cooperative Agreement Cost Principles

DOT and its operating administrations (principally FTA and FHWA for these purposes) are bound by the guidelines of the Office of Management and Budget (OMB) for determining allowable costs under grants; cost reimbursement plans; and contracts with "governmental units,"[296] educational institutions,[297] and nonprofit organizations other than educational institutions.[298] The circulars are intended to provide a uniform approach for determining allowable costs and to promote effective program delivery and efficiency, but not to dictate the extent of federal participation in the administration or use of federal funds.[299]

The principles established by Circular A-87 apply to all federal agencies in determining costs incurred by governmental units under federal awards, except where those awards are to publicly owned or financed educational institutions and hospitals, in which case the conditions of the other circulars apply.[300] Subawards are subject to the cost principles applicable to the particular organization concerned, e.g., if a governmental unit makes a subaward to an educational institution, the conditions of the circular governing educational institutions will apply.[301] OMB will grant exemptions to the terms of Circular A-87 where a federal non-entitlement program includes a statutory authorization for consolidated planning and administrative funding, provided that most of the governmental unit's funding is nonfederal and there is a state law or regulation that gives guidance substantially similar to the Circular's.[302]

Generally, a cost item is allowable if it meets a number of broad criteria.[303] Costs must be divided into those

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[283] FTA MA § 15.g.

[284] Architectural and engineering services are those that are: (1) so defined by state law, or otherwise require equivalent licensure by the state where the work is to be performed; (2) professional services that are associated with planning, design, construction, alteration, or repair of real property; or (3) professional services that architects or engineers may logically or justifiably perform, including surveying, conceptual design, soils engineering, etc. 40 U.S.C. § 3308 (2002).

[285] 40 U.S.C. §§ 541 *et seq*. (2000).

[286] 59 Comp. Gen. 251 (1980).

[287] FTA MA § 15(i); FTA C. 4220.1E para. 9.e.

[288] 40 U.S.C. § 542 (2000).

[289] 40 U.S.C. § 543 (2000).

[290] *Id*.

[291] *Id*.

[292] 40 U.S.C. § 544(a) (2000).

[293] 40 U.S.C. § 544(b) (2000).

[294] *Id*.

[295] 40 U.S.C. § 544(c) (2000).

[296] O.M.B. Circ. No. A-87, Rev. (1997) [A-87]. "Governmental units" includes state, local, and federally recognized Indian tribal governments. A-87(1).

[297] O.M.B. Circ. No. A-21, Rev. (1998) [A-21].

[298] O.M.B. Circ. No. A-122, Rev. (1998) [A-122].

[299] A-87(5).

[300] A-87 Attachment A(A)(3)(a).

[301] A-87 Attachment A(A)(3)(b).

[302] A-87 Attachment A(A)(3)(e).

[303] These criteria include, but are not limited to: (1) necessary and reasonable for proper and efficient performance and administration of the award; (2) allocable under the terms of the Circular; (3) determined in accordance with Generally Accepted Accounting Principles (GAAP) unless otherwise provided for by the Circular; and (4) adequately documented. A-87 Attachment A(C)(1). A cost is reasonable if it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. A-87 Attachment A(C)(2). A cost is allocable if

that are direct[304] or indirect.[305] Indirect costs may be pooled to facilitate equitable distribution of those expenses among benefited cost objectives.[306] Particular rules govern 42 general categories of items, ranging from alcoholic beverages to motor pools to underrecovery of costs under federal award agreements.[307] The omission of a specific item from the list does not imply it is either allowable or not; instead, the item's status should be based on the treatment of similar or related items.[308] The Circular requires governmental units to establish a Central Service Cost Allocation Plan (CSCAP), which will serve to allocate costs to federal awards for services such as accounting, data entry facilities, and other shared expenses incurred by the organs of the governmental unit.[309] Finally, the Circular provides guidance in establishing a general indirect cost rate, which is a percentage multiplier applied to direct costs under a federal award to determine the amount of indirect costs that should also be charged to the award.[310]

11. Procurement Challenges

A bid award may be set aside if the challenger clearly demonstrates that: (1) the procurement official's decision did not have a rational basis; or (2) the procurement procedure constituted a clear and prejudicial violation of an applicable regulation or procedure.[311] With respect to the first ground, courts have recognized that contracting officers are "entitled to exercise discretion upon a broad range of issues confronting them."[312] The court examines whether "the contracting agency provided a coherent and reasonable explanation of its exercise of discretion."[313] The "disappointed bidder bears a 'heavy burden' of showing that the award decision 'had no rational basis.'"[314] When a case is brought on the second ground, the disappointed bidder must show "a clear and prejudicial violation of applicable statutes or regulations."[315]

The refusal of the courts to demand any more of an agency's procurement decision than substantial compliance with applicable law and baseline substantive rationality is premised on the grounds that "judges are 'ill-equipped to settle the delicate questions involved in procurement decisions.'"[316]

C. BUY AMERICA REQUIREMENTS

1. Buy America Overview

Domestic purchasing requirements fall into two general categories—one that applies to direct federal procurements ("Buy American"), which has been in place since the Great Depression,[317] and another more recent one that applies to grants and other federal funds, such as those given to transit agencies ("Buy America").[318] Although the federal government began financing state and local transit agencies in 1964, it was not until the passage of the Surface Transportation Assistance Act of 1978 [1978 STAA] that there was serious effort to require such agencies to spend federal funds exclusively on domestically produced equipment and rolling stock.[319] While the Urban Mass Transit Administration (UMTA) had long pursued a strategy of encouraging foreign manufacturers to relocate to the United States, Congress found that effort unsatisfactory, as relocation

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the goods or services involved are chargeable or assignable to the relevant cost objective in accordance with relative benefits received. A-87 Attachment A(C)(3)(a).

[304] Direct costs are those that can be identified with a particular final cost objective. A-87 Attachment A(E)(1).

[305] Indirect costs are those that are incurred for a common or joint purpose benefiting more than one cost objective and not readily assignable to the objective benefited without a disproportionate effort to the results achieved. A-87 Attachment A(F)(1).

[306] A-87 Attachment A(F)(1).

[307] A-87 Attachment B Preamble.

[308] A-87 Attachment B Preamble.

[309] A-87 Attachment C(A)(1). Detailed guidelines for the setup and operation of CSCAPs are provided by the Department of Health and Human Services in a brochure entitled, "A Guide for State and Local Government Agencies: Cost Principles and Procedures for Establishing Cost Allocation Plans and Indirect Cost Rates for Grants and Contracts with the Federal Government," available through the U.S. Government Printing Office. A-87 Attachment C(A)(2).

[310] A-87 Attachment E. There are separate methods of calculating single and multiple allocation bases. A-87 Attachment E(C)(2) and (3). Circulars A-21 and A-122 provide substantially similar guidance for educational institutions and other nonprofit organizations respectively, with the principal difference being in the general categories of items used to determine the allowability of costs. *See, e.g.*, A-21(J) and A-122 Attachment B.

[311] Scanwell Lab., Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970).

[312] Latecoere Int'l, Inc. v. U.S. Dep't of Navy, 19 F.3d 1342, 1356 (11th Cir. 1994).

[313] *Id.*

[314] Saratoga Dev. Corp. v. United States, 21 F.3d 445, 456 (D.C. Cir. 1994) (quoting Kentron Hawaii Ltd. v. Warner, 480 F.2d 1166, 1169 (D.C. Cir. 1973)).

[315] Kentron Hawaii, Ltd. v. Warner, 480 F.2d 1166, 1169 (D.C. Cir. 1973); Latecoere, 19 F.3d at 1356. *See also* Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324 (Cir. 2001).

[316] Delta Data Sys. Corp v. Webster, 744 F.2d 197, 203 (D.C. Cir. 1984) (quoting Kinnett Dairies, Inc. v. Farrow, 580 F.2d 1260, 1271 (5th Cir. 1978)). *See generally* Elcon Enterprises, Inc. v. WMATA, 977 F.2d 1472 (D.C. Cir. 1992); AM General Corp. v. Dep't of Transp., 433 F. Supp. 1166 (D. D.C. 1977).

[317] Lawrence Hughes, *Buy North America: A Revision to FTA Buy America Requirements*, 23 TRANSP. L.J. 207, 208–09 (1995) [Hughes]. After the Civil War, an act had been passed to compel the War and Navy Departments to purchase arms domestically. Hughes at 208, n.2.

[318] However, publications and speakers often confuse the terms and simply refer to "Buy American" in regard to both types of restrictions.

[319] Hughes at 213–14.

had the potential to increase domestic competition, which was viewed as undesirable.[320] The 1978 STAA provided that federal dollars granted under the Federal Transit Act had to be spent on domestically-produced products if the project had a value of $500,000 or more; those below the cut-off were exempted from review.[321]

Four years later, Congress revisited the subject of "Buy America." Dissatisfied with the regulatory structure created by UMTA following the 1978 STAA, Congress enacted the Surface Transportation Assistance Act of 1982 [1982 STAA], which, while codifying some of UMTA's actions, also imposed stringent new burdens on recipients of federal transit funds.[322] The 1982 STAA eliminated the $500,000 cut-off, subjecting all projects to "Buy America" compliance.[323] Furthermore, the act added a requirement that all steel and manufactured products for such projects be produced domestically.[324]

Congress also took aim at the exceptions to "Buy America" that UMTA had allowed under its original regulatory structure. Congress deleted an exception for "unreasonable cost," and revised a standing waiver for foreign products with prices that were 10 percent or greater below equivalent domestic products.[325] Additionally, Congress permitted state and local governments to enact more stringent "Buy America" standards, but prohibited them from enacting corresponding "Buy State" or "Buy Local" laws.[326] The 1982 STAA did, however, allow UMTA to retain a general "public interest" exception and an exception for when no satisfactory domestic producers were available.[327] Finally, Congress codified UMTA's definition of domestically produced vehicles and equipment, which defined such items as being composed of 50 percent or more American content, by total cost, with final assembly in the United States.[328]

Taking a legal maxim of Voltaire's to heart,[329] 5 years later Congress passed the 1987 STURAA.[330] Having previously codified UMTA's 50 percent rule, Congress now decided that amount was insufficient to ensure that enough business was diverted to domestic producers.[331] After some debate, it was agreed that the content requirement would increase to 55 percent as of October 1, 1989, and increase again to 60 percent as of October 1, 1991.[332] The 1987 STURAA also further increased the price differential required to trigger the automatic waiver for rolling stock to 25 percent,[333] bringing it into line with the price differential for all other projects. Lastly, the content requirement was extended to include "sub-components" in addition to the "systems" and "components" already covered.[334]

Congress again returned to the "Buy America" provision in 1991 with ISTEA. This time iron was added to the list of items that had to be completely domestically produced, while statutory penalties for false claims of domestic manufacture were introduced as well.[335] Congress concluded this round of activity by renaming UMTA the Federal Transit Administration.[336] Finally, in 1998, Congress enacted TEA-21.[337] The change wrought by TEA-21 was relatively minor compared to those that preceded it. It gave the Secretary of Transportation [Secretary] the power to permit suppliers to correct mistaken or faulty "Buy America" certificates, provided the suppliers swear under penalty of perjury that the errors were inadvertent or clerical in nature.[338] (Although since TEA-21's enactment the "Buy America" provision has been unchanged, one possible revision that may eventually take place would be to address the

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[320] Hughes at 215.

[321] Hughes at 216.

[322] Hughes at 217–18.

[323] Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097.

[324] *Id*. Originally the Act proposed to include cement along with steel, but it was deleted before the act's passage.

[325] *Id*. The threshold price differential was increased to 25 percent for all projects other than the purchase of rolling stock, for which the 10 percent threshold was retained.

[326] Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097.

[327] Hughes at 217–18.

[328] Hughes at 218.

[329] "Let all the laws be clear, uniform and precise; to interpret laws is almost always to corrupt them," quoted in A NEW DICTIONARY OF QUOTATIONS ON HISTORICAL PRINCIPLES FROM ANCIENT & MODERN SOURCES (H.L. Mencken ed., 1942).

[330] Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, tit. III, § 337, 101 Stat. 132, 241 (1987).

[331] Hughes at 219–20.

[332] Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, tit. III, § 337, 101 Stat. 132, 241 (1987).

[333] *Id*.

[334] *Id*. This final piece of legislative legerdemain actually made it easier for foreign-made products to comply with the "Buy America" requirements, as it meant that domestically produced subcomponents shipped abroad and incorporated into other products (as is often done with computer chips) could be counted towards the American content requirement.

[335] Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, tit. I § 1048, 105 Stat. 1914, 1999–2000 (1991). FTA has interpreted the provisions on iron and steel as applying to "construction or building materials made either principally or entirely from steel or iron. All other manufactured products, even though they may contain some steel or iron elements, would not be covered." 61 Fed. Reg. 6300 (1996).

[336] Hughes at 221.

[337] Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998).

[338] Transportation Equity Act for the 21st Century, Pub. L. No. 105-178 § 3020(b), 112 Stat. 107 (1998). Readers interested in learning more about the history and development of "Buy America" are advised to consult Lawrence Hughes, *Buy North America: A Revision to FTA Buy America Requirements*, 23 TRANSP. L.J. 207 (1995) and the excellent Transit Cooperative Research Program's, *Guide to Federal Buy America Requirements*, Doc. LRD-17 (2001).

seeming conflict between "Buy America" and the North American Free Trade Agreement.)[339]

2. Applicability of Buy America

The statutory basis for "Buy America" in federally-assisted transit procurements is found in 49 U.S.C. § 5323(j). The Secretary may only release funds for a project to be financed under the Federal Transit Act if the steel, iron, and manufactured goods used in the project are domestically produced.[340] Labor costs involved in final assembly are not to be included in determining the total cost of components.[341] If a person or firm has been found to have affixed a fraudulent "Made in America" label to a product or otherwise misrepresented a foreign product as being domestically produced, that person or firm is barred from receiving any future contracts or subcontracts issued under the Federal Transit Act.[342] Finally, the Secretary may allow a supplier of steel, iron, or manufactured goods to correct mistaken or faulty "Buy America" certificates after bid opening.[343] The supplier must swear under penalty of perjury that such a mistake was inadvertent or the result of clerical error, with the burden of proof being on the supplier.[344] The grantee is not permitted to accept the supplier's sworn statement at face value, and may only honor such statements as to truly clerical or inadvertent errors. The errors must be minor, and this procedure cannot be used to correct submissions that were defective or noncompliant with the "Buy America" requirements at the time the bid or proposal was submitted.

Except where a waiver is provided, no funds may be granted by FTA unless all iron, steel, and manufactured products used in the project are produced domestically.[345] The steel and iron requirements apply to all construction materials that are made principally of steel or iron and are used as part of infrastructure projects (such as bridges or rail lines), but not to steel or iron used as part of other manufactured products or rolling stock.[346] A manufactured product is considered to be domestically produced if all of the necessary manufacturing processes take place in the United States and all components are of U.S. manufacture.[347] A component is of U.S. manufacture if it is assembled in the United States, regardless of the origin of its subcomponents.[348]

If the cost of components produced domestically is more than 60 percent of the cost of all components and final assembly takes place domestically, the above requirements do not apply to the procurement of rolling stock, train controls, communication, or traction power equipment.[349] For a component to be considered domes-

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[339] While NAFTA generally requires free trade in goods and services between the United States, Canada, and Mexico, government procurements, including those made through "cooperative agreements, grants, loans, equity infusions, guarantees, fiscal incentives, and government provision of goods and services," are exempt. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993). But the "Buy America" statute implicitly permits exemptions for non-domestically produced items where a foreign nation "has an agreement with the United States government under which the Secretary has waived the requirement of" the statute. 49 U.S.C. § 5323(j)(4)(A) (2002).

[340] 49 U.S.C. § 5323(j)(1) (2000). Although 49 U.S.C. § 5323(j) only specifically applies to funds disbursed under the Federal Transit Act, FTA's implementing regulations broaden it to cover funds that are made available through "Interstate Transfer" or "Interstate Substitution" funds as well. 49 C.F.R. § 661.1 (2000). A little-known provision of the Interstate highway program permits unused highway funds to be used for mass transit projects, so funds received through it are technically not part of the Federal Transit Act (Title 49, Chapter 53).

[341] 49 U.S.C. § 5323(j)(3) (2000).

[342] 49 U.S.C. § 5323(j)(5) (2000). The Secretary may not prevent a state from enacting more stringent "Buy America" restrictions than those provided by 49 U.S.C. § 5323(j). 49 U.S.C. § 5323(j)(6) (2000). However, the FTA will not participate in contracts governed by state or local "Buy America" programs that are not explicitly defined by state law (e.g., administrative interpretations of nonspecific state legislation), nor will the FTA participate in contracts governed by "Buy State" or "Buy Local" programs. 49 C.F.R. § 661.21(b)(2-3) (2003).

[343] 49 U.S.C. § 5323(j)(7) (2000). This does not include instances where a bidder has completely failed to submit a "Buy America" certificate. In such cases the bid is nonresponsive.

[344] 49 U.S.C. § 5323(j)(7) (2000).

[345] 49 C.F.R. § 661.5(a) (2003). An exception is provided for the refinement of steel additives, which need not have been done in the U.S. 49 C.F.R. § 661.5(b) (2003).

[346] 49 C.F.R. § 661.5(c) (2003). FTA defines a manufacturing process as being "the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials." 49 C.F.R. § 661.3 (2003). FTA regulations define rolling stock as including "buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services." 49 C.F.R. § 661.3 (2003).

[347] 49 C.F.R. § 661.5(d)(1) and (2) (2003).

[348] 49 C.F.R. § 661.5(d)(2) (2003).

