

Statewide Transportation Improvement Plan (STIP), and other legal and programmatic requirements. FTA proposes to include in its review of grant modifications a determination of whether the proposed change will require a certificate from the Department of Labor (DOL) on Employee Protective Arrangements. Also, FTA proposes changes to its use of the term "scope" as it relates to grant modifications, and to place greater emphasis on the Transportation Electronic Award and Management (TEAM) system scope code as an indicator of the project scope.

#### *B. Useful Life of Assets*

FTA Circular 5010.1C only includes useful life standards for rolling stock, specifically buses, vans, and rail vehicles. FTA uses these useful life standards to determine when the Federal interest in an asset expires, particularly when giving disposition instructions to a grantee pursuant to the requirements of the Common Grant Rule at 49 CFR 18.31. FTA Circular 5010.1D proposes to include useful life standards in subsequent grant agreements, and proposes useful life standards for trolleys, ferry boats, and facilities. FTA seeks comment on how to develop useful life standards for grant management purposes. In particular, FTA lacks information regarding the useful life of ferry boats and seeks comments on how to devise this standard.

FTA considered using its Standard Cost Category worksheet for Annualized Costs, which is used primarily for New Starts projects, to identify useful life standards for various project components, including facilities. Recognizing, however, that FTA's New Starts Program assesses the useful life of assets for purposes different from Proposed Circular 5010.1D (the New Starts Cost Category worksheet looks to the maximum useful life while Proposed Circular 5010.1D looks to the minimum), FTA proposes to adopt different useful life standards for facilities than those outlined in the New Starts Standard Cost Category worksheet. Rather, FTA proposes the language located at Chapter IV, Section 3 of Proposed Circular 5010.1D.

#### *C. Management of Real Property*

With respect to the management of real property, FTA proposes to raise the threshold for an appraisal concurrence from \$250,000 to \$500,000. Moreover, FTA proposes to update its acquisition, appraisal, and relocation requirements to conform to regulatory changes at 49 CFR part 24.

Issued this 24th day of September, 2007.

**James S. Simpson,**

*Administrator.*

[FR Doc. E7-19115 Filed 9-27-07; 8:45 am]

**BILLING CODE 4910-57-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

[Docket No. FTA-2007-29125]

#### Third Party Contracting Guidance; Notice of Proposed Program Guidance; Proposed Circular

**AGENCY:** Federal Transit Administration (FTA), DOT.

**ACTION:** Notice of availability of proposed circular and request for comments.

**SUMMARY:** The Federal Transit Administration (FTA) has placed in the docket and on its Web site, proposed guidance pertaining to procurements financed in whole or part with Federal assistance awarded by FTA through grants or cooperative agreements (third party procurements). By this notice, FTA invites public comment on FTA's proposed circular, "Third Party Contracting Guidance."

**DATES:** Comments should be submitted by November 27, 2007. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** To ensure your comments are not entered more than once into the docket, submit comments identified by the docket number [FTA-2007-29125] by only one of the following methods:

1. *Web site:* [www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments on the U.S. Government electronic docket site. [Note: The U.S. Department of Transportation's (DOT's) electronic docket is no longer accepting electronic comments. All electronic submissions must be made to the U.S. Government electronic docket site at [www.regulations.gov](http://www.regulations.gov). Commenters should follow the directions below for mailed and hand-delivered comments.]
2. *Fax:* 202-493-2251.
3. *Mail:* U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Docket Operations, M-30, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001.
4. *Hand Delivery:* U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Docket Operations, M-30, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. See the **SUPPLEMENTARY INFORMATION** section for detailed instructions on how

to submit comments and access docket information.

**FOR FURTHER INFORMATION CONTACT:** For issues regarding third party contracting procedures and practices, contact James Harper, Senior Procurement Analyst, Office of Administration, Federal Transit Administration, 1200 New Jersey Avenue, SE., East Building, Room E42-333, Washington, DC 20590, phone: 202-366-1127, fax: 202-366-3808, or e-mail, [James.Harper@dot.gov](mailto:James.Harper@dot.gov). For legal issues, contact Kerry Miller, Assistant Chief Counsel for General Law, Federal Transit Administration, 1200 New Jersey Avenue, SE., East Building, Room E56-314, Washington, DC 20590, phone: 202-366-1936, fax: 202-366-3809, or e-mail, [Kerry.Miller@dot.gov](mailto:Kerry.Miller@dot.gov).

