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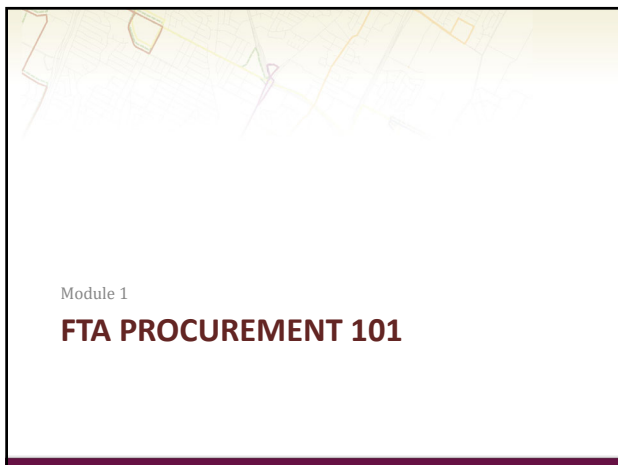
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## Coverage

- ◆ Purchase, Lease, or Acquisition of Property, Supplies, Equipment, or Services Financed in Whole or in Part by an FTA Grant

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## Basic Requirements

- ◆ Written Standards of Conduct
- ◆ Technical Capacity

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## Written Standards of Conduct

- ◆ Every Subrecipient Must Maintain Written Standards of Conduct
  - Applies to Officers, Employees, Agents, Board Members, or by Contractors or Subrecipients or Their Agents, Immediate Family Members
  - Personal Conflicts of Interest
  - Gifts
  - Violations

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Technical Capacity

- ◆ General Requirement
  - Subrecipients Must Undertake Its Procurements Effectively and Efficiently in Compliance with Applicable Federal, State, and Local Requirements

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Technical Capacity

- ◆ Written Procurement Procedures
  - Solicitations
    - Clear Descriptions
    - Nonrestrictive Specifications
    - Quality Requirements
    - Performance Specifications
    - Brand Name or Equal

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Technical Capacity

- ◆ Written Procurement Procedures
  - Necessity
  - Environmental and Energy Efficiency Preferences

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Technical Capacity

- ◆ Inclusion of All Third-Party Contract Provisions in Lower Tier Contracts
- ◆ Caution Regarding Industry Contracts

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Technical Capacity

- ◆ Written Procurement History
  - Method
  - Contract Type
  - Contractor Selection
  - Cost/Price Analysis
  - Documentation
- ◆ Access To Records
- ◆ Adherence to ODOT Policies

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Technical Capacity

- ◆ Electronic Commerce
  - Permissible, With Stipulations

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## General Requirements

- ◆ Must be Eligible Under FTA Guidelines
- ◆ Must be Necessary
  - Avoid Acquisition of Unnecessary Items
    - Unnecessary Reserves
    - Purchase for Assignment Purposes
      - Does Not Preclude Joint Procurement
      - Recipient May Contract Only For Its Current and Reasonably Expected Public Transportation Needs

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## General Requirements

- ◆ Economical Purchase
  - Joint Procurements
  - Consideration of Breaking Purchases Into Smaller Procurements
    - Economy
    - Create Opportunities for DBEs
    - However, An Entity Cannot Break Procurements Into Smaller Units Merely Get Under a Procurement Threshold

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## General Requirements

- ◆ Options
  - An Option is a Unilateral Right in a Contract By Which, For a Specified Time, a Recipient May Acquire Additional Equipment, Supplies, or Services Than Originally Procured

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## General Requirements – Check this

- ◆ Lease vs. Purchase
  - To Obtain the Best Value, the Recipient Should Review Lease Versus Purchase Alternatives for Acquiring Property and, If Necessary, Should Obtain an Analysis to Determine the More Economical Alternative
  - Specific FTA Regulations Governing Lease
    - 49 CFR part 639

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## General Requirements

- ◆ Specifications Should Not be:
  - Exclusionary
  - Discriminatory
  - Unreasonably Restrictive
  - In Violation of Federal Laws or Regulations

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## General Requirements

- ◆ Award to Responsible Vendors
  - Contractors Capable of Successfully Performing Under the Terms and Conditions of the Proposed Contract
  - Contractor Integrity
  - Compliance with Public Policy
  - Record of Past Performance
  - Financial Resources
  - Technical Resources