[349] 49 C.F.R. § 661.11(a) (2003). By way of explanation, a "component" is any article, material, or supply, whether manufactured or otherwise, that is directly incorporated into an end product at the final assembly location. 49 C.F.R. § 661.11(c) (2003). A "sub-component" is any article, material, or supply, whether manufactured or otherwise, that is "one step removed" from a component in the manufacturing process and that is directly incorporated into a component. 49 C.F.R. § 661.11(f) (2003). "Final assembly" is the creation of an end product from components brought together for that purpose as part of the manufacturing process. If a grantee is purchasing an entire system as one unit, installation of the system is considered "final assembly." 49 C.F.R. § 661.11(r) (2003). Final assembly of a new rail car would typically at least include the following operations: installation of propulsion control equipment, propulsion cooling equipment, brake equipment, energy sources for auxiliaries and controls, heating and air conditioning, communications equipment, motors, wheels and axles, suspensions and frames; the inspection and verification of all installation and interconnection work; and the in-plant testing of the stationary product to verify all functions. Final assembly of a new bus would typically at least include the following opera-

tically produced, more than 60 percent, by cost, of its subcomponents must be domestically produced and the manufacture of the component must take place in the United States.[350] A subcomponent is domestically produced simply if it is manufactured in the United States.[351]

To clarify, imagine a system with 10 components, nine of equal cost [EC] and a tenth of equal cost plus one cent [EC+1], with each component being made up of 10 subcomponents, again nine EC and one EC+1.[352] For the system to meet the requirements of "Buy America," four of the EC components may be manufactured abroad out of wholly foreign content. However, the five remaining EC components and the EC+1 component may each contain up to four foreign-made EC subcomponents. A piece of rolling stock could thus have as little as 36 percent (i.e., 60 percent of 60 percent) domestic content.[353] Furthermore, as there is no domestic content requirement for subcomponents,[354] they will be considered to be of U.S. origin as long as their sub-subcomponents are assembled domestically, regardless of the contents' origin. Theoretically then, it would be possible to completely build a rail car in a foreign nation, break it down to the sub-subcomponent level, ship those parts to the United States, reassemble the rail car, and have a vehicle which is deemed 100 percent American, although such a strategy would present substantial risks in the event of a miscalculation on content.[355]

If a subcomponent manufactured in the United States is exported for inclusion in a foreign-made component and it receives a tariff exemption, it will retain its "domestic identity" and will be counted toward the domestic content requirement.[356] However, if a domestically produced subcomponent fails to receive such an exemption, it loses its "domestic identity" and must be counted as foreign content.[357] Raw materials produced domestically, but exported for incorporation into a component which is then imported, are considered foreign content.[358] If a component is manufactured in the United States, but contains less than 60 percent domestic subcomponents, by cost, the cost of manufacturing the overall component may be added to the value of the domestic subcomponents in an effort to reach the 60 percent threshold.[359]

The cost of components and subcomponents is ordinarily considered to be the price a bidder is obligated to pay a supplier for such items.[360] The exception to this rule for domestically produced items is for those that are shipped abroad under a tariff exemption as detailed above. For such items, their cost is either the cost of purchase as noted on the invoice and entry papers when they leave the country or, if not purchased, the value of the item at the time it leaves the country as noted on the invoice and entry papers.[361] In the case of foreign-made components and subcomponents, transportation costs to the final assembly point must be included in the overall cost of the items.[362] The cost of foreign-made items is determined using the foreign exchange rate at the time the bidder executes the relevant "Buy America" certificate.[363] If a component or subcomponent is manufactured by a bidder itself, the overall cost is the sum of the cost of the labor, materials, and allocated

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tions: the installation of the engine, transmission, and axles, including the cooling and braking systems; the installation of the heating and air conditioning equipment; the installation of pneumatic and electrical systems, door systems, passenger seats, passenger grab rails, destination signs, and wheelchair lifts; and road testing, final inspection, repairs, and preparation of the vehicles for delivery. *See* Dear Colleague Letter from Gordon J. Linton, Administrator, FTA (Mar. 18, 1997) (*available at* http://www.fta.dot.gov/library/reference/buyamerica/byamrdc3.htm (visited April 21, 2003)). A partial list of train control equipment, communication equipment, and traction power equipment is presented at 49 C.F.R. § 661.11(t) through (w). The FTA considers all items listed in Appendices B and C to 49 C.F.R. § 661.11 (2003) to be "components" within the scope of the "Buy America" regulations. 66 Fed. Reg. 32412-13 (2003).

[350] 49 C.F.R. § 661.11(g) (2003).

[351] 49 C.F.R. § 661.11(h) (2003).

[352] The "equal cost plus one cent" component and subcomponent are necessary for the example because domestic content must be *greater* than 60 percent.

[353] A simplified version of this example was presented at 66 Fed. Reg. 32, 412–413 (2001).

[354] Based on the language of the enabling statute and the responses of commentators to the Notice of Proposed Rulemaking, the FTA concluded that "sub-subcomponents" were not within the scope of "Buy America." *See* 56 Fed. Reg. 926 (M) and (O) (1991).

[355] Something similar to this process has been done by Ontario Bus Industries, which shipped partially completed buses from its main plant in Mississauga, Ontario, to a smaller facility in upstate New York for final assembly so as to comply with "Buy America" requirements. Hughes at 234. An error by the firm led to an FTA investigation in 1994, which resulted in an $80,000 fine for mislabeling its products as "Made in New York." However, the FTA did not bar Ontario Bus Industries from competing for future federally-funded bus orders. *Ontario Runs Bus Builder*, PLANT, Apr. 4, 1994, at 2.

[356] 49 C.F.R. § 661.11(i) (2003). *See* 19 C.F.R. §§ 10.11 through 10.24 (2003) for an explanation of tariff exemptions.

[357] 49 C.F.R. § 661.11(j) (2003).

[358] 49 C.F.R. § 661.11(k) (2003). For example, if steel ingots are produced by the Monongahela Metal Foundry and are then shipped to a Canadian plant to be turned into I-beams, the I-beams would be considered completely foreign, even if they contained 100 percent American steel. One transit industry insider characterized this as, "A racial purity law for American steel."

[359] 49 C.F.R. § 661.11(l) (2003).

[360] 49 C.F.R. § 661.11(m)(1) (2003).

[361] 49 C.F.R. § 661.11(o) (2003).

[362] 49 C.F.R. § 661.11(m)(1) (2003). The regulation does not state whether it is permissible to add transportation costs to domestic products. In the absence of a specific prohibition, however, it appears that it could be done.

[363] 49 C.F.R. § 661.11(n) (2003).

overhead costs, along with "an allowance for profit."[364] However, it should be remembered that labor costs for final assembly cannot be included in determining overall costs.[365] The actual price of a component is to be considered in determining domestic content, not the bid price.[366]

Finally, once a bidder has determined whether the product it is offering is in compliance, it must submit the appropriate "Buy America" certificate.[367] FTA regulations require that grantees comply with "Buy America" requirements,[368] and failure by a bidder to submit a proper certificate will oblige the grantee to treat the bid as nonresponsive.[369] After a bidder has submitted its certificate of either compliance or noncompliance, it is bound by its certification upon opening of the bids.[370] If a bidder has certified that it is in compliance with the "Buy America" requirements, it may not subsequently request a waiver for any of those requirements.[371] Consequently, it is vital for a bidder to be aware of any necessary waivers and the procedures needed to obtain them.

If a successful bidder is found to be out of compliance with its certification, it must take the actions determined by FTA to be necessary to bring itself into compliance.[372] The bidder may not adjust its price to compensate for making the necessary changes.[373] If the bidder fails to take the required actions, it will not be eligible to receive the contract if the award is not yet complete.[374] However, if the contract has already been awarded and the bidder has failed to bring itself into compliance with its certification, then it has breached the contract.[375] This of course raises the question of how it may be discovered that a bidder is not in compliance. One way is through the pre-award and post-delivery review processes, the other way is through an FTA investigation; but most commonly as a result of a bid protest with the grantee by an unsuccessful bidder.[376]

3. FTA Buy America Investigations

There is a presumption that a bidder that has submitted a "Buy America" certificate is in compliance with the requirements.[377] However, in the event that another party (typically a losing or excluded bidder) suspects that a bidder is not in compliance with the requirements, that party (or "petitioner") may submit a petition for FTA to launch an investigation.[378] The petition must be in writing and include a statement of the grounds for the petitioner's suspicions and any supporting documentation.[379] If the evidence presented in the petition is sufficient to overcome the presumption of compliance, FTA will commence an investigation of the bidder.[380] Alternatively, FTA may, *sua sponte*, launch an investigation if the conditions are "appropriate."[381] Once the decision is made to proceed with an investigation, the burden is on the bidder to prove it is in compliance with the terms of the "Buy America" regulation.[382]

FTA will notify the grantee of all documentation that will be necessary for the bidder to provide to assist the investigation.[383] Once notice has been given, the grantee

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[364] 49 C.F.R. § 661.11(m)(2) (2003). The regulation states that these cost factors are to be determined in accordance with "normal accounting procedures." This would seem to be equivalent to Generally Accepted Accounting Procedures, as no other definition is offered.

[365] 49 C.F.R. § 661.11(p) (2003).

[366] 49 C.F.R. § 661.11(q) (2003). This is presumably to deter contractors from deliberately over-pricing domestically produced components in an effort to reach the 60 percent threshold.

[367] 49 C.F.R. §§ 661.6 and 661.12 provide samples of the certificate that should be completed for nonrolling stock and rolling stock procurements respectively.

[368] 49 C.F.R. § 661.13(a) (2003).

[369] 49 C.F.R. § 661.13(b) (2003).

[370] 49 C.F.R. § 661.13(c) (2003). This puts a noncompliant bidder in an unusual position. If the bidder locates domestic suppliers of needed components or subcomponents at or below the cost of the foreign-made items used to calculate its bid, it may not substitute those domestic items in an effort to make its bid more favorable. Although contradictory to traditional bidding practices, it would appear that, to go along with the logic of the "Buy America" statute, the FTA should revise this part of the regulation to permit noncomplying bidders to change their certification if it will result in an equal or lower final cost.

[371] 49 C.F.R. § 661.13(c) (2003).

[372] 49 C.F.R. § 661.17 (2003).

[373] *Id*.

[374] *Id*.

[375] *Id*.

[376] As a practical matter, most competitors keep track of the domestic content of competitors' products and will file a bid protest with the grantee if they have lost a contract due to a noncompliant product having been proffered by the winner.

[377] 49 C.F.R. § 661.15(a) (2003).

[378] 49 C.F.R. § 661.15(b) (2003). The petition to the FTA for an investigation is not a substitute for a bid protest, and the losing bidder may choose to file both a bid protest with the grantee and a petition for an investigation with the FTA to avoid the claim that it has failed to exhaust its administrative remedies.

[379] 49 C.F.R. § 661.15(b) (2003).

[380] *Id*. The FTA may provide the winning bidder an opportunity to refute the petitioner's claims prior to a formal investigation. *See*, *e.g.*, Letter from Gregory B. McBride, Acting Chief Counsel, FTA to Rolf Meissner, Vice President and General Manager, Siemens Transportation Systems, Inc., Vehicle Division (June 5, 2001) (*available at* http://www.fta.dot.gov/library/legal/buyamer/inltrs /stsi6501.html (visited April 21, 2003)) (discussing a formal response from a manufacturer accused of violating "Buy America" requirements.) However, there is no statutory or regulatory requirement that compels the FTA to give the winning bidder an opportunity to respond prior to an investigation.

[381] 49 C.F.R. § 661.15(c) (2003).

[382] 49 C.F.R. § 661.15(d) (2003).

[383] *Id*. An interesting question is raised by this process of using the grantee to conduct part of the investigation for FTA. In Printz v. United States, 521 U.S. 898 (1997), the U.S. Supreme Court held,

must respond to the request for documentation within 15 days.[384] Alternatively, the bidder being investigated may correspond directly with FTA rather than going through the grantee, provided that the bidder informs the grantee of its plans and the grantee agrees in writing.[385] The grantee must then in turn notify FTA, in writing, that the bidder will be corresponding directly with it.[386] Because of the risk to FTA funding, in most instances the grantee will not agree to the bidder bypassing the grantee unless the bidder agrees in writing to simultaneously provide copies of all documents to the grantee.[387] If the bidder desires, it may submit proprietary information only to FTA directly, while any remaining information will be funneled through the grantee.[388] FTA may conduct site investigations as needed, but will give "appropriate notification" to the party whose property is to be inspected.[389]

The grantee or bidder's reply will be sent to the petitioner by FTA after it has been received.[390] The petitioner then has 10 days to submit comments to FTA as to the content of the reply.[391] These comments will be forwarded to the grantee and bidder, which then have 5 days to respond to the petitioner's comments.[392] Failure by any party to respond within the required time frame may result in FTA disregarding their comments and proceeding to decide the issues on the basis of the other parties' responses.[393]

Upon request, FTA will make any information substantially related to the investigation available to interested parties, excluding only information that it is barred by law or regulation from releasing.[394] Therefore, a party that does not wish to have proprietary information disclosed must submit a statement to FTA identifying any proprietary information included in the documentation.[395] The regulation defines proprietary information as any information "whose disclosure could reasonably be expected to cause substantial competitive harm" to the party submitting it.[396]

If the petition for investigation is made before the contract has been awarded, the grantee is barred from making the award until the investigation is completed, unless one of three conditions is met:

1. The items to be procured are urgently required;
2. Delivery of performance will be unduly delayed by failure to make the award promptly; or
3. Failure to make prompt award will otherwise cause undue harm to the grantee or the federal government.[397]

If the grantee decides the contract must be awarded before the completion of the investigation, it must notify FTA of any such decision prior to making the actual award.[398] FTA may refuse to release funds for that contract while the investigation is pending.[399]

Once FTA concludes its investigation, it will issue a written initial decision.[400] Any party involved in the investigation may request that FTA reconsider its initial decision.[401] However, FTA will only accept such a request if the party submits new matters of fact or points of law that the party was unaware of, or otherwise did not have access to, while the investigation was in progress.[402] A request for reconsideration must be filed with FTA not later than 10 days after the initial

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The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty. Printz, 521 U.S. at 935. FTA's position is that it is a "funding agency" rather than a "regulatory agency" and that the MA creates a contractual relationship, not a regulatory one; thus, by that logic, the Printz decision would not be applicable. However, it is far from clear whether the U.S. Supreme Court would agree with such an interpretation of FTA's authority. Printz has not been cited in regard to any cases involving "Buy America" investigations, but a grantee that finds such an investigation burdensome may wish to explore the case's applicability in this area.

[384] 49 C.F.R. § 661.15(e) (2003).

[385] *Id*.

[386] *Id*.

[387] This is in part because the grantee may be conducting its own investigation, and would need the successful bidder to provide it with documents and information essential to its investigation.

[388] 49 C.F.R. § 661.15(e) (2003). Any additional documents requested by the FTA must be provided within 5 days unless an exemption is specifically given. 49 C.F.R. § 661.15(f) (2003).

[389] 49 C.F.R. § 661.15(i) (2003).

[390] 49 C.F.R. § 661.15(g) (2003).

[391] 49 C.F.R. § 661.15(g) (2003).

[392] *Id*.

[393] 49 C.F.R. § 661.15(h) (2003).

[394] 49 C.F.R. § 661.15(j) (2003).

[395] 49 C.F.R. § 661.15(k) (2003). The alleged proprietary information must be identified wherever it appears and any further comments on the material must be submitted within 10 days of the time it is originally provided. 49 C.F.R. § 661.15(k) (2003).

[396] 49 C.F.R. § 661.15(l) (2003).

[397] 49 C.F.R. § 661.15(m)(1) through (3) (2003).

[398] 49 C.F.R. § 661.15(n) (2003).

[399] 49 C.F.R. § 661.15(n) (2003).

[400] 49 C.F.R. § 661.15(o) (2003). If the investigation determines the bidder has inadvertently compromised its "Buy America" certification, it must bring itself into compliance. If the violation of the "Buy America" requirement is determined by FTA, another federal agency, or a court to have been intentional, however, then the bidder will be ineligible to receive any contract or subcontract made with FTA funds. 49 C.F.R. § 661.18 (2003). Willful refusal by a bidder to comply with its certification will have the same result as an intentional violation of the "Buy America" requirements. 49 C.F.R. § 661.19 (2003). A bidder has intentionally violated the "Buy America" requirements if it has affixed a "Made in America" label to a product not manufactured in the United States or otherwise represents a foreign-made product as being domestically produced. 49 C.F.R. § 661.18(a) and (b) (2003).

[401] 49 C.F.R. § 661.15(o) (2003).

[402] *Id*.

decision is released.[403] If FTA decides the request has merit, it will conduct another investigation consistent with the procedures above and with the need to obtain a prompt resolution to the dispute.[404] The right to petition FTA for an investigation and the right to request a review of its decision are the only federal legal rights created for third parties, *i.e.,* parties other than the winning bidder, by the "Buy America" requirements.[405] However, a party other than the apparent successful bidder may also have a right to file a bid protest with the grantee, pursuant to the grantee's own procedures.

4. Buy America Waivers

The procedure for waivers under the transit procurement "Buy America" requirements combines both statutory and regulatory elements.[406] 49 U.S.C. § 5323(j) permits the Secretary to issue waivers in four circumstances. First, there is a general "public interest" waiver.[407] Second, a waiver may be issued if the steel, iron, or goods produced in the United States are not available in sufficient quantity or are of inferior quality to what is reasonably needed.[408] As previously explained, a waiver also exists for rolling stock and related equipment where the cost of components and subcomponents produced domestically is greater than 60 percent of the total cost and final assembly takes place domestically.[409] Finally, a waiver may be given if including domestic materials will increase the total cost of the project by more than 25 percent above the cost of using imported materials.[410]

FTA's regulations do much to add finesse to the bare bones of 49 U.S.C. § 5323(j)'s waiver structure. The Secretary delegated the office's authority under the statute to the Administrator of FTA [Administrator], so waivers are granted through the office of the Administrator.[411] To grant a public interest waiver, the Administrator must consider "all appropriate factors" in regards to each request unless a general waiver has been provided by the regulation itself.[412] The Administrator may grant a waiver if he or she determines the materials for which the waiver is requested are not produced in the United States in sufficient or reasonably available quantities and of a satisfactory quality.[413] If no responsive or responsible bid is received offering an item produced domestically, it will be presumed that conditions are suitable for issuing such a waiver.[414] In the event of a single source procurement from a foreign supplier, however, the burden is on the grantee to prove the item needed is available only from that source or that it is otherwise not available domestically in sufficient quantity or quality.[415] Finally, a waiver can be issued if the Administrator determines that the inclusion of domestic content will raise the cost of the contract by more than 25 percent.[416] The factors for each of the types of waiver must be evaluated separately.[417]

In the case of rolling stock procurements, the public interest and availability waivers may be applied to specific components or subcomponents.[418] If waivers are granted for such components or subcomponents, they will be counted toward the total domestic content of the vehicle.[419] A similar principle extends to manufactured goods as well, permitting the public interest and availability waivers to convert foreign-made components and subcomponents into these treated as domestically manufactured ones.[420]

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[403] *Id*.

[404] *Id*.

[405] 49 C.F.R. § 661.20 (2003). The regulation denies "any additional right, at law or equity, for any remedy including, but not limited to, injunctions, damages, or cancellation of the Federal grant or contracts of the grantee." 49 C.F.R. § 661.20 (2003). It is unclear whether a decision by the FTA in this context would be subject to judicial review under the APA (5 U.S.C. §§ 551 *et seq*.). While the APA grants a right of review to any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" (5 U.S.C. § 702 (2001)), there have been no court challenges against an FTA "Buy America" investigative decision in at least 10 years, and the only previous claim to attempt to challenge a federal "Buy America" decision was disposed of on the grounds that the then UMTA's "Buy America" regulations did not give rise to a private cause of action. *See* Ar-Lite Panelcraft, Inc. v. Siegfried Constr. Co., No. CIV-86-525C, 1989 U.S. Dist. LEXIS 6394 (W.D. N.Y. Mar. 10, 1989).

[406] The statutory component is 49 U.S.C. §§ 5323(j)(2) and (4), while the regulatory component is 49 C.F.R. § 661.7 and its appendix together with § 661.11 and its appendix.

[407] 49 U.S.C. § 5323(j)(2)(A) (2000).

[408] 49 U.S.C. § 5323(j)(2)(B) (2000).

[409] 49 U.S.C. §§ 5323(j)(2)(C)(i) and (ii) (2000).

[410] 49 U.S.C. § 5323(j)(2)(D) (2000).

[411] This is inferable from the text of 49 C.F.R. § 661.7, which makes no reference to the Secretary, but which refers to the Administrator granting waivers.

[412] 49 C.F.R. § 661.7(b) (2003). As of January 8, 2001, the available general waivers are: (1) those laid out in 48 C.F.R. § 25.108; (2) 15-passenger vans and wagons produced by Chrysler Corp. are exempt from the requirement of being assembled in the U.S.; (3) micro-computer equipment, including software; (4) small purchases as defined in 49 C.F.R. § 18.36(d); and (5) for rolling stock and related procurements, foreign-made spare parts may be acquired where the cost of those parts is 10 percent or less of the total project cost and the parts are procured as part of the same overall contract. Appendix to 49 C.F.R. § 661.7 (2003); Appendix A to 49 C.F.R. § 661.11 (2003).

[413] 49 C.F.R. § 661.7(c) (2003).

[414] 49 C.F.R. § 661.7(c)(1) (2003).

[415] 49 C.F.R. § 661.7(c)(2) (2003).