#### SUPPLEMENTARY INFORMATION:

##### Comment Instructions and Docket Access Information

*Instructions:* You must include the agency name (Federal Transit Administration) and Docket number (FTA-2007-29125) for this notice at the beginning of your comments. Submit two copies of your comments if you submit them by mail. For confirmation that FTA has received your comments, include a self-addressed stamped postcard. Note that all comments received, including any personal information, will be posted and will be available to Internet users, without change, to [www.regulations.gov](http://www.regulations.gov). You may review DOT's complete Privacy Act Statement in the **Federal Register** published April 11, 2000, (65 FR 19477), or you may visit [www.regulations.gov](http://www.regulations.gov).

*Docket:* For access to the docket to read background documents and comments received, go to [www.regulations.gov](http://www.regulations.gov) at any time or U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Docket Operations, M-30, West Building, Ground Floor, Room W12-140, Washington, DC 20590-0001 between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

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## I. Overview

This notice announces the availability of revised proposed guidance on conducting procurements financed in whole or part with Federal assistance awarded by FTA through a grant or cooperative agreement (third party procurements). FTA Circular 4220.1E separated Federal statutory and regulatory requirements from policy interpretations, placing those interpretations in footnotes that could be accessed with that circular. Upon enactment of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, (SAFETEA-LU) (Pub. L. 109–59, August 10, 2005), 49 U.S.C. 5334(l), FTA has been required to provide public notice and opportunity for comment on significant policy interpretations. Thus, FTA has broadened the scope of FTA Circular 4220.1E from “Third Party Contracting Requirements,” to “Third Party Contracting Guidance,” to include within this proposed circular significant FTA policy guidance in addition to information about Federal statutory and regulatory requirements affecting third party procurements.

The bulk of this proposed circular consists of restructuring of the 2003 edition of FTA Circular 4220.1E coupled with updates of Federal statutory and regulatory citations. In addition, there are discussions of topics pertaining to third party procurements that had been previously omitted and new guidance clarifications. We have identified those provisions reflecting a Federal statutory or regulatory requirement and those expressing an FTA interpretation or policy position. With few exceptions, nearly all requirements, interpretations, and policy positions set forth in the text of FTA Circular 4220.1E and its footnotes have been retained, and if not included in this proposed circular or preamble, then added to FTA’s “Best Practices Procurement Manual.” While the bulk of FTA assistance is awarded to governmental recipients, many recipients participating in cooperative agreements are not governmental authorities. For this reason, the proposed circular places new emphasis on third party procurement requirements for those recipients. FTA’s recipients that are educational institutions or private non-profit

organizations must comply with the DOT regulations, “Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,” 49 CFR part 19, which in part differ from the provisions of DOT regulations, “Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,” 49 CFR part 18. (FTA refers to regulations 18 and 19 as Common Grant Rules.) To provide a comprehensive listing of procurement procedures for third party contracting, we have supplemented this proposed circular with Common Grant Rule requirements omitted in FTA Circular 4220.1E. To facilitate compliance with substantive requirements that will, or that will be likely to impact the results of third party procurements, we have added references to pertinent requirements.

Because of the increased length of this proposed circular, the circular has been divided into seven Chapters, preceded by a Table of Contents and followed by an Index. Consistent with formats adopted in FTA’s latest circulars, references and citations have been consolidated in a separate Appendix A.

This notice does not include the proposed circular; electronic versions of the proposed circular may be found on the docket, at [www.regulations.gov](http://www.regulations.gov) docket number FTA–2007–29125, or on FTA’s Web site, at <http://www.fta.dot.gov>. Paper copies of the proposed circular may be obtained by contacting FTA’s Administrative Services Help Desk, at 202–366–4865.

FTA seeks comments on the proposed circular, in particular those portions of the circular reflecting new guidance, policies, or interpretations.

