



**DEPARTMENT OF JUSTICE**  
**GENERAL COUNSEL DIVISION**

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**MEMORANDUM**

DATE: June 26, 2013

TO: Darvin Pierce, OPBC, CPPB  
QRF Coordinator  
Department of Administrative Services  
Chief Financial Office

FROM: William F. Nessly, Jr.  
Assistant Attorney General  
Business Transactions Section

SUBJECT: QRF Contracting and Federal Transit Administration Competition Requirements  
DOJ File No. 107020-GF0198-12

This memorandum responds to your inquiry concerning the impact of a public agency's receipt of Federal Transit Administration funds on the public agency's obligation to procure listed products and services from a qualified rehabilitation facility under ORS 279.850(1).

**Executive Summary.**

The mere fact that a state or local agency has received a grant or other form of Federal Transit Administration (FTA) financial assistance does not prevent that agency from complying with the "must buy" command in ORS 279.850(1). The federal requirement that the agency must use a competitive contracting process to select a contractor applies only when FTA funds are used directly to finance the particular contract in question.

## Discussion.

ORS 279.850(1)<sup>1</sup> commands public agencies to acquire products and services from qualified rehabilitation facilities (QRFs) when those products or services have been placed on the QRF procurement list the Department of Administrative Services must maintain under ORS 279.845(2).<sup>2</sup>

The Oregon Court of Appeals recognizes the QRF program as a set-aside program under which public agencies may directly award QRF contracts without conducting the competitive selection process that otherwise would be required by the Public Contracting Code.<sup>3</sup> The federal rules and circulars applicable to state and local agency contracts that are funded in whole or in part with FTA funds, however, require public agencies that receive federal assistance “to use third party procurement procedures that provide full and open competition.” *See* FTA Circular C 4220.1F, Chapter VI, §1.

Certain local public agencies have maintained that they cannot contract directly with QRFs because they receive FTA funding, so all their contracts must be solicited competitively. That’s wrong. Only those particular contracts that are funded, in whole or in part, with federal funds must be awarded competitively.<sup>4</sup>

FTA Circular C 4220.1F illustrates this principle, although not with extreme clarity. For example, the FTA definition of a grant restricts the grant to a particular project.<sup>5</sup> Chapter II, §2.a.(1) of the same circular also states that the FTA competition requirement applies only “when

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<sup>1</sup> ORS 279.850(1) states:

If any public agency intends to procure any product or service on the procurement list, that public agency shall, in accordance with rules of the Oregon Department of Administrative Services, procure such product or service, at the price established by the department, from a qualified nonprofit agency for individuals with disabilities, provided the product or service is of the appropriate specifications and is available within the period required by that public agency.

<sup>2</sup> ORS 279.845(2) provides:

The department shall establish and publish a list of sources or potential sources of products produced by any qualified nonprofit agency for individuals with disabilities and the services provided by any such agency, which the department determines are suitable for procurement by public agencies pursuant to ORS 279.835 to 279.855, 279A.025 (4) and 279C.335. This procurement list and revisions thereof shall be distributed to all public purchasing officers.

<sup>3</sup> *See Independent Contractors Research Institute v. DAS*, 207 Or App 78, 81, 139 P3d 995, *rev den* 341 Or 579 (2006) (“The key provision of the [QRF Act] requires public agencies to purchase products and services from nonprofit providers, outside of the competitive bidding process that normally governs public contracting, if the provider is a nonprofit agency employing [individuals with disabilities].”).

<sup>4</sup> The federal regulations and FTC Circular C 4220.1F contain some exceptions, like those for the rough equivalent of small procurements under ORS 279B.065, to the competition requirement.

<sup>5</sup> FTA Circular C 4220.1F , Chapter I, §5.o. states, “Grant means the instrument by which FTA awards Federal assistance to a specific recipient **to support a particular project** in which FTA does not take an active role or retain substantial control, as described in 31 U.S.C. Section 6304.” (Underlining in original; emphasis added).

[the recipient] uses FTA assistance for third-party contracts.”<sup>6</sup> Contracts under which an FTA assistance recipient pays no FTA grant moneys to the contractor are not subject to the FTA competition requirement.

The FTA and Oregon state agencies consistently observe this principle in practice. Fewer than two years ago, I participated in the negotiation of an FTA grant agreement and in the consequent award of an FTA-assisted Oregon Department of Transportation contract to acquire high-speed passenger train sets. The federal lawyers asked for and got ODOT’s representation that the third-party contract would be solicited competitively. They did not ask that ODOT likewise competitively procure, or represent that it would competitively procure, all of its Rail Safety Section contracts or all ODOT contracts. And as you know, ODOT indeed regularly, and lawfully, makes direct procurements under the QRF program.

The situation is the same with respect to local recipients like Tri-Met and other transportation districts that accept FTA funds. Unless the recipient agency directly will expend FTA funds under a contract, that contract is subject to the QRF “must buy” statute, ORS 279.850(1).

At the bottom line, virtually every federal agency that provides federal financial participation to Oregon state and local public bodies has a comparable requirement that the public bodies must competitively solicit third-party contracts that are funded in whole or in part with federal moneys. Many of these requirements, like the FTA competition requirement, have their basis in the Federal Acquisition Regulations and the federal Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

If the mere receipt of federal moneys to support one or more contracts or programs administered by a state or local agency meant that the state or local recipient must use competitive solicitations to establish all of its contracts, then virtually no Oregon state or local agency that receives federal funds could contract directly with QRFs under ORS 279.850(1). That is not what the federal laws and regulations, including those of the FTA, require.

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<sup>6</sup> Similarly, FTA Circular C 4220.1F, Chapter II, §2.b.(2) makes the competition requirements of the circular applicable only to “contracts \* \* \* in support of a recipient’s \* \* \* operations financed with FTA assistance.” The same provision states that the FTA third-party contracting requirements do not apply to operations contracts “that recipients \* \* \* finance entirely without FTA assistance.”

The opinion of one lower federal court reflects the understanding that the federal competition requirement applies only to those contracts that are funded, at least in part, directly by federal moneys. Dicta in *Pullman Incorporated v. Volpe*, 337 F Supp 431, 437 (ED Pa 1971), a case that concerned a federally funded rail rolling stock acquisition, recognized “the requirement that there be fair, open and competitive bidding for contracts **to which grants were applied.**” (Emphasis added).

The example in Chapter II, §2.b.(3) of the circular illustrates this principle. That section states that, for preventive maintenance contracts, the circular applies only to those specific FTA-assisted contracts to which the recipient can allocate and trace FTA financial assistance. If a recipient does not separately account for FTA assistance expenditures (an obvious departure from best practices), however, the circular and, therefore, the competitive contracting requirement, applies to the recipient’s preventive maintenance contracts.