[416] 49 C.F.R. § 661.7(d) (2003). This is determined by multiplying the lowest responsive and responsible bid that relies on foreign-made components by 1.25 and comparing it to the lowest responsive and responsible bid that relies on domestic components. If the former bid is still less than the latter, the waiver will be granted.

[417] 49 C.F.R. § 661.7(e) (2003).

[418] 49 C.F.R. § 661.7(f) (2003).

[419] 49 C.F.R. § 661.7(f) (2003).

[420] 49 C.F.R. § 661.7(g) (2003).

The regulation concludes by providing for two instances in which a waiver need not or may not be granted. The former is where the foreign nation in which the item is produced has entered into an agreement with the United States to suspend the "Buy America" requirement.[421] The latter is where although the foreign nation in question has entered into such an agreement, it has violated the terms of the agreement by discriminating against American-made goods that are within the scope of the agreement.[422]

To receive a waiver, a bidder must ordinarily request it in writing "in a timely manner" through the grantee that is making the procurement.[423] The grantee will then in turn submit the request in writing, with all relevant facts and supporting information, to the Administrator through the appropriate regional FTA office.[424] The exception to the general rule is where a bidder is requesting either a public interest waiver or an availability waiver. In such a case, the bidder itself may submit the waiver request to FTA, with a copy to the grantee, who may also submit a request.[425] Following review of the request, the Administrator will publicly release a written determination listing the reasons for granting or denying the requested waiver.[426] This procedure applies to all iron, steel, and manufactured goods not in compliance with the "Buy America" requirements, as well as rolling stock failing to meet the 60 percent domestic content requirement.[427]

5. Pre-Award Buy America Audit

As initially implemented, no uniform review mechanism existed to verify the domestic content of rolling stock procured through FTA grants. This changed, however, with the passage of STURAA.[428] STURAA directed FTA (at the time called UMTA) to develop standards for both pre-award and post-delivery audits to assess the domestic content of rolling stock, as well as verifying that the vehicles complied with federal motor vehicle safety requirements and the specification of the bid itself.[429] STURAA further mandated that FTA must make provisions for independent inspections as part of the prescribed auditing procedures.[430] To this end, FTA formulated 49 C.F.R. § 663,[431] which applies to all recipients of grants under the Federal Transit Act, and 23 U.S.C. § 103(e)(4), using those funds to purchase passenger-carrying rolling stock.[432]

49 C.F.R. § 663 defines "pre-award" as being that period before the grantee enters into a formal contract with the bidder.[433] An "audit" is a review resulting in a report containing certification of compliance with the "Buy America" requirements, bid specifications, and, if applicable, the Federal Motor Vehicle Safety Standards.[434] Indeed, an audit is specifically limited to verifying those points.[435] Funds provided through an FTA grant may be used by the grantee to cover the costs of any activities related to the audit process.[436] The grantee is obligated to certify it will carry out the auditing process in compliance with the terms of FTA regulations and maintain the requisite certifications on file.[437] Failure by the grantee to comply with the requirements of the regulation can result in the suspension or compulsory repayment of any funds provided by FTA.[438] The purpose of a pre-award audit is to verify that the rolling stock proposed by the bidder complies with applicable "Buy America" and federal motor vehicle safety requirements. It must be noted that the pre-award audit is independent of both the post-delivery audit and any FTA investigation of "Buy America" compliance that might be implemented in accord with the procedures discussed in § 5.02.03 above.[439]

A pre-award audit must include three parts: (1) a duly executed "Buy America" certificate; (2) a statement that the purchase meets the grantee's requirements; and (3) a Federal Motor Vehicle Safety certificate, if necessary.[440] The requirement for a "Buy America" cer-

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[421] 49 C.F.R. § 661.7(h)(1) (2003), by implication, permits such a suspension. The U.S.-Canada Free Trade Agreement, NAFTA, and similar agreements do not constitute suspensions of this provision however. Hughes at 221–22. As of the last revision to 49 C.F.R. § 661.7(h), no agreement existed that suspended the requirement. The FTA considers this portion of the regulation "inactive." 61 Fed. Reg. 6300, 6300-01 (1996).

[422] 49 C.F.R. § 661.7(h)(1) and (2) (2003). As no such agreements exist as of this writing, this provision is likewise inactive.

[423] 49 C.F.R. § 661.9(b) (2003). A grantee may also request a waiver on its own initiative.

[424] 49 C.F.R. § 661.9(c) (2003).

[425] 49 C.F.R. § 661.9(d) (2003).

[426] 49 C.F.R. § 661.9(e) (2003).

[427] 49 C.F.R. § 661.9(a) (2003); 49 C.F.R. § 661.11(x) (2003). If rolling stock has some foreign content but meets the 60 percent threshold, the bidder merely needs to complete the appropriate "Buy America" certificate. 49 C.F.R. § 661.12 (2003).

[428] Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 159. 56 Fed. Reg. 48384 (1991).

[429] 56 Fed. Reg. 48384 (1991).

[430] *Id*.

[431] *Id*.

[432] 49 C.F.R. § 663.3 (2003). 49 C.F.R. § 663 also applies to funds disbursed under the National Capital Transportation Act; however, that act applies only to Washington, D.C., transit agencies. 49 C.F.R. § 663.3 (2003).

[433] 49 C.F.R. § 663.5(a) (2003).

[434] 49 C.F.R. § 663.5(f) (2003).

[435] 49 C.F.R. § 663.9 (a) and (b) (2003). It should be noted that an audit mandated by this section is separate from the audit process required by the Office of Management and Budget through its Audits of State and Local Governments Circular A-128 of 1985. 49 C.F.R. § 663.9(c) (2003).

[436] 49 C.F.R. § 663.11 (2003).

[437] 49 C.F.R. § 663.7 (2003).

[438] 49 C.F.R. § 663.15 (2003).

[439] 49 C.F.R. § 663.13 (2003).

[440] 49 C.F.R. § 663.23 (a) through (c) (2003). The Federal Motor Vehicle Safety standards are promulgated by the Na-

tificate may be met in two different ways. If a waiver has been granted for the purchase, then a letter to that effect from FTA will suffice.[441] Absent a waiver (which is rarely granted), the grantee must have certification, prepared by itself or by a party other than the manufacturer or its agents, which lists components and subcomponents of the rolling stock, identified by manufacturer, country of origin, and costs, along with the location of final assembly and a description of activities and costs associated with that assembly.[442] As a matter of practice, many grantees believe that a pre-award audit prepared by an independent third party offers advantages of increased accuracy and reduced prospects of a successful claim of organizational conflict of interest. A statement that the purchase meets the grantee's requirements must include certification that the desired rolling stock satisfies the specifications given in the bid advertisement and that the bidder is a responsible manufacturer capable of meeting the advertisement's specifications.[443] If the rolling stock acquired would be subject to the Federal Motor Vehicle Safety standards, the grantee must obtain, and keep on file, a copy of the manufacturer's certification information that confirms the rolling stock complies with those standards.[444] If the rolling stock acquired is not subject to the Federal Motor Vehicle Safety Standards, the grantee must keep on file its certification that it received a statement to that effect from the manufacturer.[445] The only exception to the requirement that some sort of record be kept on file concerning the rolling stock's compliance with Federal Motor Vehicle Safety Standards is where the rolling stock is not a motor vehicle.[446]

6. Post-Delivery Buy America Audit

The requirement of a post-delivery audit was created at the same time as the pre-award audit, and it is a substantially similar process.[447] "Post-delivery" is defined as that time period from when the rolling stock is delivered to the grantee until: (1) title to the rolling stock is transferred to the grantee, or (2) the rolling stock is put into revenue service, whichever comes first.[448] An "audit" is, once again, a review resulting in a report containing certification of compliance with the "Buy America" requirements, bid specifications, and, if applicable, Federal Motor Vehicle Safety Standards.[449] The scope and financing methods for a post-delivery audit are identical to those of the pre-award audit.[450] The purpose of a post-delivery audit is to verify that the rolling stock, as actually manufactured, meets the bidder's contractual and regulatory obligations.[451] A post-delivery audit must be completed before the rolling stock's title is transferred to the grantee.[452]

Like a pre-award audit, a post-delivery audit must include three parts: (1) a duly executed "Buy America" certificate; (2) a statement that the purchase meets the grantee's requirements; and (3) a Federal Motor Vehicle Safety Standard certificate, if necessary.[453] There are two possible means by which the requirement for a "Buy America" certificate may be satisfied. One is a letter from FTA granting a waiver for the purchase.[454] In the absence of a waiver, the grantee must have certification, prepared by itself or an independent third party, which lists components and subcomponents of the rolling stock, identified by manufacturer, country of origin, and costs, along with the location of final assembly and a description of activities and costs that were associated with such assembly.[455] As a matter of practice, many grantees prefer that the certification be prepared by an independent third party. A report from an experienced outside party may provide greater technical expertise than is available in-house, and eliminates the risk that the post-delivery audit was slanted toward ratifying the award decision made by procurement staff. A statement that the purchase meets the grantee's requirements must include a report from a resident inspector at the manufacturing site that provides accurate records of all vehicle construction activity and explains how the construction and operation of the rolling stock meets the specifications of the contract.[456] Following the inspector's certification, the completed rolling stock must also be visually inspected and road tested, after which the rolling stock may be considered by the grantee to have met the contract's specifications.[457]

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tional Highway Traffic Safety Administration and are codified at 49 C.F.R. § 571 (2002).

[441] 49 C.F.R. § 663.25(a) (2003).

[442] 49 C.F.R. § 663.25(b)(1) and (2) (2003).

[443] 49 C.F.R. § 663.27(a) and (b) (2003).

[444] 49 C.F.R. § 663.41 (2003).

[445] 49 C.F.R. § 663.43(a) (2003).

[446] 49 C.F.R. § 663.43(b) (2003).

[447] 56 Fed. Reg. 48384 (1991).

[448] 49 C.F.R. § 663.5(b) (2003).

[449] 49 C.F.R. § 663.5(f) (2003).

[450] 49 C.F.R. §§ 663.3, 663.7, 663.9, 663.11, 663.13, and 663.15 (2003).

[451] *See* Letter from Gregory B. McBride, Acting Chief Counsel, FTA, to Rolf Meissner, Vice President and General Manager, Siemens Transportation Systems, Inc., Vehicle Division (June 5, 2001) (*available at* http://www.fta.dot.gov/library/legal/buyamer/inltrs/stsi6501.html (visited April 21, 2003)).

[452] 49 C.F.R. § 663.31 (2003).

[453] 49 C.F.R. § 663.33(a) through (c) (2003).

[454] 49 C.F.R. § 663.35(a) (2003).

[455] 49 C.F.R. § 663.35(b)(1) and (2) (2003).

[456] 49 C.F.R. §§ 663.37(a)(1) and (2) (2003). A resident inspector must be someone who was at the manufacturing site throughout the time of manufacture of the rolling stock, other than an employee or agent of the manufacturer. 49 C.F.R. § 663.37(a) (2003). Some transit industry members claim that the resident inspector need not be present during the entire manufacturing process, but the regulation does not explicitly make such an allowance.

[457] 49 C.F.R. § 663.37(b) (2003).

An exception to the regular procedure for the post-delivery review of rolling stock is made for procurements of 10 or fewer buses or any quantity of ordinary production model vans.[458] In the event of such procurements, a resident inspector's report is not required; the grantee must simply visually inspect and test drive the rolling stock.[459] The other post-delivery audit requirements still apply, however.

As in the pre-award audit, if the rolling stock acquired would be subject to the Federal Motor Vehicle Safety Standards, the grantee must obtain, and keep on file, a copy of the manufacturer's certification information that confirms the rolling stock complies with those standards.[460] If the rolling stock acquired is not subject to the Federal Motor Vehicle Safety Standards, the grantee must keep on file its own certification that it received a statement to that effect from the manufacturer.[461] The only exception to the requirement that a record be kept on file concerning the rolling stock's compliance with Federal Motor Vehicle Safety Standards is where the rolling stock is not a motor vehicle.[462]

If the grantee is unable to complete a post-delivery audit because it cannot be certified that the rolling stock meets the "Buy America" requirements or that it meets the grantee's requirements, the grantee may reject the rolling stock.[463] The grantee may then exercise any legal rights it has under the contract or at law.[464] Alternatively, the grantee and manufacturer may agree to conditional acceptance of the rolling stock pending the manufacturer's correction of the deviations within a reasonable period of time.[465]

7. Other "America First" Regulations

There are two other "America First" regulations that are of tangential interest to the realm of transit procurement. These are typically called "Fly America"[466] and "Ship America."[467] "Fly America" simply requires that, with certain exceptions, anyone whose air travel is financed with federal government funds must use a U.S. flag air carrier service.[468] The term "U.S. flag air carrier service" is broadly construed. In addition to regular U.S. flag air carriers,[469] the term also includes foreign air carriers that have entered into code-sharing arrangements with U.S. flag air carriers, provided that the ticket or e-ticket documentation identifies the U.S. flag air carrier's designator code and flight number.[470]

A foreign air carrier may not be used merely because of cost, convenience, or personal preference.[471] However, a foreign air carrier may be used where:

1. Use of such an air carrier is a matter of necessity;[472]

2. The service is provided under a transportation agreement that the United States and the home government of the foreign carrier are parties to and that DOT has determined to meet the requirements of the Fly America Act;[473]

3. No U.S. flag air carrier provides service on a particular leg of the route, but in such a case the traveler may only use the foreign carrier to travel to the nearest point possible that will permit a transfer to a U.S. flag air carrier;[474]

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[458] 49 C.F.R. § 663.37(c) (2003).

[459] *Id*.

[460] 49 C.F.R. § 663.41 (2003).

[461] 49 C.F.R. § 663.43(a) (2003).

[462] 49 C.F.R. § 663.43(b) (2003).

[463] 49 C.F.R. § 663.39(a) (2003). Strangely, this part of the regulation omits any reference to the Federal Motor Vehicle Safety Standards as being grounds to reject delivery of rolling stock. This would seem to imply that the grantee must accept delivery of the rolling stock, but presumably would have a breach of contract action that would require the correction of the defects. The use of the permissive "may" by the regulation is also peculiar, and the regulation offers no guidance, nor does the Federal Register entry for the regulation (59 Fed. Reg. 43,778), nor does the definitive "Dear Colleague Letter" on the subject (Dear Colleague Letter from Gordon J. Linton, Administrator, FTA (Mar. 18, 1997) (*available at* http://www.fta.dot.gov/library/reference/buyamerica/byamrdc3.htm (visited April 23, 2003)), *amended by* Dear Colleague Letter from Gordon J. Linton, Administrator, FTA (Aug. 5, 1997) (*available at* http://www.fta.dot.gov/library/reference/buyamerica/dc_c-97-13.html (visited April 21, 2003)). Based on other FTA rulings, however, it appears likely that the FTA would withdraw its funding for the part of the procurement that involved noncompliant rolling stock. *See* Letter from Patrick W. Reilly, Chief Counsel, FTA, to Stanley L. Kaderbeck, Deputy Commissioner and Chief Engineer, City of Chicago Department of Transportation (Dec. 14, 1999) (*available at* http://www.fta.dot.gov/library/legal/buyamer/inltrs/bal121499.html (visited April 21, 2003)) (rejecting request for a waiver for two noncompliant steel beams but offering that if the beams were procured separately with nonfederal funds, the FTA would still fund the remainder of the original procurement).

[464] 49 C.F.R. § 663.39(a) (2003).

[465] 49 C.F.R. § 663.39(b) (2003).

[466] 41 C.F.R. §§ 301-10.131 through 301-10.140 (2002).

[467] 46 C.F.R. §§ 381.1 through 381.9 (2002). "Ship America" is also sometimes referred to as "Cargo Preference" by FTA.

[468] 41 C.F.R. § 301-10.132 (2002). Under the MA, this includes trips financed through FTA grant money. FTA MA § 14.c. A U.S. flag air carrier is a carrier that holds a certificate under 49 U.S.C. § 41102, with the exception of foreign air carriers operating under permits. 41 C.F.R. § 301-10.133 (2002).

[469] A U.S. flag air carrier is a carrier that holds a certificate under 49 U.S.C. § 41102, with the exception of foreign air carriers operating under permits. 41 C.F.R. § 301-10.133 (2002).

[470] 41 C.F.R. § 301-10.134 (2002).

[471] 41 C.F.R. §§ 301-10.139 and 301-10.140 (2002).

[472] 41 C.F.R. § 301-10.135(a) (2002). Necessity exists when service via a U.S. flag air carrier is available but: (1) it cannot provide the air transportation needed; (2) it will not accomplish the agency's mission; (3) a foreign carrier will provide more expeditious travel in the event of medical problems; (4) an unreasonable safety risk is posed by traveling on a U.S. flag air carrier; or (5) there are no available seats in the authorized class of service on a U.S. flag air carrier, but such seats are available on a foreign air carrier. 41 C.F.R. § 301-10.138(a) and (b) (2002).

[473] 41 C.F.R. § 301-10.135(b) (2002).

[474] 41 C.F.R. § 301-10.135(d) (2002).

4. A U.S. flag air carrier involuntarily reroutes traffic to a foreign air carrier;[475]

5. Travel time on a foreign carrier would be 3 hours or less, while use of a U.S. flag air carrier would at least double the travel time;[476]

6. The costs of such transportation will be reimbursed in full by a third party;[477]

7. Despite offering nonstop or direct service to the destination, use of a U.S. flag carrier would extend travel time by 24 hours or more;[478]

8. Use of a U.S. flag air carrier would increase the number of transfers that must be made outside of the United States by two or more;[479]

9. Where nonstop or direct service is not available and use of a U.S. flag air carrier would increase travel time by 6 hours or more;[480] or

10. Where nonstop or direct service is not available and use of a U.S. flag air carrier would result in a connection time of 4 hours or more at an overseas airport.[481]

The "Ship America" regulations define cargoes that must be transported on U.S. flag vessels and the procedures necessary to document those activities.[482] The U.S. DOT is explicitly subject to the conditions of the "Ship America" regulations.[483] Cargoes that are subject to the terms of the regulation include equipment, materials, or commodities procured for the account of the United States, as well as such cargoes procured with grants, loans, or guarantees made by the federal government.[484] A party subject to "Ship America" must supply the Office of National Cargo and Compliance with a report providing certain information about any shipments within 20 working days of the date of loading if the shipment originates from the United States, or 30 working days if it originates in another country.[485] The report must be in the format approved by the Maritime Administrator.[486] Alternatively, a properly notated copy of the ocean bill of lading, in English, may be substituted for the report.[487]

All cargoes shipped by a federal department or agency that fall under the "Ship America" regulations must first be loaded on available U.S. flag vessels.[488] Where it is not feasible to transport an entire shipment exclusively on board U.S. flag vessels, the cargo must be loaded in such a manner as to give U.S. flag vessels freight revenue per long ton that is at least equal to the revenue generated for the foreign flag vessels.[489] Federal departments and agencies are obligated to require all grantees or other fund recipients to make use of U.S. flag vessels in such a way that domestically owned vessels receive at least 50 percent of the revenue generated by the shipment.[490]

D. PROPERTY ACQUISITION

1. Real Property Acquisition and the URARPAPA

The acquisition of real property by a state agency using federal funds requires the agency to comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URARPAPA).[491] URARPAPA was Congress's response to the large-scale displacement of people and businesses that had resulted from the vast expansion of federally-funded highway, mass transit, and urban redevelopment programs in the previous decade and a half.[492] URARPAPA was passed for the purpose of establishing "a uniform policy for the fair and equitable treatment of person displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance."[493] In particular, URARPAPA was passed to ensure that "displaced persons"[494] do not "suffer dispro-

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[475] 41 C.F.R. § 301-10.135(e) (2002).