## II. Chapter-by-Chapter Analysis

### A. Chapter I—Introduction and Background

The first four sections of this chapter are a general introduction to FTA that is proposed to be included in all new and revised program circulars for the orientation of readers new to FTA programs.

Section 5 of this chapter sets forth definitions of terms appearing in the proposed circular. While many definitions within the Definitions section or elsewhere in FTA Circular 4220.1E or its footnotes have been retained, the following new definitions have been added:

a. A definition of *Approval, Authorization, Concurrence, and Waiver* has been added to emphasize that these must be in writing.

b. We are defining *Common Grant Rule* to encompass both the uniform administrative regulations applicable to governmental recipient and the uniform administrative regulations for institutions of higher education and private non-profit organizations.

c. A definition of *Cooperative Agreement* has been added in light of our emphasis on ensuring our recipients understand that the proposed circular applies to recipients of cooperative agreements as well as to grantees.

d. Definitions of *Governmental Recipient* and *Non-Governmental Recipient* have been added.

e. The definition of *Electronic Commerce* has been added.

f. *Property*, a term used frequently within this proposed circular, has been defined.

g. *Recipient*, a term used frequently within this proposed circular in lieu of *Grantee*, has been added to accommodate recipients of cooperative agreements as well as grants.

Because the terms *piggybacking* and *tag-on* tend to be unfamiliar jargon used chiefly by some participants in FTA projects, those terms have been transferred from the formal definitions section of the proposed circular to the discussion of use of existing contracts in Chapter V of the proposed circular.

Section 6 consolidates FTA’s role in complying with the various third party procurement requirements, policies, and practices. The subsections addressing third party contract reviews, procurement system reviews, and training and technical assistance are substantially similar to those of FTA Circular 4220.1E. The text on self-certification has been revised for greater consistency with the Common Grant Rules. Part 18 permits recipients to seek self-certification, but does not require them to do so, nor does that Common Grant Rule permit FTA to require self-certification. Part 19 has no provisions addressing self-certification. When this came to our attention a few years ago, we made the Procurement certification optional, but strongly encourage applicants and recipients to self-certify their procurement systems. A new subsection discussing FTA’s prerogatives with respect to audits has been added. New subsections addressing the Master Agreement and FTA’s “Best Practices Procurement Manual” expand the discussion on these topics in this proposed circular.

### B. Chapter II—Applicability

1. Section 1 of this Chapter consolidates the types of recipients and the types of projects to which this circular applies. Those provisions are

substantially similar to their counterpart provisions within FTA Circular 4220.1E or its footnotes, with a few important exceptions set forth below:

a. FTA Circular 4220.1E inadvertently misstated FTA's long-standing practice in administering its State managed programs when it took the position that only States and State instrumentalities could use State procedures when undertaking procurements financed with FTA's funding for State managed programs. Changes have been made to the applicability of State procedures to governmental subrecipients to conform to FTA's years-long practice with respect to State managed programs. Whether subrecipients other than States could use State procurement procedures had been a matter of some controversy for many years. That matter was resolved as set forth in the preamble to DOT regulations, "Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non Profit Organizations," 49 CFR part 19, published (59 FR 15639, April 4, 1994). OMB authorized governmental subrecipients of States to use State procedures for procurements financed with funds provided through FTA's State managed programs. OMB, however, did not authorize non-governmental subrecipients of States to use State procedures, but required them to use the procedures of part 19 for procurements financed through the same State managed programs. Consequently, the guidance in this circular has been amended to comport with these OMB decisions.

b. FTA is revisiting its policy on permitting recipients to separate FTA assisted operations procurements from operations procurements that do not receive FTA assistance. For that reason, Chapter II, Subsection 1.b(2)(b) of the circular with the heading "Operations Contracts Financed Entirely Without FTA Assistance" is RESERVED in the proposed circular. The reason for this review is that the current FTA Circular 4220.1E expressly states that "Congestion Mitigation and Air Quality (CMAQ) and Job Access/Reverse Commute (JARC) funds may be used for operations by all grantees. The circular must be applied to all contracts that are funded, in part, by CMAQ or JARC funds. Using CMAQ or JARC funds for a specific operating contract or contracts does not trigger the requirement to apply the circular to other operating contracts." In contrast, Footnote 2 to FTA Circular 4220.1E states, "Those grantees authorized to use formula funds for operating assistance must apply the circular to all operating

contracts—even if they are able to administratively segregate the federal funds to non-contract operating expenses. The ability to use formula funds for operating assistance hinges upon a grantee's total operating expenses and the portion of those expenses not offset by operating income."