[476] 41 C.F.R. § 301-10.135(f) (2002).

[477] 41 C.F.R. § 301-10.135(g) (2002).

[478] 41 C.F.R. § 301-10.136(a) (2002).

[479] 41 C.F.R. § 301-10.136(b)(1) (2002).

[480] 41 C.F.R. § 301-10.136(b)(2) (2002).

[481] 41 C.F.R. § 301-10.136(b)(3) (2002).

[482] 46 C.F.R. § 381.1 (2002). Certain provisions of the "Ship America" regulation are unlikely to be of ordinary concern to the transit industry, such as those dealing with the shipment of bulk agricultural goods (46 C.F.R. § 381.9), and are therefore excluded from this analysis. Please consult the C.F.R. for a more complete discussion of issues related to "Ship America."

[483] 46 C.F.R. § 381.2(c)(15) (2002).

[484] 46 C.F.R. § 381.2(b)(1) and (4) (2002). As provided for by the MA, this includes cargoes obtained with FTA grant money. FTA MA § 14.b.

[485] 46 C.F.R. § 381.3(a) (2000). The report must include: (1) the identity of the sponsoring U.S. government agency or department; (2) the name of the vessel; (3) the vessel flag of registry; (4) the date of loading; (5) the port of loading; (6) the port of final discharge; (7) the commodity description; (8) the gross weight in pounds; and (9) the total ocean freight revenue in U.S. dollars. 46 C.F.R. § 381.3(a)(1) through (9) (2002).

[486] 46 C.F.R. § 381.3(b) (2002).

[487] *Id*.

[488] 46 C.F.R. § 381.5 (2000). An exemption is permitted to this where the agency and the Maritime Administrator agree that there are no available U.S. flag vessels at "fair and reasonable rates" or where there is a "substantially valid reason" for loading foreign vessels first. 46 C.F.R. § 381.5(a) and (b) (2002).

[489] 46 C.F.R. § 381.4 (2002).

[490] 46 C.F.R. § 381.7 (2002).

[491] 42 U.S.C. § 4621 (2000). Interested readers should also consult FTA Circular 5010.1C, ch. II on this subject.

[492] Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. No. 91-646, 84 Stat. 1895 (1971) (codified as amended at 42 U.S.C. § 4601 *et seq.*).

[493] 42 U.S.C. § 4621(b) (2000).

[494] A "displaced person" is any person who moves from real property, moves their personal property from real property, or is a residential tenant, or conducts a business or farm operation that will be permanently displaced as a direct result of a written notice of intent to acquire or the acquisition of such real property in whole or in part for a program or project undertaken by a federal agency or with federal financial assistance. 42 U.S.C. §§ 4601(6)(A)(i) and (ii) (2000). This does not

portionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons."[495]

Before FTA may approve any federally financed grant to, or contract or agreement with, a grantee that will result in the acquisition of real property or otherwise displace a person within the scope of URARPAPA, the grantee must provide "appropriate assurances" that it will comply with both URARPAPA and DOT's pertinent regulations.[496] A grantee may provide such assurances at one time to cover all subsequent federally assisted programs or projects if the federal agency believes that would serve the purposes of URARPAPA.[497] If a federal or state agency provides federal funds to a third party that will cause displacement, the agency providing the funds is responsible for ensuring compliance with DOT's regulations, even if the contract between the agency and the third party stipulates that the third party is responsible.[498] FTA may choose to waive any requirement under DOT's regulations provided that URARPAPA does not mandate the requirement and that the waiver would not reduce any assistance or protection promised by the regulations.[499] As an alternative to the URARPAPA regulatory regime, FTA may release funds to a grantee if the latter certifies that there exists a comparable state provision providing equal or greater protection than URARPAPA.[500] Where there are multiple compensatory programs available, a displaced person may not receive compensation under URARPAPA if another program (such as the aforementioned state provision) is in effect.[501]

FTA is required to monitor state compliance with URARPAPA and DOT's regulations.[502] To this end, FTA periodically must investigate a grantee's performance, with the grantee being obligated to provide any information requested for the purpose of the investigation.[503] If the investigation reveals that a grantee has failed to comply with federal (or FTA-approved equivalent state) laws and regulations governing the payment of relocation assistance, property transfer costs, or litigation expenses, FTA should withhold further funding from the project until the grantee brings itself into compliance.[504] If the grantee is in violation of any other laws and regulations pertinent to real property acquisition, FTA may withhold funding until the situation is rectified.[505] In either event, FTA must notify the "lead agency" (i.e., DOT acting through FHWA), of its intention to withhold funds at least 15 days prior to making a final determination about whether to do so.[506]

A grantee receiving federal funds for real property acquisition or other displacement of persons must maintain records of all such acquisitions and displacements in sufficient detail to show compliance with URARPAPA and DOT regulations.[507] Additionally, a grantee must submit a report of its real property acquisition and displacement activities if FTA so requests.[508]

2. The Appraisal Process

a. Content of Appraisals

Before an attempt is made to acquire real property, whether by negotiation with a property owner or an action under eminent domain, the grantee interested in acquiring the property must obtain an appraisal of the property's value.[509] The format and level of documentation for an appraisal will depend on the complexity of the work required.[510] However, an agency must develop minimum standards for appraisals "consistent with established and commonly accepted appraisal practice" for properties that, due to their simplicity or low value, would not require the degree of analysis necessary for a

include persons who are determined to have been living unlawfully on the property, who moved into the property with the intent of obtaining assistance under URARPAPA, or had rented the property with the knowledge that their tenancy would be terminated by the property acquisition. 42 U.S.C. § 4601(6)(B)(i) and (ii) (2000).

[495] 42 U.S.C. § 4621(b) (2000). Working under this direction from Congress, DOT formulated 49 C.F.R. §§ 24.1 *et seq*. While these regulations are largely a recapitulation of URARPAPA, it does bring with it a somewhat more pragmatic outlook. For example, DOT's regulations begin with the statement that the purpose of them, among other things, is "to encourage and expedite acquisition by agreements with…owners, to minimize litigation and relieve congestion in the courts, and to promote public confidence in federal and federally-assisted land acquisition programs." 49 C.F.R. § 24.1(a) (2002).

[496] 49 C.F.R. § 24.4(a)(1) (2002).

[497] *Id*.

[498] 49 C.F.R. § 24.4(a)(2) (2000).

[499] 49 C.F.R. § 24.7 (2002). Any request for a waiver must be examined on a case-by-case basis. 49 C.F.R. § 24.7 (2002).

[500] 49 C.F.R. § 24.4(a)(3) (2002); 49 C.F.R. § 24.601 (2002).

[501] 49 C.F.R. § 24.3 (2002).

[502] 49 C.F.R. § 24.4(b) (2002).

[503] 49 C.F.R. § 24.603(a) (2002).

[504] 49 C.F.R. § 24.603(b) (2002). Interestingly, this regulation specifically uses the word "should," which implies the federal agency retains some measure of discretion about whether to withhold payments. The regulation does not offer guidance as to when it may be appropriate to continue payments despite a violation.

[505] 49 C.F.R. § 24.603(b) (2002).

[506] *Id*.

[507] 49 C.F.R. § 24.9(a) (2002). These records are to be kept for at least 3 years after each displaced person receives the final payment to which he or she is entitled under the appropriate federal laws and regulations. 49 C.F.R. § 24.9(a) (2002).

[508] 49 C.F.R. § 24.9(c) (2002). However, such a report may not be required more frequently than once every 3 years unless the FTA shows good cause. 49 C.F.R. § 24.9(c) (2002).

[509] 49 C.F.R. § 24.102(c)(1) (2002). An appraisal is not necessary if the owner has approached the agency about the possibility of donating the property or where the agency reasonably anticipates the fair market value of the property would be $2500 or less. 49 C.F.R. § 24.102(c)(2) (2002).

[510] 49 C.F.R. § 24.103(a) (2002).

detailed appraisal.[511] A detailed appraisal reflecting "nationally recognized appraisal standards, including, to the extent appropriate, the Uniform Appraisal Standards for Federal Land Acquisition" must be prepared for all other real property acquisitions.[512] Additionally, if the owner of a "real property improvement" plans to remove it prior to acquisition of the property (e.g., an above-ground swimming pool, prefabricated tool shed, etc.), the amount offered for the property must be discounted by the salvage value of the improvement.[513]

b. Appraiser Qualifications

Agencies (federal or state) are required to establish minimum qualifications for appraisers.[514] These qualifications must be consistent with the degree of complexity posed by the appraisal assignment.[515] If an agency wishes to employ an independent appraiser for a "detailed appraisal," the appraiser so retained must be certified in accordance with Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989.[516] (See Section 5.03.02.01 above for a description of what must be included in an appraisal.) An appraiser or reviewing appraiser may not have any interest, direct or indirect, in the property to be appraised that could in any way conflict with the preparation or review of the appraisal.[517] Compensation for appraisal work must not be predicated upon the value of the property.[518]

c. Appraisal Reviews

Any grantee that is making acquisitions of real property must have an appraisal review process.[519] At a minimum, the process must include a qualified reviewing appraiser who shall examine all appraisals to determine whether each meets applicable appraisal requirements, and return individual appraisal reports for corrections or revisions if necessary.[520] If the reviewing appraiser determines that an appraisal is unsatisfactory, and it is not practical to obtain an additional appraisal, then the reviewing appraiser may "develop appraisal documentation" to support an approved or recommended valuation.[521] The reviewing appraiser's certification of the recommended or approved value of the property must be set forth in a signed statement that identifies the appraisal reports used and explains the basis for the certification.[522] Damages or benefits to any remaining property must also be identified in the certification.[523] If a significant amount of time has passed since the initial appraisal, the grantee must obtain a new appraisal of the property.[524]

3. The Real Property Acquisition Process

A grantee that plans on acquiring real property is subject to a wide range of obligations under URARPAPA and DOT's regulations for the purpose of protecting property owners and tenants' interests and rights.[525] The obligations discussed below apply to almost any acquisition of real property for projects where there is federal financial assistance in any part.[526] The only circumstances where these obligations do not apply are those where:

1. The transaction is voluntary;[527]

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[511] *Id*.

[512] *Id*. A detailed appraisal must at least include: (1) the purpose and function of the appraisal, a definition of the property being appraised, and a statement of the assumptions and limiting conditions affecting the appraisal; (2) an adequate description of the physical characteristics of the property being appraised (and, in the case of a partial acquisition, an adequate description of the remaining property), a statement of the known and observed encumbrances, title information, location, zoning, present use, an analysis of highest and best use, and at least a 5-year sales history of the property; (3) all relevant and reliable approaches to value consistent with commonly accepted professional appraisal practices; (4) a description of comparable sales, including a description of all relevant physical, legal, and economic factors such as parties to the transaction, source and method of financing, and verification by a party involved in the transaction; (5) a statement of the value of the real property to be acquired and, for a partial acquisition, a statement of the value of the damages and benefits, if any, to the remaining real property; and (6) the effective date of valuation, date of appraisal, signature, and certification of the appraiser. 49 C.F.R. § 24.103(a)(1) through (6) (2002). To the extent permitted by state law, the appraiser should adjust his or her findings to avoid any reflection of the property's likely acquisition upon its value, other than that due to physical deterioration within reasonable control of the owner. 49 C.F.R. § 24.103(b) (2002).

[513] 49 C.F.R. § 24.103(c) (2002).

[514] 49 C.F.R. § 24.103(d)(1) (2002).

[515] *Id*. The regulation does not prescribe exact qualifications, but it does recommend examining "experience, education, [and] training." 49 C.F.R. § 24.103(d)(1) (2002).

[516] 49 C.F.R. § 24.103(d)(2) (2002). The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 is codified at 12 U.S.C. §§ 3331 *et seq*. (2000).

[517] 49 C.F.R. § 24.103(e) (2002).

[518] *Id*. An appraiser may not act as a negotiator for the acquisition of any property that he or she has done appraisal work on, except where the property is valued at $2500 or less and the grantee so approves. 49 C.F.R. § 24.103(e) (2002).

[519] 49 C.F.R. § 24.104 (2002).

[520] 49 C.F.R. § 24.104(a) (2002).

[521] 49 C.F.R. § 24.104(b) (2002).

[522] 49 C.F.R. § 24.104(c) (2002).

[523] *Id*.

[524] 49 C.F.R. § 24.102(g) (2002). The regulation does not define how great a delay is necessary to reach the level of "significant."

[525] 49 C.F.R. § 24.1 (2002).

[526] 49 C.F.R. § 24.101(a) (2002).

[527] For a transaction to be considered voluntary it must meet *all* of the following requirements: (1) no specific site or property needs to be acquired; (2) the property to be acquired is not part of an intended, planned, or designated project area where all or substantially all of the property within the area is to be acquired within specific time limits; (3) the agency will not acquire the property in the event negotiations fail to result in an

2. The grantee making the acquisition lacks eminent domain power;[528]

3. The property is to be acquired from a government entity and the grantee making the acquisition cannot condemn property of that sort;[529] or

4. The property is to be acquired by a cooperative from a party who, as a condition of membership in the cooperative, has agreed to provide needed real property without charge.[530]

Aside from the acquisition of fee simple interests in land, these obligations also apply where the grantee is seeking to acquire fee title subject to a life estate, acquire a lease of 50 years or more (including options), or acquire a permanent easement.[531]

A grantee must make every reasonable effort to acquire real property by negotiation.[532] But before those negotiations may commence, the grantee is obligated to undertake a number of preliminary tasks. As soon as is feasible, the grantee must notify the owner of its interest in acquiring the property, the grantee's need to secure an appraisal of the property, and the basic protections given the owner under URARPAPA and DOT's own regulations.[533] Following the appraisal process (discussed above), the grantee must establish an amount, not less than the appraisal value, that it believes is the just compensation for the property, and promptly deliver to the owner a written offer for the property on those price terms.[534] The grantee must make reasonable efforts to contact the owner or the owner's agent and discuss its offer for the property, along with its acquisition policies and procedures.[535] Following the grantee's overtures, the owner shall be given reasonable opportunity to consider the offer and to present information for the purpose of suggesting the modification of the grantee's offer.[536] If that information is compelling, a material change in the condition of the property has occurred, or a significant amount of time has passed since the initial appraisal, the grantee is obligated to have the original appraisal updated or a new one prepared.[537] If a meaningful change in the fair market value is found, the grantee must promptly reestablish the amount of just compensation and submit a modified offer to the owner in writing.[538]

The purchase price for the property may exceed the amount determined as being just compensation when reasonable efforts to negotiate an agreement at that amount have failed and an authorized official of the grantee certifies the greater settlement as being "reasonable, prudent, and in the public interest."[539] A written justification must be prepared that indicates the available information that supports such a settlement.[540] If the acquisition of part of the property would result in the owner holding "an uneconomic remnant," the grantee shall offer to acquire that remnant as well.[541] The grantee may agree to permit a former owner or tenant to remain on the property following its acquisition with the understanding that the grantee may terminate the leasehold on short notice and that rent will be charged at the fair market rate for such occupancy.[542]

Special provisions govern the acquisition of property that includes tenant-owned improvements. A grantee must offer to acquire at least an equal interest in all buildings, structures, or other improvements on any property to be acquired, and this shall include any improvement a tenant has made where it has the right or obligation to remove the improvement at the expiration of its lease term.[543] Just compensation for a tenant-owned improvement is calculated as the amount by which the improvement contributes to the fair market value of the whole property or its salvage value, whichever is greater.[544] However, no payment may be made to a tenant-owner for any improvement unless:

1. The tenant-owner transfers to the grantee its entire interest in the improvement;

2. The owner of the property where the improvement is located disclaims its interest; and

3. The payment would not result in the duplication of any compensation otherwise authorized by law.[545]

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amicable agreement and the owner is informed of such in writing; and (4) the agency informs the owner of what it believes to be the fair market value of the property. 49 C.F.R. § 24.101(a)(1)(i) through (iv) (2002).

[528] The agency must unambiguously notify the owner of its lack of eminent domain power before making an offer for the property and also inform the owner of what it believes to be the fair market value of the property. 49 C.F.R. § 24.101(a)(2)(i) and (ii) (2002).

[529] *See, e.g.,* TEX. LOCAL GOV'T CODE § 261.001 (2000), which gives counties eminent domain power over all public lands except those serving as cemeteries.

[530] 49 C.F.R. § 24.101(a)(1) through (4) (2002).

[531] 49 C.F.R. § 24.101(b) (2002).

[532] 49 C.F.R. § 24.102(a) (2002).

[533] 49 C.F.R. § 24.102(b) (2002).

[534] 49 C.F.R. § 24.102(d) (2002). Along with the offer, the agency must provide the owner a written statement giving the basis of the offer for just compensation, which must include: (1) a statement of the amount offered, and in the case of a partial acquisition, the compensation for damages, if any, to the remaining property; (2) a description and location identification of the real property and the interest in the real property to be acquired; and (3) an identification of the buildings, structures, and other improvements that are considered to be part of the real property for which the offer of just compensation is made. 49 C.F.R. §§ 24.102(e)(1) through (3) (2002).

[535] 49 C.F.R. § 24.102(f) (2002).

[536] *Id.*

[537] 49 C.F.R. § 24.102(g) (2002).

[538] *Id.*

[539] 49 C.F.R. § 24.102(i) (2002).

[540] *Id.*

[541] 49 C.F.R. § 24.102(k) (2002).

[542] 49 C.F.R. § 24.102(m) (2002).

[543] 49 C.F.R. § 24.105(a) (2002).

[544] 49 C.F.R. § 24.105(c) (2002).

[545] 49 C.F.R. § 24.105(d)(1) through (3) (2002).

Aside from just compensation for the property itself, an owner is entitled to other sorts of reimbursements under URARPAPA and DOT's guidelines as well. An owner must be reimbursed for all reasonable costs necessarily incurred for recording fees and other similar expenses incidental to conveying the property to the agency,[546] penalty costs for prepayment of preexisting recorded mortgages, and the *pro rata* share of any prepaid property taxes for the period after the grantee obtains title or takes effective possession of the property, whichever is earlier.[547] When feasible, the grantee shall pay these costs directly so as to spare the owner from having to pay them and then seek reimbursement from the grantee.[548] An owner is also entitled to reimbursement for any reasonable expenses (e.g. attorney's fees, appraisal fees, etc.) incurred as a result of a condemnation action, but only if:

1. The final judgment of the court is that the grantee cannot acquire the property via condemnation;
2. The condemnation proceeding is abandoned by the grantee other than under an agreed-upon settlement; or
3. The court renders a judgment in favor of the owner in an inverse condemnation proceeding or the grantee effects a settlement of such proceeding.[549]

A grantee is prohibited from advancing the date of condemnation, delaying negotiations, or otherwise undertaking any coercive actions calculated to induce an agreement on the terms for acquiring the property.[550] Furthermore, before requiring the owner to surrender possession of the property, the grantee must pay the owner the agreed purchase price or, in the event of a condemnation action, deposit with the court an amount not less than the grantee's determination of fair market value or the court's award of compensation.[551] Grantees are barred from intentionally creating circumstances that would give rise to an inverse condemnation proceeding.[552] If a grantee wishes to use eminent domain to acquire property, it must institute formal condemnation proceedings.[553]

4. The Relocation Process

Before a grantee acquires real property, it must assess whether that planned acquisition will result in the displacement of any persons (including both residential and business displacement).[554] A person is "displaced" when he or she moves from a piece of real property or removes his or her personal property from a piece of real property as a direct result of:

1. A written notice of intent to acquire, the initiations of negotiations for, or the acquisition of, the real property in whole or in part for a federally-funded project;
2. The rehabilitation or demolition of the real property for the purposes of a federally-funded project; or
3. A written notice of intent to acquire, or the acquisition, rehabilitation or demolition of, in whole or in part, other real property on which the person conducts a business or farm operation, for a federally-funded project.[555]

However, there are many exceptions to this general category of displaced persons, which may reduce or even eliminate the possible amount of compensation a person may receive.[556]

A "relocation assistance advisory program" must be established to deal with any anticipated displaced persons.[557] The advisory program must include such facilities and services as are appropriate or necessary to render many possible forms of assistance.[558] This assistance must include, but is not limited to:

1. A determination of the relocation needs and preferences of each person to be displaced, including a personal interview with each person;
2. Providing current and continuing information on the availability, purchase prices, and rental costs of comparable replacement dwellings; and
3. Providing current and continuing information of the availability, purchase prices, and rental costs of suitable commercial and farm properties and locations, along with assistance in establishing a business or farm in a suitable replacement location.[559]

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[546] This does not include costs solely required for perfecting the owner's title to the property prior to transfer. 49 C.F.R. § 24.106(a)(1) (2002).