Now, however, because the JARC program is a "formula" program, and because the New Freedom Program is a new formula program, FTA must reconsider the issue of whether and to what extent recipients of formula assistance should be able to separate Federal funds so that operations contracts not financed with FTA funding may be exempt from FTA procurement requirements.

In addition to contracts financed entirely without FTA assistance by grantees that receive operating assistance only from the JARC and CMAQ programs and which FTA determined are not subject to FTA procurement requirements, FTA must determine the extent to which FTA requirements should apply to operations contracts financed entirely without FTA assistance by recipients of operating assistance under the New Freedom program, 49 U.S.C. Section 5317, the Elderly Individuals and Individuals with Disabilities Pilot program, 49 U.S.C. Section 5310 note, and even the Nonurbanized Area Formula program, all of which involve some recipients or subrecipients that receive only a small portion of their support from FTA.

At this time, recipients in large urbanized areas are generally ineligible to use Urbanized Area Formula assistance to support operations, apart from capital funding for preventive maintenance funds, FTA has permitted those recipients to exempt all their operations contracts from FTA requirements provided they are able to trace their use of preventive maintenance funding to specific contracts. If, however, they are unable to do so, and use FTA assistance for general support of preventive maintenance costs, then FTA requirements will apply to all their operations procurements. In contrast, recipients in smaller urbanized areas currently must apply FTA requirements to all their operations procurements, whether or not they are financed with FTA assistance, if they use any of their Urbanized Area Formula assistance to support operations.

FTA is seeking comments about the extent to which FTA requirements should be applied to the operations contracts of recipients and subrecipients financed entirely without Federal

assistance, in particular comments on the rationale for excluding other operating contracts from the applicability of FTA requirements, technical examples of how operating expenses could be tracked and managed to segregate FTA funded expenses from other operating costs, and examples of possible unintended consequences of a change in FTA policy. FTA also seeks comments on the extent of agency operating expenses that are not related to transit but are subject to FTA procurement requirements under the concept that one dollar of FTA operating assistance brings an agency's entire operating budget under the FTA requirements. If determinations are made on a program by program basis, FTA seeks comments on which programs should permit separation of operations contracts funded entirely without FTA assistance from FTA-funded operations contracts, and which programs should prohibit separation of operations contracts funded entirely with FTA assistance from FTA requirements, and reasons in support of those comments.

FTA is also seeking comments estimating the level of impact on disadvantaged business enterprises if FTA approves separation of operations contracts financed entirely without FTA funding, and reasons in support of those estimates. Nevertheless, a recipient that enters into third party contracts for operations or planning must comply with the requirements of DOT regulations, "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs," 46 CFR Part 26, applicable to those contracts, regardless of the allocation of its FTA assistance to contracting or other purposes.

c. A new category for Public-Private Partnerships has been added to accommodate FTA's support for innovative project development arrangements. FTA will work with the recipient to craft appropriate procurement procedures when public-private partnerships are involved.

d. The text pertaining to leveraged leasing in a footnote to FTA Circular 4220.1E has been modified to cover complex innovative finance transactions in which FTA might participate.

Sections 2 and 3 discussing the applicability of Federal laws and regulations and State laws and regulations remain substantially similar to those of FTA Circular 4220.1E. A reference to the new SAFETEA-LU requirement imposing Federal Acquisition Regulation standards on audits connected with procurements of architect engineering services is used.

### *C. Chapter III—The Recipient's Responsibilities*

Apart from specific procurement procedures discussed at length in Chapter VI, this chapter consolidates the recipient's procurement responsibilities. While much information has been retained from FTA Circular 4220.1E, Common Grant Rule requirements not included in that circular have been addressed in this proposed circular.

Section 1, discussing Written Standards of Conduct, is substantially similar to the text of FTA Circular 4220.1E.

Section 2.a, pertaining to Self-Certification, has been modified to conform more closely to the requirements of the Common Grant Rule for governmental recipients in that recipients may, but are not compelled to, self-certify their procurement systems, and that FTA strongly encourages them to do so.

Section 3 contains many subsections, such as Procurement Capacity, Requirements for Adequate Contract Provisions, Procurement History, and Use of Electronic Commerce, which are substantially similar to their counterparts in FTA Circular 4220.1E. Other subsections, such as Record-Keeping, that were omitted from FTA Circular 4220.1E but addressed in the Common Grant Rules, have been included in this proposed circular.

One major change is that SAFETEA-LU expanded FTA and the Comptroller General's authority to review all contract documents pertaining to procurements financed under 49 U.S.C. Chapter 53. Previously, the Comptroller General's authority to review contract documents was limited to non-competitive procurements.

Another change is that the Special Notification Requirements, formerly applicable to all recipients as provided in Federal appropriations acts applicable to the entire Federal Government, have been narrowed recently to apply exclusively to States. We caution, however, that future appropriations acts may further amend the notification requirements for recipients.

A new subsection has been added to caution the recipient to take care when adopting an industry-prepared contract to assure that all required Federal requirements and clauses have been addressed or appended as a part of that contract.

Section 4 includes Audit provisions that have been added to the proposed circular, with information about the use and restrictions of use of the recipient's own auditors and the need for auditors

independent of the recipient to perform certain federally required audits. The role Federal audit agencies might play is briefly noted.

### *D. Chapter IV—The Recipient's Needs and Federal Requirements Affecting Those Needs*

Section 1 of this chapter specifies that any federally-assisted acquisition must be within the scope of the project from which funding is derived. The amount or quantity of property or services to be acquired can affect the procurement's eligibility for Federal assistance. These provisions addressing necessity, procurement size, options, lease vs. purchase, and specifications, while arranged differently from the format of FTA Circular 4220.1E contain substantially similar provisions supplemented by additional relevant provisions of the Common Grant Rules. A new reference to FTA's spare ratio standards requirements for vehicles has been added, as well as a general prohibition on using FTA funds to finance unnecessary reserves.

In Section 2, FTA has identified the various Federal requirements that will have an effect on the property and services a recipient acquires. To facilitate compliance with those requirements, FTA has compiled a list of Federal requirements and policies for contractors, a list of Federal requirements and policies that are applicable to all acquisitions, and lists of specific requirements and policies applicable to some, but not all, acquisitions. FTA hopes these lists will serve as useful reminders to a recipient seeking to acquire property and services with Federal assistance. Again, the bulk of the provisions set forth in this section have been included in FTA Circular 4220.1E or are part of the Procurement section of the Common Grant Rules. Consequently, we are identifying in this preamble only those provisions of the proposed circular that are new or that amend previously established requirements and policies.

Section 2.a. contains requirements pertaining to the contractor's internal operations in order to qualify for FTA assisted contracts. While the Common Grant Rules require recipients to engage with "responsible" contractors, a statutory provision within SAFETEA-LU expressly established a requirement restricting awards only "to responsible contractors possessing the ability to successfully perform under the terms and conditions of a proposed procurement." For fixed guideway projects, SAFETEA-LU expressly requires that contractors must be

considered in light of their past performance.

Along with a discussion of provisions in support of disadvantaged business enterprise (DBE), we have also included the Common Grant Rule's provisions requiring support for small and minority firms and women's business enterprises, irrespective of whether or not they qualify as DBEs.

We have also added provisions pertaining to the contractor's obligation to protect sensitive security information consistent with DOT and Homeland Security regulations. We have also included guidance encouraging seat belt use required by Executive Order. While these provisions have been in FTA's Master Agreement for the last few years, they have not been addressed until now in the Common Grant Rules or in FTA's third party contracting publications.