[547] 49 C.F.R. § 24.106(a)(1) through (3) (2002).

[548] 49 C.F.R. § 24.106(b) (2002).

[549] 49 C.F.R. § 24.107(a) through (c) (2002).

[550] 49 C.F.R. § 24.102(h) (2002).

[551] 49 C.F.R. § 24.102(j) (2002).

[552] 49 C.F.R. § 24.102(l) (2002).

[553] *Id*.

[554] This planning procedure should be done in "such a manner that the problems associated with the displacement of individuals, families, businesses, farms, and non-profit organizations are recognized and solutions are developed to minimize the adverse impacts of displacement." 49 C.F.R. § 24.205(a) (2002). *See* 49 C.F.R. § 24.205(a) and (b) (2002) for more on the recommended contents of such a plan and financing for planning.

[555] 49 C.F.R. § 24.2 (2002). See definition of "displaced person."

[556] These exceptions include, but are not limited to: (1) a person who moves before the initiation of negotiations, unless the agency determines that the person was displaced as a direct result of the project; (2) a person who enters into occupancy of the property only after the date of its acquisition for the project; (3) a person who has occupied the property for the purpose of obtaining assistance under URARPAPA; (4) a person whom the agency determines has not been displaced as a direct result of a partial acquisition; (5) a person who is determined to be in unlawful occupancy prior to the initiation of negotiations or who has been evicted for cause; or (6) a person who is not lawfully present in the U.S. and who has been determined to be otherwise ineligible for relocation benefits. 49 C.F.R. § 24.2 (2002). See definition for "persons not displaced," which also includes a number of more exotic categories of non-displaced persons.

[557] 49 C.F.R. § 24.205(c)(1) (2002).

[558] 49 C.F.R. § 24.205(c)(2) (2002).

[559] 49 C.F.R. § 24.205(c)(2)(i) through (iii) (2002).

The relocation program shall be coordinated with project work and "other displacement-causing activities" to minimize duplication of functions and to ensure that displaced persons receive consistent treatment.[560]

As soon as feasible, the grantee must furnish a person scheduled to be displaced with a general written description of the grantee's relocation program.[561] Eligibility for relocation assistance begins on the same date as the initiation of negotiations for the property; the grantee must promptly notify occupants in writing of that change in status.[562] No lawful occupant may be required to move unless he or she has received at least 90 days advance written notice of the earliest date by which he or she may be required to move.[563] In the event that the 90-day notice is issued before a comparable replacement dwelling is available, the notice must state clearly that the occupant will not have to move earlier than 90 days after such a dwelling comes available.[564] However, an occupant may be required to move on less than 90 days written notice if the grantee determines that such a notice is impracticable.[565]

Ordinarily, a person to be displaced from a residential dwelling cannot be compelled to vacate the property unless at least one comparable replacement dwelling has been made available.[566] Where possible, three or more comparable replacement dwellings should be made available for the occupant's selection.[567] However, under certain limited circumstances FTA (or in the case of "flexed funds," FHWA) may grant a waiver to the requirement that a comparable dwelling be made available before a person is obligated to move from a property.[568] Where a waiver is granted, the grantee must "take whatever steps are necessary" to relocate the person to a "decent, safe and sanitary dwelling," including paying for reasonable moving expenses and increases in rent or utilities incurred as part of the relocation, and make available a comparable replacement dwelling as soon as it is feasible.[569]

Once a person has become eligible for relocation assistance, he or she must file a claim for assistance with such supporting documentation as may be reasonably required to demonstrate expenses occurred for the purposes of relocating.[570] A displaced person must also demonstrate that he or she is a U.S. citizen, an alien lawfully present in the United States, or, in the case of a corporation, authorized to conduct business within the United States.[571] The grantee is obligated to provide

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[560] 49 C.F.R. § 24.205(d) (2002).

[561] 49 C.F.R. § 24.203(a) (2002). The written description must, at minimum, do the following: (1) inform the person that he or she may be displaced for the project and explain the relocation payment for which the person may be eligible; (2) inform the person that he or she will be given reasonable relocation advisory services; (3) describe the conditions of eligibility and the procedures for obtaining the relocation payment; (4) inform the person that he or she will be given at least 90 days notice before being displaced and that the displacement will not occur unless at least one comparable replacement dwelling has been made available; (5) inform the person that anyone who is an alien not lawfully present in the U.S. is ineligible for relocation advisory services and payments unless such ineligibility would result in exceptional and extremely unusual hardship to a qualifying spouse, parent, or child; and (6) describe the person's right to appeal the agency's determination as to a person's application for assistance under URARPAPA and DOT's regulations. 49 C.F.R. § 24.203(a)(1) through (5) (2002). As the regulation states that the grantee "shall" provide a description of the relocation program to people scheduled to be displaced, the grantee must provide copies of the description even if those potentially displaced have not requested relocation assistance.

[562] 49 C.F.R. § 24.203(b) (2002).

[563] 49 C.F.R. § 24.203(c)(1) (2002). The notice must either give a specific date as the earliest date by which the occupant may be required to move, or indicate that the occupant will receive a further notice, giving at least 30 days advance warning, of the specific date by which the occupant must depart the property. 49 C.F.R. § 24.203(c)(3) (2002).

[564] 49 C.F.R. § 24.203(c)(3) (2002).

[565] 49 C.F.R. § 24.203(c)(4) (2002). The agency is required to keep a copy of its determinations in the applicable case file.

[566] 49 C.F.R. § 24.204(a) (2002). A "comparable replacement dwelling" is one that is: (1) decent, safe, and sanitary; (2) functionally equivalent to the original dwelling; (3) adequate in size to accommodate the occupants; (4) in an area not subject to unreasonably adverse environmental conditions; (5) in a location generally not less desirable than the location of the original dwelling with respect to public utilities or commercial and public facilities, and that is reasonably accessible to the person's place of employment; (6) on a site that is typical in size for residential development with normal site improvements, including customary landscaping but not necessarily special improvements (such as swimming pools or gazebos); (7) currently available to the displaced person on the private market (unless the person was receiving government housing assistance, in which case it may so reflect that assistance); and (8) within the financial means of the displaced person. 49 C.F.R. § 24.2 (2002). See definition for "comparable replacement dwelling."

[567] *Id*. A comparable replacement dwelling is considered to have been made available when: (1) the person to be displaced has been informed of its location; (2) the person has had sufficient time to negotiate and enter into a purchase agreement or lease for the property; and (3) the person is assured of receiving the relocation assistance and acquisition payment in sufficient time to complete the purchase or lease of the property. 49 C.F.R. § 24.204(a)(1) through (3) (2002).

[568] The available circumstances are: (1) a major disaster as defined in § 102(c) of the Disaster Relief Act of 1974; (2) a presidentially declared national emergency; or (3) any other emergency that requires immediate evacuation of the property, such as when continued occupancy would constitute a substantial danger to the health or safety of the occupants. 49 C.F.R. § 24.204(b)(1) through (3) (2002).

[569] 49 C.F.R. § 24.204(c)(1) through (3) (2002).

[570] 49 C.F.R. § 24.207(a) (2002). All claims must be filed with the agency within 18 months after the date of displacement, if tenants, or, if owners, the date of displacement or the date of the final acquisition payment, whichever is later. The agency may waive this deadline for good cause. 49 C.F.R. § 24.207(d)(1) and (2) (2002).

[571] 49 C.F.R. § 24.208(a)(1) through (4) (2002). *See* 49 C.F.R. § 24.208 (2002) for further details on how citizenship and legal

reasonable assistance to displaced persons in completing and filing a claim.[572] Payments may be made in advance of receiving all supporting documents if the displaced person can demonstrate the need for such a payment to avoid hardship; however, the grantee must impose safeguards to ensure that the payment is used for a proper purpose.[573] If there were multiple occupants in the original dwelling who relocated to different dwellings, the grantee must determine whether they had formed a single household in the original dwelling and allocate relocation assistance accordingly.[574] Where the grantee disapproves all or part of a claim for payment, or refuses to even consider one, it is required to promptly notify the claimant in writing, including the basis for its determination and the procedures for appealing that decision.[575]

A variety of different payment schemes for relocation are based on the nature of the displacement, either residential or "nonresidential" (i.e. businesses, farms, and nonprofit organizations). For residential moves, the displaced person has a choice of receiving a fixed payment[576] or a payment for any reasonable and necessary moving expenses as determined by the agency.[577] Residential displaced persons receive different payments for housing based on the length and nature of their residency on the original property.[578] A similar choice between fixed payments[579] and reasonable and necessary expenses[580] confronts nonresidential displaced persons, but such persons can further qualify to receive reasonable and necessary "reestablishment expenses."[581] Finally, special rules for compensation exist where the grantee is displacing a utility's facilities in such a manner as to create "extraordinary expenses" for the utility.[582]

5. Nondiscrimination in Housing

The implementation of any real property acquisition and relocation plan must be in accordance with a wide variety of civil rights legislation and executive orders.[583] Of particular significance, however, are 42 U.S.C. § 3608 and Executive Order 12892 of January 20, 1994, as these impose affirmative duties to combat discrimination on DOT, its agencies, and recipients of federal funds. The former mandates: "All executive departments and agencies shall administer their programs and activities relating to housing and urban development…in a manner affirmatively to further the purposes of [the Fair Housing Act] and shall cooperate with the Secretary [of Housing and Urban Development] to further such purposes."[584]

Executive Order 12892 builds significantly upon this base. It begins by explaining that the term "programs and activities" includes not only those operated directly by the federal government, but all grants, loans, and contracts made by the federal government, as well as all exercise of regulatory responsibility.[585] This includes FTA grants of federal financial assistance, including interstate substitution funds.[586] In addition to carrying

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residency may be certified and verified, and how to deal with relocation assistance for illegal aliens.

[572] 49 C.F.R. § 24.207(a) (2002). Claims shall be reviewed in an expeditious manner and payment shall be made as soon as is feasible following receipt of sufficient supporting documentation. 49 C.F.R. § 24.207(b) (2002).

[573] 49 C.F.R. § 24.207(c) (2002). Advance relocation payments are to be deducted from the total of the final relocation amount to be paid. 49 C.F.R. § 24.207(f) (2002).

[574] 49 C.F.R. § 24.207(e) (2002). If the occupants originally formed a single household, each person must receive a prorated share of the reasonable relocation payment that would have been made to a single household. If the occupants originally constituted multiple households, then each such groups are entitled to separate relocation payments. 49 C.F.R. § 24.207(e) (2002).

[575] 49 C.F.R. § 24.207(g) (2002).

[576] 49 C.F.R. § 24.302 (2002). The amount of the fixed payment is to be determined based on a schedule prepared by the Federal Highway Administration.

[577] 49 C.F.R. § 24.301 (2002). This includes, but is not limited to: (1) transportation for a distance of 50 miles or less; (2) storage of personal property for 12 months or less; and (3) insurance for the replacement value of personal property moved. 49 C.F.R. § 24.301(a), (d), and (e) (2002). See 49 C.F.R. § 24.301 (2002) for a further list of ordinarily permissible expenses and 49 C.F.R. § 24.305 (2002) for a list of expenses usually not covered by relocation payments.

[578] The categories are homeowners with 180 days or more of occupancy prior to initiation of negotiations (49 C.F.R. § 24.401 (2002)), tenants and homeowners with 90 days or more of occupancy prior to initiation of negotiations (49 C.F.R. § 24.402 (2002)), and tenants and homeowners with less than 90 days of occupancy prior to initiation of negotiations (no housing payments beyond the acquisition amount provided for under 49 C.F.R. §§ 24.101 and 24.102 (2002)). Mobile home owners and occupants receive special consideration. 49 C.F.R. §§ 24.501 *et seq*.

[579] 49 C.F.R. § 24.306 (2002).

[580] 49 C.F.R. § 24.303 (2002).

[581] 49 C.F.R. § 24.304 (2000). Reestablishment expenses include, but are not limited to: (1) repairs or improvements to the replacement real property as required by federal, state, or local law; (2) advertisement of replacement location; and (3) estimated increased costs of operation for the first 2 years of operation at the replacement site. 49 C.F.R. § 24.304(a)(1), (8), and (10) (2002). *See* 49 C.F.R. § 24.304(a) and (b) (2002) for a more complete list of permissible and impermissible reestablishment expenses.

[582] 49 C.F.R. § 24.307 (2002). "Extraordinary expenses" are those that, in the determination of the agency, are not routine or predictable expense relating to the utility's occupancy of rights-of-way and are not ordinarily budgeted as operating expenses. 49 C.F.R. § 24.307(b) (2002).

[583] 49 C.F.R. § 24.8 (2002). This includes § 1 of the Civil Rights Act of 1866, Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, the Age Discrimination Act of 1975, Executive Order 11063—Equal Opportunity and Housing, and Executive Order 12259—Leadership and Coordination of Fair Housing in Federal Programs.

[584] 42 U.S.C. § 3608(d) (2000).

[585] Exec. Order No. 12892 § 1-102, 59 Fed. Reg. 2939 (1994).

[586] FTA MA § 21.b.

out the actions specifically delineated in 42 U.S.C. § 3608, the head of each executive agency must take appropriate steps to require that all persons and entities "who are applicants for, or participants in, or who are supervised or regulated under" the prescribed forms of agency programs must comply with the terms of the order.[587] If the agency receives a complaint alleging a violation of the Fair Housing Act, or otherwise obtains information that suggests that a violation has occurred, it must forward that complaint or information to the Secretary of Housing and Urban Development for investigation.[588] Where the complaint or information "indicate a possible pattern or practice of discrimination in violation of the Act," the agency must also forward it to the U.S. Attorney General.[589]

The order requires the head of each executive agency to cooperate and provide requested information to any other agency that is investigating possible violations of the Fair Housing Act.[590] If an executive agency concludes that any person or entity, including state or local government agencies, within the scope of its authority has not complied with the terms of the order, or any other regulation or procedure adopted pursuant to the order, the executive agency must first attempt to resolve the violation by "informal means."[591] However, the agency is under no obligation to attempt an informal resolution if another executive agency has already attempted such a resolution with the same person or entity and been rebuffed.[592] If informal resolution fails or is discarded as an option, the executive agency must impose sanctions, but may choose which of those sanctions is appropriate,[593] including:

1. Cancellation or termination of agreements or contracts;

2. Refusal to extend any further aid under any program or activity within the scope of the order until it is satisfied that the person or entity will bring itself into compliance;

3. Refusal to grant supervisory or regulatory approval to such a person or entity under any program or activity within the scope of the order or revoke any such approval if already given; and

4. Any other action that "may be appropriate under law."[594]

The sanctions imposed by the executive agency in response to findings of violations of the order must be reported to the Secretary of Housing and Urban Development and, where appropriate, the Attorney General, in a timely manner.[595]

Finally, the order directs the heads of executive agencies to consider imposing sanctions against any person or entity against which another executive agency has imposed sanctions under the terms of the order.[596] The heads of executive agencies should also consider imposing sanctions against a person or entity that is subject to an ongoing investigation by either the Secretary of Housing and Urban Development or the Attorney General.[597]

6. Energy Assessments

In the wake of the energy crises of the 1970s, the U.S. federal government briefly became concerned with improving energy efficiency in public buildings.[598] In the realm of transportation, that led to the enactment of a regulation mandating the preparation of an "energy assessment" as a condition for FTA (at the time UMTA) assistance in the construction or modification of buildings.[599] An energy assessment consists of an analysis of the total energy requirements of a building, at a level of detail appropriate for the scale of the proposed construction activity.[600] The analysis must consider the overall design of the facility or modification, and alternative designs thereto, particularly noting the materials and techniques to be used and "special or innovative" conservation measures to be employed.[601] Furthermore, the analysis must also describe the fuel

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[587] Exec. Order No. 12892 § 2-203, 59 Fed. Reg. 2939 (1994).

[588] Exec. Order No. 12892 § 2-204, 59 Fed. Reg. 2939 (1994).

[589] *Id*.

[590] Exec. Order No. 12892 § 5-501, 59 Fed. Reg. 2939 (1994).

[591] Exec. Order No. 12892 § 5-502, 59 Fed. Reg. 2939 (1994). "Informal means" include "conference, conciliation, and persuasion."

[592] *Id*.

[593] *Id*.

[594] Exec. Order No. 12892 § 5-502(a) through (d), 59 Fed. Reg. 2939 (1994).

[595] Exec. Order No. 12892 § 5-505, 59 Fed. Reg. 2939 (1994).

[596] Exec. Order No. 12892 § 5-504, 59 Fed. Reg. 2939 (1994).

[597] *Id*.

[598] The structure of the regulation clearly suggests that at one time it was intended to serve as part of a larger regulatory regime for energy conservation that never came to pass. While 49 C.F.R. § 622.301 (2003) requires the preparation of an energy assessment, it makes no provisions for penalties in the event the applicant fails to prepare one. (FTA could possibly withhold funding because the application would be incomplete, but the regulation does not specifically authorize that.) Furthermore, there is no requirement that the applicant follow any of the recommendations contained in the analysis; it need merely note them and continue on. By comparison, 14 C.F.R. § 152.607, which is the only other part of the C.F.R. to require an energy assessment, orders that "the building design, construction, and operation shall incorporate, to the extent consistent with good engineering practice, the most cost-effective energy conservation features identified in the energy assessment." 14 C.F.R. § 152.607 (2000). The fact that the term "energy assessment" only appears in three C.F.R. parts, including 49 C.F.R. § 622.301 and 14 C.F.R. § 152.607 (discussed above), further indicates its status as an anomaly. Removal of the energy assessment requirement or a reconfiguration of it into something meaningful would doubtless serve to eliminate a time-consuming step of the procurement process that is currently of very limited value.

[599] 45 Fed. Reg. 58038 (1980) (codified at 14 C.F.R. 152.607 and 49 C.F.R. § 622.301).

[600] 49 C.F.R. § 622.301(a) (2003).

[601] 49 C.F.R. § 622.301(a)(1) through (3) (2003).

requirements for the structure's environmental systems and operations essential to its purpose, project those requirements over the life of the facility, and provide an estimated cost for the fuel.[602] With respect to fuel, the analysis must outline opportunities for using an energy source other than petroleum or natural gas, with particular emphasis on the potential for employing renewable energy sources.[603]

Compliance with the energy assessment requirement must be documented as part of the EA or EIS for projects that are obligated to produce them.[604] For all other projects, the energy assessment must be sent to FTA along with the application for assistance.[605] Under certain limited circumstances, FTA may provide financial assistance for the purpose of completing the assessment.[606]

7. Property Management

Because of concerns about the possibility of federal funds being spent on projects that will be abandoned prematurely, the Federal Transit Act imposes certain minimum requirements on grantees for the maintenance of equipment and facilities. Under "urbanized area formula grants,"[607] the Secretary may release a grant only if the applicant submits a program of projects that has gone through a public participation process.[608] The applicant must also provide certification for the grant's fiscal year that the applicant:

1. Has or will have the legal,[609] financial,[610] and technical capacity[611] to carry out the program;

2. Has or will have satisfactory continuing control[612] over the use of the equipment and facilities; and

3. Will maintain[613] the equipment and facilities.[614]

Substantially similar restrictions apply for ordinary capital investment grants and loans as well.[615] Except as

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[602] 49 C.F.R. § 622.301(a)(4) (2003).

[603] 49 C.F.R. § 622.301(a)(5)(i) and (ii) (2003).

[604] 49 C.F.R. § 622.301(b) (2003).

[605] *Id*.

[606] 49 C.F.R. § 622.301(c) (2003). *See* OMB Circular No. A-87, Rev. (1997) for how to determine eligibility for such assistance.

[607] These grants are for capital projects and financing "the planning and improvement costs of equipment, facilities, and associated capital maintenance items for use in mass transportation, including the renovation and improvement of historic transportation facilities." 49 U.S.C. § 5307(b)(1) (2000).

[608] *See* 49 U.S.C. § 5307(c) (2000) for a description of the public participation process.

[609] "Legal capacity" is a demonstration by the grant applicant that it is authorized and eligible under state or local law to receive and use FTA funds. Officials of the applicant must have been delegated the appropriate authority under state and local law by the governing body of the applicant. For the first capital program grant application, an "Opinion of Counsel" must be submitted by the applicant. This document identifies the legal authority of the applicant, citing relevant statutes and describing any pending legislation or litigation that may impact the applicant's legal authority or otherwise affect the applicant's ability to complete the project. Subsequent grant applications may be based on the authority expressed in the annual certification process. However, if a change occurs that may significantly affect the applicant's ability to carry out the project, a new Opinion of Counsel must be filed with FTA. Federal Transit Administration Circular 9300.1A ch. 6 § 4(b) (1998) [FTA C. 9300.1A].

[610] "Financial capacity" refers to the applicant's ability to match and manage FTA funds, cover cost overruns and operating deficits, and to maintain and operate federally-funded property and equipment. The sources of local and state contributions must be identified and assurances made that adequate funds are available from those sources. The statement of financial capacity must reflect two items: financial condition and financial capability. Financial condition includes historical trends and present experience in financial factors affecting the applicant's ability to operate and maintain its transit system at the current level of service. Financial capability concerns the sufficiency of the applicant's funding sources to meet any future operating deficits and capital costs, as well as the reliability of those sources. After an applicant's first grant procedure, financial capacity will be determined during its annual OMB Circular A-133 audit. FTA C. 9300.1A ch. 6 § 4(c) (1998). *See* Federal Transit Administration Circular 7008.1 (1987) for a detailed discussion of how to determine financial capacity.

[611] "Technical capacity" concerns the ability of the applicant to properly execute and manage federal grants. The FTA generally relies on its own past experience with the applicant; but where an applicant is seeking a capital grant for the first time, the applicant must demonstrate that it is able to complete the project in accordance with all relevant laws and regulation. All applicants must include a "proposed project milestone schedule" and certify that its procurement system is in compliance with all applicable federal laws, regulations, executive orders, and FTA Circular 4220.1D (now FTA Circular 4220.1E). FTA C. 9300.1A ch. 6 § 4(d) (1998).

[612] The FTA generally relies on its past experience with the grant applicant when making this determination. The grant applicant may include brief descriptions or references to documents supporting its capability to maintain adequate control of the property to be acquired. Evidence of such control may be shown through property inventory records, excess real property utilization plans, procurement manuals, financial reports, and related documents. If the applicant has previously received grants for capital projects, satisfactory continuing control may be demonstrated through biennial inventories of real property to ensure that the property continues to be needed for the purposes specified in the initial grants. FTA C. 9300.1A ch. 6 § 4(e) (1998).

[613] Grantees must maintain equipment and facilities obtained with federal funds in good operating order. Maintenance plans are required to be documented, and the grantee must have a system for recording and enforcing warranty claims. A first-time grant applicant should provide sufficient information to enable the FTA to determine whether the applicant will exercise satisfactory continuing control over equipment and facilities and that the applicant has an adequate maintenance plan. If a recent performance review of the applicant has been made under the Urbanized Area Formula Program, information from that review may be sufficient to make the necessary findings without further documentation. FTA C. 9300.1A ch. 6 § 4(f) (1998).

[614] 49 U.S.C. § 5307(d)(1)(A) to (C) (2001).

otherwise provided,[616] the Secretary may only release funds in those instances where it has been determined the applicant "has or will have the legal, financial, and technical capacity to carry out the project, satisfactory continuing control over the use of equipment or facilities, and the capability to maintain the equipment or facilities," along with the will to so maintain them.[617]

8. Flood Insurance

In 1968, Congress adopted the National Flood Insurance Program (NFIP) for the purpose of reducing the risk of catastrophic loss the public faced from flooding.[618] Executive branch agencies are ordinarily barred from providing funds for the acquisition of property, or construction on previously owned property, that has been determined to lie within a "special flood hazard" area.[619] Yet funds may be made available if the buildings, structures, and any personal property are covered by flood insurance at least equal to the development cost of the project or to the maximum limit of coverage permitted by the NFIP for the type of construction concerned, whichever is less, and for the life of the property regardless of changes in ownership.[620] Under the FTA MA, a grantee must participate in the NFIP where the project or acquisition in question has an insurable value of $10,000 or more.[621] It is therefore important that the grantee ascertain early in the planning process whether land under consideration for the project lies on a floodplain.

E. ACQUISITION OF ROLLING STOCK

1. General Acquisition Rules

The acquisition of rolling stock largely proceeds in the same manner as any other procurement; however, there are some notable differences. There are the special "Buy America" requirements that apply to rolling stock. Furthermore, an unusual statutory exception to the basic rules of competitive bidding applies to the acquisition of rolling stock.[622]

49 U.S.C. § 5326 specifically provides that grantees may enter into contracts for rolling stock based on initial capital costs or "performance, standardization, life cycle costs, and other factors" in addition to contracts reached through bidding.[623] This effectively gives explicit legal permission for the use of competitive proposals in place of sealed bids. FTA strongly encourages grantees to avail themselves of this option if possible.[624] Grantees may wish to obtain a copy of the American Public Transportation Association's (APTA) *Standard Bus Procurement Guidelines*, which contains suggested contract terms, warranty conditions, and other informa-

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[615] Funds released under these programs may be used for: (1) capital projects for new fixed guideway systems, and extensions to such existing systems, including the acquisition of real property, the initial acquisition of rolling stock for the system, alternatives analysis related to the development of the system, and the acquisition of rights-of-way and relocation, for fixed guideway corridor development for projects in the advance stage of alternatives analysis or preliminary engineering; (2) capital projects, including property and improvements other than highways and fixed guideway facilities, needed for an efficient and coordinated mass transportation system; (3) the capital costs of coordinating mass transportation with other transportation; (4) the introduction of new technology, through innovative and improved products, into mass transportation; (5) capital projects to modernize existing fixed guideway systems; (6) capital projects to replace, rehabilitate, and purchase buses and related equipment and to construct bus-related facilities; (7) mass transportation projects planned, designed, and carried out to meet the special needs of elderly individuals and individuals with disabilities; and (8) the development of corridors to support fixed guideway systems, including protecting rights-of-way through acquisition, construction of dedicated bus and high occupancy vehicle lanes and park-and-ride lots, and other nonvehicular capital improvements that the Secretary may decide would result in increased mass transportation usage in the corridor. 49 U.S.C. § 5309(a)(1) (2000).

[616] The exceptions are twofold. First, the Secretary may release funds to state or local government authorities for the acquisition of interests in real property to be used for mass transportation systems as long as there is a reasonable expectation that the property is required for mass transportation and will be so used within a reasonable amount of time. 49 U.S.C. § 5309(b)(1) and (2) (2000). Second, the Secretary may release funds for a new fixed guideway system, or an extension thereto, if it is determined that the project is: (1) based on the results of an alternatives analysis and preliminary engineering; (2) justified based on a comprehensive review of its mobility improvements, environmental benefits, cost effectiveness, and operating efficiencies; and (3) supported by an acceptable degree of local financial commitment, including evidence of stable and dependable financing sources to construct, maintain, and operate the system or extension. 49 U.S.C. § 5309(e)(1)(A) through (C) (2000).

[617] 49 U.S.C. § 5309(d)(1) and (2) (2000).

[618] Charles T. Griffith, *The National Flood Insurance Program: Unattained Purposes, Liability in Contract, and Takings*, 35 WM. & MARY L. REV. 727 (1994).

[619] 42 U.S.C. § 4012a(a) (2000).

[620] 42 U.S.C. § 4012a(a) (2000). However, if the funds are provided through a loan or loan guarantee, the insurance policy must only equal the outstanding principal of the loan and need only continue until the loan has been repaid in full. 42 U.S.C. § 4012a(a) (2000). Loans that are for an original amount of $5000 or less and that are made for a period of 1 year or less need not have flood insurance. 42 U.S.C. § 4012a(c)(2)(A) and (B) (2000). State-owned property need not be federally insured if the Director of the NFIP determines it to be covered by a state flood insurance program that offers comparable protection to the NFIP. 42 U.S.C. § 4012a(c)(1) (2000).

[621] FTA MA § 20.b. It should be noted that the FTA has apparently failed to promulgate an actual regulation, as required under 42 U.S.C. § 4012a(b)(2) (2000), but the Master Agreement is nonetheless considered controlling.

[622] FTA defines rolling stock as including "buses, vans, cars, railcars, locomotives, trolley cars and buses, and ferry boats, as well as vehicles used for support services." 49 C.F.R. § 661.3 (2000).

[623] 49 U.S.C. § 5326(c)(1) and (2) (2000).

[624] MANUAL § 6.3.1.1.

tion designed to assist in formulating an effective RFP.[625]

2. Bus Testing

A further difference between the acquisition of rolling stock, in particular buses,[626] and general procurements is the requirement that buses be tested at a specific federal government facility. In 1987, as part of STURAA,[627] Congress mandated that federal funds could be used to acquire new bus models after September 30, 1989, only if those bus models had been tested at a specific federal facility.[628] Consequently, FTA now requires all new or altered bus models to be tested in accordance with the bus testing standards below before final acceptance of the first vehicle by the grantee.[629]

It is the responsibility of the grantee to determine whether a vehicle it wishes to acquire is a "new bus model."[630] While it is the grantee's responsibility to determine whether the vehicle falls within the regulation's scope, it is the responsibility of the vehicle's manufacturer to schedule the testing and transport the test vehicle to the testing facility.[631] FTA and the manufacturer must pay 80 percent and 20 percent of the testing costs, respectively.[632]

Once the vehicle is delivered to the testing facility, it will be subject to different forms of testing depending both on the novelty and the life expectancy of the model. If the model has not previously been tested at the facility, then it must undergo the full range of tests in all categories of inspection.[633]

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[625] MANUAL § 6.3.1.2. (The Manual incorrectly refers to the organization as the American Public Transit Association.) Grantees should be aware that not all of the recommendations contained in the *Standard Bus Procurement Guidelines* comply with FTA or DOT requirements, so the text should be considered strictly advisory. MANUAL § 6.3.1.2. However, proper use of the *Standard Bus Procurement Guidelines* should significantly reduce the likelihood of bid protests as the guidelines were developed jointly by APTA members and bus manufacturers, so they are reflective of most industry standards.

[626] A bus is a "rubber-tired automotive vehicle used for the provision of mass transportation." 49 C.F.R. § 665.5 (2003).

[627] Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, tit. III, § 317(a), 101 Stat. 132, 233 (1987).

[628] 49 U.S.C. § 5323(c) (2000). Administered by Pennsylvania State University's Pennsylvania Transportation Institute in Altoona, the bus testing facility was formerly a training facility for railroad personnel. 57 Fed. Reg. 33394 (1992); 49 U.S.C. § 5318(a) (2000).

[629] 49 C.F.R. § 665.7(a) (2003).

[630] 49 C.F.R. § 665.7(b) (2003). The term "new bus model" is broader than simply a truly new design, in that it includes all bus models that first entered mass transit service in the U.S. on October 1, 1988, or later, and bus models that were in service prior to that date but that have subsequently undergone a "major change in configuration or components." 49 C.F.R. § 665.5 (2003). A "major change in configuration" is a change that may have a significant impact on the handling, stability, or structural integrity of the vehicle. 49 C.F.R. § 665.5 (2003). A "major change in components" means: (1) for a vehicle not manufactured on a mass produced chassis, a change in its engine, axle, transmission, suspension, or steering components; or (2) for a vehicle that is manufactured on a mass produced chassis, a change in the vehicle's chassis from one major design to another. 49 C.F.R. § 665.5 (2003).

[631] 49 C.F.R. §§ 665.21 and 665.25 (2003). Only a single test vehicle is required; it must already meet all applicable federal motor vehicle safety standards (*see* 49 C.F.R. §§ 571.1 *et seq.*), and be substantially fabricated and assembled by techniques and tooling that will be used in the production of subsequent vehicles of that model. 49 C.F.R. § 665.11(a)(1) through (3) (2003).

[632] 49 U.S.C. § 5318(d) (2000). As a practical matter, the manufacturer's share of the testing cost is passed on to the grantee. Thus, when a grantee makes a decision about technical specifications, it must assess whether it is willing to accept the delay and cost of having a vehicle tested at Altoona due to changes in configuration or components that the grantee may be interested in.

[633] 49 C.F.R. § 665.11(b) (2003). The categories of inspection are: (1) maintainability; (2) reliability; (3) safety; (4) performance; (5) structural integrity; (6) fuel economy; and (7) noise. "Maintainability" includes "bus servicing, preventive maintenance, inspection and repair." 49 C.F.R. pt. 665, App. A(1) (2003). "Reliability" is measured by recording all vehicle breakdowns that occur during testing, including repair time, and the actions necessary to restore the vehicle to operational status. 49 C.F.R. pt. 665, App. A(2) (2003). "Safety" is determined by the vehicle's handling and stability during obstacle and lane-change tests. 49 C.F.R. pt. 665, App. A(3) (2003). "Performance" is a function of the vehicle's acceleration and gradeability at seated load weight. 49 C.F.R. pt. 665, App. A(4) (2003). "Structural integrity" is determined by testing the vehicle's structural strength and durability, along with its resistance to physical distortion. 49 C.F.R. pt. 665, App. A(5) (2003). "Fuel economy" is determined by measuring miles attained per gallon of fuel expended at seated load weight. 49 C.F.R. pt. 665, App. A(6) (2003). "Noise" is measured from both the interior and exterior of the vehicle. 49 C.F.R. pt. 665, App. A(7) (2003). If the model itself has not been tested previously, but uses a mass-produced chassis that has been tested at the facility before for use in another model, then the new model need only undergo partial testing. 49 C.F.R. § 665.11(c) (2003). "Partial testing" is defined as performing only those tests that might yield significantly different data from previous tests on the chassis or model. 49 C.F.R. § 665.5 (2003). Equally, if the model itself has been tested previously, but the manufacturer now wishes to have the certified operational life of the model extended, partial testing is required. 49 C.F.R. § 665.11(d) and (f) (2003). If the model has been tested previously, it may be used in lower service life categories without further testing. 49 C.F.R. § 665.11(f) (2003). The life expectancy of the model is determined by its minimum service life as measured in years or miles. The categories are: (1) minimum service life of 12 years or 500,000 miles; (2) minimum service life of 10 years or 350,000 miles; (3) minimum service life of 7 years or 200,000 miles; (4) minimum service life of 5 years or 150,000 miles; and (5) minimum service life of 4 years or 100,000 miles. 49 C.F.R. § 665.11(e) (2003) A manufacturer may choose to terminate testing prematurely and will only be assessed the costs of any tests performed to the time testing was stopped. 49 C.F.R. § 665.27(b) (2003). The facility's operator will perform all maintenance and repairs on the test vehicle as per the manufacturer's specifications, unless the operator determines that the

Once testing is completed, the operator of the facility must provide a test report to the manufacturer that submitted the bus for inspection.[634] The manufacturer in turn must provide a copy of the test report to the grantee during the procurement process at the stage identified by the grantee.[635] If a bus model that has been tested has subsequently had alterations made to it that have not been tested, the manufacturer must notify the grantee of the alteration during the procurement process and describe it, explaining why the alteration was not considered a "major change" within the scope of the regulation.[636]

F. RAIL LINE, TRACKAGE RIGHTS, AND RIGHTS-OF-WAY

Prior to the ICC Termination Act of 1995, rail common carriers operating in interstate and foreign commerce fell under the jurisdiction of the Interstate Commerce Commission (ICC), as they had since the creation of this, the nation's first independent agency, in 1887.[637] With ICC's sunset, such jurisdiction, and much of its staff, was transferred to the nascent U.S. Surface Transportation Board (STB), housed within DOT.

Agreements between carriers for the transfer of operating authority from one railroad to another, or for the joint use of facilities—whether by line sales, leases, or trackage use arrangements—require prior review and approval by the STB.[638] STB also has broad authority to impose such conditions as it deems appropriate as a condition of approval of a transfer of operating authority.[639] STB also monitors and adjudicates disputes that may arise under trackage rights or lease arrangements.[640]

Smaller intercarrier transactions are usually not controversial, particularly with respect to leases in which both parties will use the track and accept the public service obligation. The same is true for trackage rights agreements, which allow two carriers to operate over a single track. However, STB has no authority to compel a railroad to allow another service provider, such as a transit operator, to operate over the rail carrier's track, though there have been legislative proposals to confer such authority to STB from time to time.[641]

In 1985, ICC streamlined processing of these transactions by providing for expeditious review under a "class exemption"[642] for many of these transactions,[643] which may be invoked by filing a 7-day advance notice at STB. Any person may challenge a particular transaction by filing a petition to revoke the exemption, though such revocations are rare.[644] Trackage rights allow one railroad to perform local, overhead, or bridge operations over the tracks of another carrier that may or may not continue to provide service over the same line.[645] Leases and contracts to operate rail lines by a Class I railroad also require STB approval.[646]

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nature of the maintenance or repair would require the manufacturer's assistance. 49 C.F.R. § 665.27(c) (2003). In that event, the operator must be allowed to supervise the manufacturer's work. 49 C.F.R. § 665.27(c) (2003). The manufacturer may observe all tests, even if it is not permitted to assist. 49 C.F.R. § 665.27(d) (2003). Posting an observer at the facility is highly recommended if the design is new or represents a very substantial change over an earlier design, as the observer (if sufficiently trained) may be able to answer questions for the testing staff, thereby reducing the amount of time necessary to complete the process.

[634] 49 C.F.R. § 665.13(a) (2003).

[635] 49 C.F.R. § 665.13(b)(1) (2000). If the manufacturer uses a test report in support of its effort to obtain a contract, it must make the report publicly available and notify the facility operator of this action. 49 C.F.R. § 665.13(b)(2) and (d) (2000). However, the test report is the only information or documentation that will be made public in connection with models tested at the facility. 49 C.F.R. § 665.13(e) (2000).

[636] 49 C.F.R. § 665.13(c) (2003).

[637] Paul Dempsey, *The Interstate Commerce Commission: The First Century of Economic Regulation,* 16 TRANSP. L. J. 1 (1987).

[638] STB approval under the statutory "public interest" standard automatically confers antitrust immunity, as well as immunity from other federal and state laws that might otherwise be used to block such a transaction. 49 U.S.C. § 11321 (2000).