Section 2.b. contains lists of Federal requirements or policies applicable to the 19 categories of procurement issues. While most of the requirements applicable to each category have appeared in FTA Circular 4220.1E or the Common Grant Rules, new provisions and amended interpretations in the proposed circular are identified for each category:

(1) Scope of the Project. This provision is now explicitly stated in the proposed circular.

(2) Period of Performance. These provisions are derived from FTA Circular 4220.1E.

(3) Federal Cost Principles. These requirements in FTA Circular 4220.1E and the Common Grant Rules are unchanged.

(4) Payment Provisions. These provisions are derived from FTA Circular 4220.1E.

(5) Domestic Preference for Property—Buy America. Recipients are cautioned that FTA's Buy America regulations for third party procurements differ from Federal "Buy American Act" regulations that apply to direct Federal procurements.

(6) Shipments of Property—U.S. Flag Requirements. Added to the proposed circular are these domestic requirements as set forth in the Common Grant Rules and the Master Agreement.

(7) Project Travel—Use of U.S. Flag Air Carriers. Added to the proposed circular are these domestic requirements as set forth in the Common Grant Rules and the Master Agreement.

(8) Wage and Hour Requirements. The proposed circular updates the thresholds to \$100,000 resulting from amendment of the Contract Work Hours and Safety Standards Act. Previously, the Act's thresholds were \$2,000 for construction work and \$2,500 for

Federal purchases and contracts other than construction.

(9) Environmental Protections. The Common Grant Rules indicate that environmental requirements may well affect certain procurements, but only refer to a few, such as Clean Air and Clean Water laws and regulations. We recognize that many other requirements may impact the implementation of procurement, and are including a list of those set forth in our current Master Agreement to facilitate compliance.

(10) Energy Conservation. Energy conservation was not included as a topic in FTA Circular 4220.1E, but we are adding it to the proposed circular. These requirements in the Common Grant Rules remain unchanged.

(11) Metric Measurements. Added to the proposed circular are these metric use provisions as set forth in the Common Grant Rules and the Master Agreement.

(12) Intelligent Transportation Systems. Added to the proposed circular are these intelligent transportation system architectural compatibility requirements as set forth in the Master Agreement.

(13) Electronic Reports and Information. Added to the proposed circular are these accessibility requirements as set forth in the Master Agreement.

(14) Rolling Stock—Special Requirements. These requirements applicable to the types of rolling stock and procurements thereof have been applicable to FTA-assisted projects for many years. Except for procedural requirements pertaining to the five-year limitation and the provisions authorizing award to other than the low bidder, these provisions have not been included in FTA Circular 4220.1E. But to facilitate compliance, we have listed these requirements within the proposed circular. The following are particularly notable:

(a) In consolidating procurement requirements of 49 U.S.C. Section 5325 and former Section 5326 into Section 5325, Congress did not retain the provisions of former 49 U.S.C. 5326(d) authorizing a recipient's sole source purchases of associated capital maintenance items from the original manufacturer. Consequently, this circular does not include discussions of associated capital maintenance items.

(b) SAFETEA-LU added a prohibition at 49 U.S.C. Section 5325(i) against restricting bus procurements to in-State dealers.

(c) We are also adding a reference to FTA's minimum service life requirements for buses that appear in FTA Circulars 5010.1, 9030.1, and

9300.1 to alert the recipient of its need to buy vehicles with an adequate useful life.

(15) Architectural/Engineering and Related Services—Special Requirements. Two important changes are included in the proposed circular.

(a) We are clarifying the requirements as set forth in FTA Circular 4220.1E to stress that FTA considers the use of qualifications-based procurement procedures appropriate only for contracts for services involving construction or leading to or related to construction. FTA's policy is that procurements for similar services not leading to construction may not be undertaken using qualifications-based procurement procedures.

(b) The SAFETEA-LU requirement for the use of Federal Acquisition Regulation (FAR) standards for determining indirect costs for architect engineering contracts set forth at 49 U.S.C. Section 5325(b)(3) has been added.