[639] 49 U.S.C. § 11324(c) (2000).

[640] The statutory requirements for line sales differ depending upon whether the annual revenue of the involved carriers places them in the categories of Class I ($250 million or more), Class II (less than $250 million but more than $20 million) or Class III ($20 million or less). *See* 49 C.F.R. § 1201 1-1 (2002).

[641] KEVIN SHEYS, STRATEGIES TO FACILITATE ACQUISITION AND USE OF RAILROAD RIGHT OF WAY BY TRANSIT PROVIDERS (TCRP Legal Research Digest, 1994).

[642] 49 C.F.R. § 1180.2(d)(7) (2002).

[643] 49 C.F.R. § 1180.2(d) (2002). The class exemption embraces the acquisition of nonconnecting lines approved for abandonment; the acquisition of nonconnecting lines, where the transaction is not part of a series that would lead the railroads to connect with each other and does not involve a Class I railroad; renewal of leases; joint projects involving the relocation of a line of railroad that does not disrupt service to shippers; and acquisitions of trackage rights.

[644] Paul Dempsey & William Mahoney, *The U.S. Short Line Railroad Phenomenon: The Other Side of the Tracks,* 21 TRANSP. L.J. 383, 389 (1993).

[645] Bridge trackage rights improve operating efficiency for a carrier by providing alternative, shorter, and/or faster routes. Local trackage rights may introduce a new competitor. STB approval of trackage rights arrangements is required under either 49 U.S.C. 11323 (if a Class I carrier), 10902 (if a Class II or III carrier), or 10901 (if a noncarrier) (2000). See 49 C.F.R. § 1180 (proposals under § 11323); 49 C.F.R. § 1150 (proposals under § 10901 or § 10902) (1999).

[646] Lines are sometimes leased by a non-operating carrier to another carrier willing to assume the common carrier obligation of providing service on demand. 49 U.S.C. § 11323 (2000). See 49 C.F.R. § 1180 (2002). (Leases by a noncarrier or by a Class II or III railroad are handled as a line acquisition under 49 U.S.C. § 10901 or § 10902, respectively.) A class exemption exists for the renewal of previously approved leases, 49 C.F.R. § 1180.2(d)(4) (1999). INTERSTATE COMMERCE COMMISSION,

1. Line Sales to Noncarriers

A noncarrier, such as a transit operator, must obtain authorization from STB in order to acquire or operate an existing rail line from a railroad common carrier subject to STB's jurisdiction.[647] STB may disapprove such an application only if it finds the proposal inconsistent with the "public convenience and necessity."[648]

Since 1980, railroads have sold increasing numbers of branch lines to smaller carriers and noncarriers. As a consequence, several hundred new shortline and regional railroads have been created.[649] Moreover, several transit providers have also purchased rail lines without becoming common carriers subject to jurisdiction of STB.[650] By avoiding railroad common carrier status, transit providers avoid subjecting themselves to a plethora of STB regulatory requirements.[651]

The acquisition of a rail line by a noncarrier enjoys a simplified and expedited process.[652] Advance notice of 7 days for each proposed transaction, however, must be published in the *Federal Register*.[653]

STB's general policy has been not to impose labor protection provisions on the line transfers to noncarrier new entrants.[654] However, where the *only* apparent purpose of a proposed sale was to abrogate a collective bargaining agreement, the regulatory agency has declined to treat a proposal as a line sale to a noncarrier.[655] STB has also disapproved efforts to purchase rail lines under class exemptions when it found that the purchaser intended to scrap the line.[656]

2. Financial Assistance Program

The Staggers Rail Act of 1980 established expedited procedures for rail line abandonments.[657] But recognizing that line abandonments might result in the loss of valuable access to communities and shippers, and the loss of rights-of-way of potential value now or in the future, Congress established procedures whereby a "financially responsible person" might acquire the line either to preserve the service, or bank the right-of-way for future rail use.[658] A significant number of offers of financial assistance to purchase or subsidize rail lines are filed each year.[659] Many transit organizations have been among the purchasers.[660]

STUDY ON INTERSTATE COMMERCE COMMISSION REGULATORY RESPONSIBILITIES (1994).

[647] 49 U.S.C. § 10901(a)(3) and (4) (2000). 49 C.F.R. § 1150 (2002). The statute has been consistently construed in such a way that line acquisitions by existing carriers are governed by § 11343, *e.g.*, Railway Labor Exec. Ass'n v. ICC, 930 F.2d 511 (6th Cir. 1991), and noncarrier line acquisitions are covered by § 10901, *e.g.,* People of the State of Illinois v. United States, 604 F.2d 519, 524–25 (7th Cir. 1979). The STB adopted a class exemption in 1996 allowing Class III railroads to acquire and operate additional rail lines through a notification process. 49 C.F.R. § 1150.41 (2002).

[648] The STB may modify a proposal or condition its approval. 49 U.S.C. § 10901(c) (2000). The purpose of requiring regulatory approval for a noncarrier acquisition of an existing line is (1) to prevent a carrier from avoiding regulatory review by accomplishing indirectly (through a noncarrier affiliate) what it could not accomplish directly without regulatory scrutiny, and (2) to ensure that the public is not harmed by transfers of lines to entities that are not able to provide the needed rail service.

[649] See Dempsey & Mahoney, *supra* note 644, at 383.

[650] SHEYS, *supra* note 641, at 7–8.

[651] See 49 U.S.C. §§ 10101 *et seq.* (2000).

[652] *Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901, 1 I.C.C. 2d 810 (1985), aff'd* Illinois Commerce Comm'n v. ICC*,* 817 F.2d 145 (D.C. Cir. 1987); 49 C.F.R. §§ 1150.31 *et seq*. (2002). 49 C.F.R. § 1180.2(d)(2) (2002).

[653] 49 C.F.R. 1150.32 (2002). See Dempsey & Mahoney, *supra* note 644, at 383, 389.

[654] But for a comprehensive criticism of the ICC/STB activities in this arena, *see* William Mahoney, *The Interstate Commerce Commission/Surface Transportation Board as Regulator of Labor's Rights and Deregulator of Railroad's Obligations: The Contrived Collision of the Interstate Commerce Act with the Railway Labor Act,* 24 TRANSP. L.J. 241 (1997).

[655] *Sagamore National Corp.—Acquisition and Operating Exemption—Lines of Indiana Hi-Rail Corp.,* Finance Docket No. 32523 1994 Lexis 219 (1994).

[656] SURFACE TRANSPORTATION BOARD, 1996/1997 ANNUAL REPORT (1997).

[657] See Note, *Proposed Regulatory Reform in the Area of Railroad Abandonment*, 11 TRANSP. L.J. 301 (1979); Note, *The Staggers Rail Act of 1980: Authority to Compete With Ability to Compete*, 12 TRANSP. L.J. 213 (1982). The STB must determine whether "the public convenience and necessity require or permit a proposed abandonment or discontinuance. In applying this standard, the STB weighs the financial interests of the individual railroad, the service and development needs of local shippers and communities, and the public interest in maintaining a healthy, adequate interstate rail network. The STB must also evaluate whether the discontinuance or abandonment will have "a serious adverse impact on rural and community development." *See generally,* Paul Dempsey, *Entry Control Under the Interstate Commerce Act: A Comparative Analysis of the Statutory Criteria Governing Entry in Transportation,* 13 WAKE FOREST L. REV. 729 (1977).

[658] When a rail line is approved for abandonment, any person may offer to purchase or subsidize that line to permit continued rail service. 49 U.S.C. § 10905 (2000). 49 C.F.R. § 1152.27 (2002). The STB's financial assistance program is available to all rail lines authorized for abandonment. *Exemption of Rail Line Abandonments or Discontinuance—Offers of Financial Assistance*, 4 I.C.C. 2d 164, 169 (1987) (applying the financial assistance procedures to abandonments authorized by exemption under Section 10505 as well as those approved under Section 10903).

[659] From fiscal years 1988 through 1994, 90 offers of financial assistance were filed, covering a total of 1,575 miles of rail line.

[660] Examples include the Metropolitan Transit Authority of Harris County, Texas, *Union Pacific Railroad Abandonment*, 2001 STB Lexis 586 (2001); Madison County Metro-East Transit, *Norfolk Southern Railway Abandonment,* 2001 STB Lexis 336 (2001); Dallas Area Rapid Transit, *Dallas Area Rapid Transit Abandonment Exemption*, 2000 STB Lexis 664 (2000).

The Financial Assistance Program is designed to enable immediate and uninterrupted continuation of rail service on lines that otherwise would be abandoned and the right-of-way lost.[661] Statutory deadlines, however, limit the time that a railroad can be required to continue losing money from operating a line while a purchase or subsidy agreement is being negotiated.[662]

Whenever an application for abandonment is filed, a notice must be published in the *Federal Register* within 20 days.[663] Within 10 days of the decision or 120 days of the application, whichever comes sooner, any person may offer to purchase or subsidize that line to permit continued rail service.[664] If an offeror is found to be financially responsible[665] and the offer both reasonable (i.e., it is likely the assistance proposed would cover the difference between revenues attributable to the line and the avoidable cost of providing the service, plus a reasonable profit, or the acquisition cost of the line), and *bona fide*, STB must postpone the abandonment authority to allow the parties to negotiate.[666] If the parties fail to reach an agreement, STB can compel the carrier to sell the line to the offeror, or to provide subsidized service, with STB setting the amount of compensation.[667]

A local governmental institution such as a transit provider has several alternatives in pursuing a rail line: (1) the transit system could make its own offer of financial assistance for the line (though it might have a responsibility to continue freight service over the rail line); (2) the transit system could enter into an agreement with another offeror for shared use of the line after the acquisition; or (3) the transit system could oppose the line's acquisition by an offeror on grounds that it is not financially responsible, or has failed to make a *bona fide* offer.[668]

Without this program, persons who wish to preserve rail service could still purchase a line from the abandoning railroad or provide a subsidy through private, voluntary agreements with the abandoning carrier, though there would be no way to force the carrier to negotiate. Similarly, the program ensures against the loss of service while the arrangement is in negotiation. Most importantly, the Financial Assistance Program ensures that the right-of-way is not lost to reversionary interest holders, in which case the difficulty, cost, and time required to condemn the needed land likely would eliminate any prospect of restoring the line. State condemnation proceedings are not nearly as expeditious as the federal financial assistance program. Moreover, in some states condemnation actions are limited to public entities.[669] Under the law of other states, a transit agency intending to exercise its power of eminent domain may find that the eminent domain authority of the rail carrier is superior, barring condemnation by the transit authority.

3. Rails-To-Trails Program

A transit agency may not have the ability to purchase a right-of-way from a railroad seeking to abandon a line. Yet both the transit agency and the railroad may see value in preserving the right-of-way as a potential future line for transportation services as demand and financial ability grow. Section 8(d) of the National Trails System Act Amendments of 1983 provides for the preservation of rail rights-of-way that would otherwise be abandoned, and their use as recreational trails, if a voluntary agreement is concluded between the rail carrier and a potential rail sponsor. [670] The proposed trail sponsor must agree to two conditions:

1. To bear all managerial, financial, and legal responsibility for the right-of-way, including payment of property taxes and assumption of any liability in connection with the trail use; and

2. That the line shall remain subject to possible reactivation for rail service at any time.

Where these two conditions are met, the rail line will not be considered abandoned, and any reversionary interests in the underlying right-of-way will not be triggered during the interim period of trail use. STB may only deny a trail use application if the carrier refuses to participate, or the trail user fails to pay taxes and assume liability for the right-of-way.[671]

This "railbanking" provision is designed to preserve rail corridors as a national transportation resource while adding to the nationwide system of trails in the

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[661] *Exemption of Rail Line Abandonments or Discontinuance—Offers of Financial Assistance*, 4 I.C.C. 2d 164, 169 (1987) (applying the financial assistance procedures to abandonments authorized by exemption under Section 10505 as well as those approved under Section 10903).

[662] INTERSTATE COMMERCE COMMISSION, STUDY ON INTERSTATE COMMERCE COMMISSION REGULATORY RESPONSIBILITIES 45 (1994).

[663] 49 C.F.R. § 1152.27 (2003).

[664] 49 U.S.C. § 10905 (2000). 49 C.F.R. § 1152.27(c) (2003).

[665] Financial responsibility relates both to whether the offeror has the resources necessary to cover the line's fair market value purchase price, 49 U.S.C. § 10905(f)(1) (2000), and to operate the line for a 2-year period, 49 U.S.C. § 10905(f)(4) (2000). 49 U.S.C. § 10905(d) and (e) (2000). If an offeror is found to be financially responsible and the offer reasonable and *bona fide*, the STB must postpone the abandonment authority to allow the parties to negotiate.

[666] 49 U.S.C. § 10905(d) and (e) (2000).

[667] The STB must determine the amount of subsidy "based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line." 49 U.S.C. § 10905(e) and (f) (2000). In the case of a sale, the STB may not set a price that is below the fair market value of the line.

[668] SHEYS, *supra* note 641, at 5.

[669] INTERSTATE COMMERCE COMMISSION, *supra* note 622, at 45–46.

[670] 16 U.S.C. §§ 1247(d), 1248(b) (2000). This statute amended the National Trails System Act of 1968.

[671] 49 C.F.R. § 1152.29 (2002).

interim.[672] Railroad lines were laid before the growth of many cities and offer the only straight-line transportation corridor free of obstruction in many urban areas. Some transit operators have shown interest in preserving these rights-of-way for future passenger rail corridors. Previous legislative efforts to preserve unused rail rights-of-way had been largely unsuccessful because most rail rights-of-way are not owned in fee simple absolute by the railroad, but are held under an easement. [673] Under the law of some states, a railroad easement automatically expires, and the land reverts to the original landowner, if it is no longer used for rail service. Such an expiration provision may supersede state property law.[674]

In every abandonment proceeding, the public is advised of the potential availability of the line—through direct notice to the National Park Service and to the head of each county through which the line runs, and publication in both local newspapers and the *Federal Register*—and given an opportunity to negotiate voluntary agreements to use the line as a recreational trail if it is approved for abandonment. The trail sponsor must file a trail use request in an STB abandonment proceeding, which includes:

1. A map clearly identifying the corridor proposed for trail use;

2. A statement of willingness to accept financial responsibility, manage the trail, pay the property taxes, and accept responsibility for any liability arising from the use of the right-of-way as a trail; and

3. An acknowledgement that the use of the right-of-way for a trail is subject to the sponsor's fidelity to its obligations, and that future reactivation of the trail as a right-of-way is accepted.[675]

If the parties reach an agreement, the railroad may salvage its track and discontinue service on the line, but the right-of-way remains intact for use as a trail. If no agreement is reached, the railroad may abandon the line entirely, provided the other relevant statutory and regulatory obligations are fulfilled.[676]

While the Rails-to-Trails program theoretically supersedes state laws that would otherwise compel the return of a discontinued railroad easement to the underlying property holder,[677] the question of when "discontinued" becomes "abandoned" remains partially within the realm of state law.[678] Consequently there have been a string of court decisions finding that while the Rails-to-Trails program may convert a right-of-way to non-rail uses, such an action constitutes a taking.[679]

A representative case, *Glosemeyer v. United States*, concerned an action by a group of Missouri landowners. The landowners held fee interests in property burdened by two separate railroad easements held by the Missouri Pacific Railroad (MoPac) and the Missouri-Kansas-Texas Railroad Company (MKT).[680] The MoPac ceased operating trains over its line in question in 1991; it received permission from ICC to abandon the line in 1992, and that same year negotiated an agreement with a trail service provider.[681] The following year, the MoPac removed all rails and ties from the right-of-way.[682] The MKT ceased operating trains over its line in 1987, received permission from ICC to abandon the line later that year, and immediately thereafter turned over the line to a trail service provider.[683] Some time later, the MKT removed all track from the right-of-way.[684] The landowners alleged that they would have enjoyed full use of the right-of-way except for the railroads' transfer of their easements to the trail service providers, and consequently the transfer amounted to a taking of a new easement.[685]

The court recognized that Congress deliberately preempted state property law with the National Trails System Act Amendments of 1983, but it noted that where such preemption extinguishes a property interest, a compensable taking has occurred.[686] Thus whether the Rails-to-Trails Program effected a taking in this instance depended "upon the nature of the state-created property interest that petitioners would have enjoyed absent the federal action and upon the extent that the federal action burdened that interest."[687] In other words,

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[672] By 1999, some 930 trails had been developed over some 8,900 miles of abandoned rights-of-way outside the rail-banking program. U.S. GENERAL ACCOUNTING OFFICE, SURFACE TRANSPORTATION: ISSUES RELATED TO PRESERVING INACTIVE RAIL LINES AS TRAILS 4 (Oct. 1999).

[673] These include the alternative public use provisions of 49 U.S.C. § 10906 (2000); the provisions of 45 U.S.C. § 716(a)(4) (2000) for preserving track in fossil fuel natural resource areas; and the rail banking provisions of Section 809 of the Railroad Revitalization and Regulatory Reform Act of 1976, 49 U.S.C. § 10906.

[674] Preseault v. ICC, 494 U.S. 1, 8 (1990) [Preseault].

[675] U.S. GENERAL ACCOUNTING OFFICE, *supra* note 672, at 6.

[676] INTERSTATE COMMERCE COMMISSION, *supra* note 662, at 48.

[677] Preseault, 494 U.S. at 8.

[678] *See, e.g.*, Conrail v. Lewellen, 682 N.E.2d 779 (Ind. 1997), finding that for purposes of determining whether an easement returned to the underlying property owner, "abandonment" of a right-of-way was determined by state statute, not the ICC/STB; *see also* Chatham v. Blount County, 789 So. 2d 235 (Ala. 2001), while not specifically a Rails-to-Trails case, it recognized that state law defines when a rail line has been abandoned and a railroad may not transfer its easement once it has been extinguished.

[679] *See, e.g.,* Preseault; Fritsch v. Interstate Commerce Comm'n, 59 F.3d 248 (D.C. Cir. 1995); Glosemeyer v. Missouri K. T. R.R., 879 F.2d 316 (8th Cir. 1989); Chatham v. Blount County, 789 So. 2d 235 (Ala. 2001).

[680] Glosemeyer v. United States, 45 Fed. Cl. 771,774–75 (2000) [Glosemeyer]. While this case was heard in the U.S. Court of Federal Claims, the ruling was made using Missouri state law under the Erie doctrine.

[681] *Id*. at 774.

[682] *Id*. at 774.

[683] *Id*. at 775.

[684] *Id*. at 775.

[685] *Id*. at 775–76.

[686] *Id*. at 776.