(16) Construction—Special Requirements. These requirements have been applicable to FTA-assisted construction projects for many years. Some, but not all have been addressed in FTA Circular 4220.1E. Others set forth in the Common Grant Rules and the Master Agreement are listed to facilitate compliance. Except for the following, those requirements remain unchanged. We have included notice that the threshold of \$2,000 for construction safety requirements has been increased by law so that those requirements apply only to federally-assisted construction contracts in excess of \$100,000.

(17) Public Transportation Services—Special Requirements. Added to the proposed circular are requirements that apply to a recipient's project involving transit services as set forth in the Master Agreement.

(18) Research, Development, Demonstration, Deployment, and Special Studies—Special Requirements. Added to the proposed circular are provisions that might apply to a recipient's research and development project as set forth in the Master Agreement.

(19) Audit Services—Special Requirements. FTA has consolidated various procurement concerns the recipient needs to consider when acquiring audit services for various purposes. The recipient is cautioned to avoid duplicative audits. In addition, SAFETEA-LU added a provision to 49 U.S.C. Section 5325(b)(3) expressly requiring the use of FAR standards for determining indirect costs for architect

engineering contracts of the types listed in Section 5325(b)(1).

(20) Use of \$1 Coins. To facilitate compliance with Section 104 of the Presidential \$1 Coin Act of 2006, 31 U.S.C. Section 5312(p), FTA-assisted property that requires the use of coins or currency in public transportation service or supporting service must be fully capable of accepting and dispensing \$1 coins.

Section 2(c) consolidates in the proposed circular various provisions within the Common Grant Rules and Master Agreement that address difficulties that the recipient may encounter during contract performance. Except for the mention of contract termination, these were not included in FTA Circular 4220.1E. But because they express FTA policy, we are including them in the proposed circular.

#### *E. Chapter V—Sources*

This chapter consolidates information about the various sources from which a recipient may acquire property or services. Most of the information has been derived from the Common Grant Rules and FTA Circular 4220.1E, with supplementary material describing recent laws and regulations as described below:

Section 1, Force Account, adds a discussion of the recipient's use of its own workforce to perform necessary services. FTA's concerns are that those employees have sufficient technical capacity to perform the work.

Section 2, Shared Use, encourages the recipient to consider whether property or services might be shared.

Section 3, Joint Procurement, lists the advantages to be obtained when recipients are able to acquire larger quantities by procuring property and services for the use of all.

Section 4, State Purchasing Schedules, acknowledges the availability of such sources, but cautions the recipient to assure that all Federal requirements are met.

Section 5, Federal Excess and Surplus Property, identifies a potential source of property endorsed by the Common Grant Rules.

Section 6, Federal Supply Schedules, has been modified to describe changes resulting from enactment of laws expanding the types of entities and types of property and services that may be obtained from the General Services Administration's (GSA's) supply schedules compiled for use by Federal agencies. GSA has granted unlimited use of the Federal Supply Schedules to the District of Columbia and four U.S. insular areas. State and local governments have unlimited access to

GSA's Information Technology supply schedules. In addition, State and local governments have access to all GSA supply schedules when procuring property or services for disaster or emergency relief.

Section 7, Exiting Contracts, recognizes that a recipient will often find it advantageous to gain access to a contract between another recipient and a vendor. In addition to describing permissible and impermissible uses, this section highlights the pitfalls and disadvantages of accessing existing contracts of other entities.

Section 8, the Open Market, will be addressed in detail in Chapter VI of this circular.

#### *F. Chapter VI—Procedural Requirements for Open Market Procurements*

This chapter consolidates the various procurement procedures of the Common Grant Rules and FTA Circular 4220.1F and its Footnotes, supplemented by related information. Additions and changes are highlighted below:

Section 1 describes "full and open competition" now broadened by SAFETEA-LU to apply to all procurements supported by 49 U.S.C. Chapter 53, rather than specifically addressed to procurements supported by 49 U.S.C. Section 5307. In addition, information about the appropriate treatment of unsolicited proposals has been added.

Section 2 sets forth requirements and prohibitions to assure appropriate solicitations. A new reference to the Stafford Act has been added because that Act permits local preferences for firms and individuals using Stafford Act funding for major disaster or emergency relief. Illustrations of acceptable descriptions of salient characteristics of technical items have been transferred to the "Best Practices Procurement Manual."

Section 3 describes eight methods of procurement: (a) Micro-purchases, (b) small purchases, (c) sealed bids, (d) competitive proposals, (e) architectural and engineering services, (f) design-bid-build, (g) design-build, and (h) other than full and open competition. These procedures are substantially similar to those set forth in the Common Grant Rules and FTA Circular 4220.1E and its Footnotes accompanied by closely related information. The most

significant modifications are in Section 3.e, pertaining to architectural and engineering procurements. Requirements pertaining to the use of qualifications-based procedures in architectural and engineering procurements set forth in SAFETEA-LU have been modified. Audit and indirect cost provisions, particularly with respect to the use of Federal Acquisition Regulation standards and confidentiality of data, applicable to architectural and engineering procurements have also been modified to accommodate the new provisions of SAFETEA-LU. In addition, FTA stresses its position that qualifications-based competitive proposal procedures are suitable for use in procurements related to or leading to a construction project. Qualifications-based competitive procurement procedures are not to be used in connection with procurements that are not related to or lead to construction.

Section 4 identifies as prohibited the cost plus a percentage of cost procedure, and also sets forth restrictions pertaining to use of time and materials contracts, but does not change previous requirements.

Section 5 serves as a reminder that costs must be eligible under the applicable Federal standards.

Section 6 discusses costs and price analysis as set forth in the Common Grant Rules and FTA Circular 4220.1E and its Footnotes. In addition, Section 6 adds a provision authorizing the payment of incentive payments in furtherance of new SAFETEA-LU provisions addressing incentives.

Section 7 discusses options as set forth in the Common Grant Rules and FTA Circular 4220.1E and its Footnotes.

Section 8 consolidates requirements pertaining to contract award. The new SAFETEA-LU requirements pertaining to awards to responsible contractors are included in this section, along with SAFETEA-LU's continued authority permitting recipients to award contracts to other-than the lowest bidder if the award furthers an objective consistent with the purposes of FTA's enabling legislation.

#### *G. Chapter VII—Protests, Changes and Modifications, Claims, Disputes, and Settlements*

This chapter consolidates FTA guidance pertaining to third party

procurement protests with guidance pertaining to third party contract changes and modifications, claims, disputes, and settlements.

Section 1 addresses FTA and the recipient's responsibilities pertaining to the adjudication of protests of third party contract decisions. These provisions are substantially similar to those within FTA Circular 4220.1E, with the new addition explaining FTA's practice of reviewing only those protests of an "interested party," that is an actual or prospective bidder or offeror with a direct economic interest in the third party contract award.

Sections 2 through 5 add FTA guidance pertaining to third party contract changes and modifications, claims, disputes, and settlements, respectively. This guidance has been transferred from FTA Circular 5010.C, "Grant Management Guidelines," and remains essentially unchanged.

#### *F. Appendix A—References*

References that have appeared on the first pages of FTA Circular 4220.1E have been consolidated in Appendix A. This proposed circular contains many more references than FTA Circular 4220.1E due to identification of Federal substantive requirements that affect or are likely to affect the results of procurements. The following references within FTA Circular 4220.1E have been omitted either because they have been repealed or superseded:

1. Section 1555 of the Federal Acquisition Streamlining Act of 1994, 40 U.S.C. 481, pertaining to use of GSA supply schedules, has been repealed, revised by law, and re-codified at 40 U.S.C. 502.

2. Executive Order No. 12612, "Federalism" dated 10-26-87 has been superseded by Executive Order No. 13132, "Federalism," 8-4-99, 5 U.S.C. Section 601 note.

#### *I. Appendix B—FTA Regional and Metropolitan Contact Information*

FTA's contact list has been updated to the date of publication of the circular.

Issued in Washington, DC, this 24th day of September, 2007.

**James S. Simpson,**  
Administrator.

[FR Doc. E7-19116 Filed 9-27-07; 8:45 am]

BILLING CODE 4910-57-P