[687] *Id*. at 776 (quoting Preseault at 24).

if the easements would have been terminated without the intervention of the Rails-to-Trails Program, then new easements for the recreational trails have been imposed.[688]

Under Missouri law, an abandonment of an easement occurs where there is evidence of an intention to abandon and acts consistent with that intent.[689] With particular regards to railroads, an easement for a right-of-way is extinguished when trains cease to operate over it with no prospect for resumption of service.[690] The court found the very fact that the railroads sought permission from ICC to abandon their lines demonstrated their intent to abandon their easements.[691] Meanwhile, the complete removal of tracks from the rights-of-way made it clear there was no prospect for resumption of rail service.[692] Finally, the fact that the railroads conveyed their entire legal easements to the trail service providers "for a contrary purpose" offered definitive proof of abandonment.[693]

The U.S. federal government attempted to argue that the use of the rights-of-way as trails that were part of the national "railbank" constituted use for a "railroad purpose" within the scope of state law.[694] However, the court strongly rejected this argument, pointing out that under Missouri law an easement "terminates as soon as such purpose ceases to exist, is abandoned, or is rendered impossible."[695] A "railroad purpose" has been defined in Missouri as one related to "the movement of trains over rails,"[696] and not to encompass other forms of transportation or recreational uses.[697] Consequently, while it was hypothetically possible for the rights-of-way to return to railroad use someday, the court found the fact that no "evidence was offered of a present intent to reinstate rail service in the future" established that the easements were indeed abandoned.[698] Having found that the plaintiffs were entitled to full use of their land, the court quickly concluded a taking had occurred and issued a summary judgment in their favor.[699]

G. INTELLECTUAL PROPERTY

FTA's purpose in providing financial assistance to research and development projects is to increase transportation knowledge in general rather than to benefit the direct recipient of federal largesse.[700] With regard to patents, a grantee must immediately notify FTA and give a detailed report of any patentable "invention, improvement, or discovery" made by the grantee, or its third party contractors, which is conceived of or first reduced to practice in the course of a federally-funded project.[701] Unless FTA waives its rights, in writing, to the patentable item or process, the grantee must turn over those rights in accordance with the Department of Commerce's regulations concerning federal interests in intellectual property.[702]

The MA deals with copyright issues in somewhat more detail. FTA interests extend to all "subject data"[703] delivered or to be delivered by a grantee to FTA under a grant or cooperative agreement.[704] Grantees, other than institutions of higher learning, may not publish or reproduce subject data in whole or in part, other than for their own internal purposes, without the written consent of FTA until such time as FTA publicly releases, or approves the release of, the data.[705] Institutions of higher learning are free to publish subject data.[706] A

[688] *Id*. at 776.

[689] *Id*. at 776.

[690] *Id*. at 777.

[691] *Id*. at 777.

[692] *Id*. at 777.

[693] *Id*. at 778.

[694] *Id*. at 778.

[695] *Id*. at 778 (quoting Ball v. Gross, 565 S.W.2d 685, 689 (Mo. Ct. App. 1978)).

[696] *Id*. at 779.

[697] *Id*. at 779 (quoting Boyles v. Mo. Friends of the Wabash Nature Trail, Inc., 981 S.W.2d 644, 649–50 (Mo. Ct. App. 1998)).

[698] *Id.* at 780.

[699] *Id.* at 782.

[700] FTA MA § 18.d.

[701] FTA MA § 17.a.

[702] FTA MA § 17.b. Although the Department of Commerce's regulations only specifically apply to non-profit organizations and small businesses, the FTA MA applies the regulations to all grantees, subgrantees, and any third party contractor, regardless of their size or nature. FTA MA § 17.b. The Department of Commerce regulations are found at 37 C.F.R. §§ 401.1 *et seq*. (2000).

[703] Subject data is recorded information that is delivered or specified to be delivered under a grant or cooperative agreement, including, but not limited to, computer software, engineering drawings, manuals, technical reports, and related information. Financial reports, cost analyses, or other items used for project administration purposes are excluded. FTA MA § 18.a.

[704] FTA MA § 18.a. Funds delivered by grant or cooperative agreement in accordance with the MA ordinarily compose all FTA financial assistance; however, in the event that a party receives funding in some other manner, it is governed by the bald language of DOT's intellectual property regulations. Where the grantee is a *state or local government*, the federal agency providing funds reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for federal government purposes: (1) the copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and (2) any rights of copyright to which a grantee, subgrantee, or contractor purchases ownership with grant support. 49 C.F.R. § 18.34 (a) and (b) (2002). Where the grantee is an *institution of higher education, a hospital, or other non-profit organization*, it may copyright any work that is subject to copyright and was developed, or for which ownership was purchased, under an award. However, the awarding agency reserves a royalty-free, nonexclusive, and irrevocable right to reproduce, publish, or otherwise use the work for federal purposes and to authorize others to do so. 49 C.F.R. § 19.36(a) (2002).

[705] FTA MA § 18.b(1).

[706] FTA MA § 18.b(2).

grantee, regardless of its status, must agree to provide the federal government a royalty-free, non-exclusive, and irrevocable license to publish or otherwise use, and to authorize others to use, any subject data developed or purchased with federal funds by the grantee or third party contractors.[707] Data developed without federal funds does not become subject to FTA control, but FTA is free to disclose such data to other parties unless the grantee supplying it has clearly indicated that it is proprietary or confidential.[708]

Unless otherwise limited by state law, a grantee must agree to "indemnify, save, and hold harmless" the federal government[709] against any liability, including costs and expenses, resulting from the grantee's willful or intentional violation of another party's copyright arising out of the publication, use, or disposition of any data furnished under the project.[710] However, the grantee will not be required to indemnify the federal government for such liability arising from the wrongful acts of federal employees or agents.[711] The prudent transit attorney will ensure that this indemnification clause is passed through to contractors in all third party contracts in which a copyright clause is contained.

H. THE METRIC SYSTEM

Although the United States had legalized use of the metric system in 1866 and was a signatory to the 1875 Treaty of the Meter, which established the General Conference of Weights and Measures and other intergovernmental bodies devoted to the refinement and promotion of the metric system, the United States lagged behind many other nations in adopting it for general use.[712] In an effort to accelerate American use of the metric system, Congress passed the Metric Conversion Act of 1975.[713] The Metric Conversion Act established that it is "the declared policy of the United States" to prefer the use of the metric system for the purpose of trade and commerce.[714] More significantly, the Act required each federal agency to use the metric system in its procurements, grants, and other business activities by the end of the fiscal year 1992, except where it would prove impractical or otherwise create inefficiencies.[715] Nonmetric weights and measures were to be permitted to remain in nonbusiness agency activities.[716]

With the end of the 17-year phase-in period rapidly approaching, President George H.W. Bush issued Executive Order 12770 on July 25, 1991, for the purpose of implementing Congress's earlier directives.[717] The order required the heads of all executive branch departments and agencies (including FTA) to adopt the metric system for use in all procurements, grants and other business-related activities by September 30, 1992.[718] Use of the metric system would not be required where impractical. However, the federal agencies were required to establish "effective process[es] for a policy-level and program-level review" of any proposed exceptions.[719] The agencies must list any such exceptions in their annual reports, with proposals for remedying the problems giving rise to the exceptions.[720] Furthermore, the departments and agencies must also use metric units in government publications as those publications are revised on a normal schedule, or where a new publication is issued.[721]

Neither DOT nor its operating administrations have adopted any regulations giving detailed directions to grantees on the use of the metric system.[722] FTA's MA, which all grantees are obligated to sign as part of receiving federal funding, simply requires grantees to "use the metric system of measurement in [their] Project activities," and "[t]o the extent practicable and fea-

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[707] FTA MA § 18.c(1) and (2). In the event a project is not completed, all data produced to date by that project will become subject data and must be delivered to the FTA. FTA MA § 18.d. Unless it has specifically declared it will not do so, the FTA may give any other grantees or third party contractors access to relevant subject data or license the use of copyrighted materials by those parties. FTA MA § 18.d.

[708] FTA MA § 18.g.

[709] Including its officers, employees, and agents as long as they are acting within the scope of their official duties. FTA MA § 18.e.

[710] *Id*.

[711] *Id*.

[712] 15 U.S.C. § 205a (2000).

[713] Pub. L. No. 94-168, § 2, 89 Stat. 1007 (1975). This was later amended by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, tit. V, subtit. B, pt. I, subpt. F, § 5164(a), 102 Stat. 1451 (1988).

[714] 15 U.S.C. § 205b(1) (2000).

[715] 15 U.S.C. § 205b(2) (2000).

[716] 15 U.S.C. § 205b(4) (2000).

[717] Exec. Order No. 12770 Preamble, 56 Fed. Reg. 35,801 (July 29, 1991).

[718] Exec. Order No. 12770 § 2(a), 56 Fed. Reg. 35,801 (July 29, 1991).

[719] Exec. Order No. 12770 § 2(a)(1) and (2), 56 Fed. Reg. 35,801 (July 29, 1991).

[720] Exec. Order No. 12770 § 2(a)(2), 56 Fed. Reg. 35,801 (July 29, 1991).

[721] Exec. Order No. 12770 § 2(b), 56 Fed. Reg. 35,801 (July 29, 1991).

[722] DOT's regulation for its own internal processes states in its entirety,

> The Metric Conversion Act, as amended by the Omnibus Trade and Competitiveness Act (15 U.S.C. 205), declares that the metric system is the preferred measurement system for U.S. trade and commerce. The Act requires each Federal agency to establish a date or dates in consultation with the Secretary of Commerce, when the metric system of measurement will be used in the agency's procurements, grants, and other business-related activities. Metric implementation may take longer where the use of the system is initially impractical or likely to cause significant inefficiencies in the accomplishment of federally funded activities. Federal awarding agencies shall follow the provisions of E.O. 12770, "Metric Usage in Federal Government Programs."

49 C.F.R. § 19.15 (2002).

sible…accept products and services with dimensions expressed in the metric system of measurement."[723]

The practical problem for grantees is that routine commercial products and spare parts are stated in standard/imperial measurements rather than metric. [724] Furthermore, the volume of business generated is unlikely to convince suppliers to make products available in metric measurements. Thus, in procurements for which metric measures are required, the grantee must be certain to clearly state in the advertisement and contracting documents whether the use of standard/imperial measures will make the bid nonresponsive or otherwise result in negative consequences for the bidder.[725]

I. PROPERTY DISPOSITION

If a grantee under the Federal Transit Act decides that an asset obtained using federal funds (in whole or in part) no longer serves the purpose for which it was acquired, it must seek approval from the Secretary for any disposition of the asset.[726] The Secretary may authorize the transfer of the asset to a "local government authority" for a public purpose related to mass transportation without further obligation to the federal government.[727] If the transfer is for a public purpose other than mass transportation, the Secretary may only approve it if:

1. The asset will remain in public use for at least 5 years after the date the asset is transferred;

2. There is no purpose eligible for assistance under the Federal Transit Act for which the asset should be used;

3. The overall benefit of the transfer, considering fair market value and other factors, is greater than the FTA's interest in liquidating the asset and obtaining a pecuniary return; and

4. Following "an appropriate screening or survey process,"[728] there is no interest in acquiring the asset (if a facility or land) for federal government use.[729]

After making the above determinations, the Secretary must give final approval for the transfer in writing, including the reasons and findings that support the decision.[730]

In the event the grantee wishes to dispose of assets other than by transferring them to a local government, it must obtain permission from the Secretary, who may attach such conditions as are deemed appropriate or are required by statute.[731] These are typically referred to as "disposition instructions." If FTA permits the grantee to dispose of the asset, the grantee must follow applicable state and local statutes and regulations for the disposition of used or obsolete property. Many such statutes or ordinances require a legal notice or public posting of the assets and sale to the highest offeror. The net income of asset sales or leases must be used by the grantee to cover project costs or other capital costs that are being financed by FTA.[732]

More detailed provisions on the disposition of both real property and equipment are provided by FTA Circular 5010.1C, ch. II. The Circular requires that for real property, grantees must prepare, and keep updated, an excess property utilization plan for all property that is no longer needed for its originally intended purpose.[733] The plan should identify and explain the reason that the property is no longer required for its original purpose.[734] An inventory list should be part of the plan, including such information as the property's location, condition of the title, original acquisition cost, federal participation ratio, FTA grant number, appraisal information, description of improvements, current use of the property, and the anticipated disposition of the property.[735] The grantees must notify FTA when real

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[723] FTA MA § 30; 49 C.F.R. § 19.44(a)(3)(v) (2001).

[724] DOT itself routinely uses standard/imperial measurements in its own regulations and publications. *See, e.g.*, 49 C.F.R. § 665.11(e) (2000), which measures the service life of buses in terms of miles, and 49 C.F.R. § 665 App. A(6) (2000), which states that fuel efficiency will be measured in miles per gallon "or equivalent."

[725] Negative consequences could include compelling the successful bidder to pay the grantee's cost for converting standard/imperial measures to metric.

[726] 49 U.S.C. § 5334(g)(1) (2000). The statute does not prescribe a minimum dollar amount to trigger the Secretary's involvement and the FTA has not promulgated any regulations concerning this statute. FTA Circular 5010.1C, ch. II (3)(f), however, establishes value based rules for the disposition of equipment. See discussion *infra*.

[727] 49 U.S.C. § 5334(g)(1) (2000). Puzzlingly, the statute uses the specific term "local government authority." Ordinarily, statutes are careful to either say merely "government authority" (*see, e.g.*, 49 U.S.C. § 5565(a) (2000)) or say "State and local" (*see, e.g.*, 49 U.S.C. § 5565(a)(1) (2000)) when discussing governments other than the U.S. federal government. The term "local government authority" would seem to suggest that a grantee may only transfer the asset to a truly local government authority and could not transfer it to a state government authority. The statute does not articulate any logic for denying grantees the right to make transfers at the state level, so this may simply be the result of poor drafting, but grantees should be careful to not make plans that rely on transfers to state government authorities without receiving clarification from the Secretary as to the permissibility of doing so.

[728] Posting a notice of the proposed transfer in the Federal Register is a typical method of screening. *See, e.g.*, 63 Fed. Reg. 53122 (1998), which is a notice of the intent to dispose of a parking/recreation facility in Dorado, Puerto Rico.

[729] 49 U.S.C. § 5334(g)(1)(A) through (D) (2000).

[730] 49 U.S.C. § 5334(g)(2) (2000). The requirements imposed by 49 U.S.C. § 5334 are in addition to, and do not supersede, any other statutes governing the disposition of federally-owned or -financed property under an assistance agreement. 49 U.S.C. § 5334(g)(3) (2000). There do not appear to be any such statutes in effect as of March 12, 2001.

[731] 49 U.S.C. § 5334(g)(4)(A) (2000).

[732] 49 U.S.C. § 5334(g)(4)(B) (2000).

[733] *See* FTA C. 5010.1C, ch. II (2)(c)(0).

[734] *See id*.

[735] *See id*.

property is no longer being employed for the purpose that it was acquired for, whether idled or put to alternative uses.[736] Excess real property utilization plans and inventories must be retained by the grantee for FTA examination during the Triennial Review process, unless the FTA and grantee agree otherwise.[737]

If a grantee determines that it no longer requires real property acquired with federal funds, FTA may approve use of the property for other purposes.[738] This includes use in other federally-funded programs or in nonfederal programs if those programs' purposes are consistent with the purpose of programs within FTA's purview.[739] If a grantee will use the funds from the real property's disposal to acquire replacement real property under the same program, FTA may allow the net proceeds from the disposal of the original property to be used as offset against the cost of the replacement property.[740] FTA recognizes seven (arguably eight) alternative means of disposing of real property:

1. Sell and reimburse FTA;
2. Offset against replacement costs;
3. Sell and use proceeds for other capital projects;
4. Sell and keep proceeds in open project;
5. Transfer to public agency for nontransit use;
6. Transfer to other FTA-eligible project;
7. Retain title and buy out FTA share; and
8. Employ in joint development (although included with disposition methods in the Circular, FTA considers this a form of program income).[741]

Disposition of equipment, including rolling stock, is a less complex process than disposition of real property; however, the process still has its share of nuances. Rolling stock that has not been fully depreciated is singled out for special treatment, without regard to its value.[742] FTA must be reimbursed for its share of interest in the rolling stock's disposal price.[743] Any disposition of rolling stock prior to the end of its projected service life requires approval from FTA beforehand.[744] If revenue rolling stock is disposed of prior to the end of its service life, FTA must receive either its share of the unamortized value of the rolling stock's remaining service life[745] or the federal share of the sales price, whichever is greater.[746] With prior FTA approval, grantees may use 100 percent of the trade-in value or sales proceeds from the disposition of rolling stock, whether retaining any service life or not, to offset the cost of replacement rolling stock.[747] If the cost of the replacement rolling stock is greater than the proceeds from the sale of the original, the grantee must cover the difference.[748] If there are any proceeds from the sale remaining after the acquisition of the replacement rolling stock, those are to be returned to FTA, less the share of the grantee and other agencies.[749]

In the case of equipment other than rolling stock with some residual service life, when the equipment is no longer needed for the project or program it was acquired for, the grantee may employ the equipment in other projects or programs, but must receive FTA approval before doing so.[750] FTA retains its interest in the equipment under such circumstances.[751] If the grantee chooses to sell the equipment instead, it is subject to different FTA requirements depending on the equipment's value. Where the equipment is estimated to have a fair market value greater than $5,000, whether for a single unit or for an aggregation of items purchased collectively,[752] FTA must be reimbursed with a percentage of either the fair market value or the net proceeds, equal to FTA's participation in the original grant.[753] The grantee must notify the FTA of the method planned for disposal.[754] If upon reaching its projected service life the equipment is estimated to have a fair market value of $5,000 or less, whether for a single unit or for an aggregation of items purchased collectively, the grantee may dispose of the equipment without reimbursing FTA.[755] The grantee must, however, retain a record of this action.[756]

With prior FTA approval, grantees may also either transfer equipment to another public agency without reimbursing FTA[757] or sell the equipment and use the proceeds to reduce the gross project cost of other FTA-eligible capital transit projects.[758] In the latter instance,

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[736] *See id*.

[737] *See id*.

[738] *See* FTA C. 5010.1C, ch. II (2)(c)(1).

[739] *See id.*

[740] *See id.*

[741] *See* FTA C. 5010.1C, ch. II (2)(c)(1) for more detail on each of these disposal alternatives.

[742] *See* FTA C. 5010.1C, ch. II (3)(f)(1).

[743] *See id.*

[744] *Id*.

[745] This is calculated on straight line depreciation of the original purchase price. *Id*.

[746] *Id*.

[747] *See* FTA C. 5010.1C, ch. II (3)(f)(5).

[748] *Id*.

[749] *See id*. *E.g.*, a grantee purchases a rail car for $500,000, including $400,000 in FTA funds. Some time later, the grantee sells the rail car for $200,000 and purchases a bus for $100,000 with the proceeds. 80 percent (i.e., its share of the original procurement) of the remaining $100,000 would be returned to FTA, while the grantee would receive 20 percent.

[750] FTA C. 5010.1C, ch. II (3)(f)(2).

[751] *Id*.

[752] *E.g.*, 20,000 pieces of 6-foot steel rebar purchased for a construction project.

[753] FTA C. 5010.1C, ch. II (3)(f)(3). *E.g.*, A grantee purchases $50,000 of office furniture, including $25,000 in FTA-provided funds. Some years later, the grantee sells the office furniture for $20,000. FTA must then be reimbursed with $10,000.

[754] *Id*.

[755] FTA C. 5010.1C, ch. II (3)(f)(4).

[756] *Id*.

[757] FTA C. 5010.1C, ch. II (3)(f)(6). The Circular recommends that grantees interested in making such transfers consult with their regional FTA offices for procedures. *Id*.

[758] FTA C. 5010.1C, ch. II (3)(f)(7).

the grantee must record the receipt of the proceeds, showing that the funds are restricted to use in a subsequent capital project.[759] Subsequent capital grant applications should indicate that the gross project cost has been reduced by proceeds from the earlier equipment disposal.[760]

J. OTHER PROCUREMENT REQUIREMENTS AND CONSIDERATIONS

Because so many factors in making a procurement are governed by regulations other than those directly pertaining to procurement itself, further Sections that should be consulted in conjunction with procurement decisions include Section 3—Environmental Law, [761] Section 4—Finance,[762] and Section 7—Safety.[763]

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[759] *Id*.

[760] *Id*.

[761] Including such topics as compliance with the Clean Air Act, the Federal Water Pollution Control Act, and NEPA.

[762] Including such topics as project management oversight, rail terminal conversion, and job access and reverse commute grants.

[763] Including such topics as seismic design and related issues.