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## General Requirements

- ◆ Establishing Periods of Performance
  - Must be Reasonable
  - Consistent with Federal Limitations
    - Five Years on Rolling Stock/Replacement Parts
  - Time Extensions
    - "Cardinal" Changes Require Sole Source Justification

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## General Requirements

- ◆ Advance Payments
  - Not Permitted Under FTA Programs Without Prior Written Approval
  - A Subrecipient May Use Local Funds for Advance Payments
    - Local Fund Payments Made Before a Grant Award or a Letter of No Prejudice (or Other Pre-Award Authority) Are Ineligible

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## General Requirements

- ◆ Progress Payments
  - Periodic Payments to Contractors May be Made for Costs Incurred in the Performance of the Contract
  - Title to Project Property or Alternative Security Arrangement Must be In Place to Protect the Subrecipient's Interest

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## General Requirements

- ◆ Protection Against Performance Difficulties
  - Remedies
    - Liquidation Damages
    - Violations or Breaches
    - Suspension of Work
    - Termination

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## Socio-Economic Requirements

- ◆ Socio-Economic Requirements
  - Labor
    - Wage and Hour Requirements
    - Fair Labor Standards
  - Civil Rights
  - Environmental Protections
  - Energy Conservations
  - Buy America

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## Rolling Stock Requirements

- ◆ Rolling Stock
  - Accessibility
  - Manufacturer DBE
  - Minimum Service Life
  - Spare Ratio Standards
  - Pre-Award/Post Delivery Reviews
  - Bus Testing

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## A/E & Related Procurements

- ♦ Architectural/Engineering Services
  - Qualifications Based Procurement (Brooks Act)
  - Limited to Program Management, Construction Management, Feasibility Studies, Preliminary Engineering, Design, Architectural, Engineering, Surveying, Mapping, or Related Services
- ♦ FTA Does Not Permit this Method of Procurement for Other Professional Services

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## Construction

- ♦ Construction
  - Bid Guarantee – Five (5%) of Bid Price
  - Performance Bond – 100% of Contract Price
  - Payment Bond – 100% of Contract Price
  - Other Requirements

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Module 2

## PROCUREMENT METHODS

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## Procurement Types

- ◆ Procurement Types
  - Special
    - Shared Use
    - Joint Procurements
    - State/Local Purchasing Schedules (State Contract)
    - Federal Excess/Surplus Property
  - Open Market Procurements

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## Procurement Types

- ◆ Shared Use
  - Procurements Where Equipment, Property or Good is Shared Among Transit and Other Governmental Uses
  - FTA/ODOT Must Determine Pro Rata Share for Establishing Level of Federal Participation

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## Procurement Types

- ◆ Joint Procurements
  - Procurements where Equipment, Property, or Good is Procured by Two or More Recipients/ Subrecipients
- ◆ Assignment
  - Entity Specifies Quantities Above That Needed by The Recipient/Subrecipient for the Sole Purpose of Assigning Purchasing Rights to Another Entity
  - Sometimes Referred to as “Piggy-Backing”
  - All FTA Requirements Apply

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## Procurement Types

- ◆ State Local Purchasing Contracts
  - A Widely Used Practice by States in the Section 5310 and Section 5311 Programs
  - State DOT Acquisition of Vehicles on State Purchasing Contracts or Schedules
- ◆ Excess Property
  - FTA Encourages Recipients to Use Federal Excess and Surplus Property Managed by the GSA When Permitted

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## Procurement Types

- ◆ State Local Purchasing Contracts
  - Used in Oregon
    - PTD Works With the Department of Administrative Services to Solicit Bids for Commonly Used Vehicle Type
    - PTD Will Typically Issue Purchase Orders
    - OMB and FTA Encourage Use of this Procurement Method for Subrecipients

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## Procurement Types

- ◆ State Local Purchasing Contracts
  - Cautionary Note
    - The Subrecipient Must be Assured that DAS Conducted the Required Cost/Price Analysis Prior to Award
    - Other Requirement
      - FTA's Pre-Award Requirements Were Met
        - » Adherence to Purchaser's Specifications
        - » Buy America Compliance

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## Procurement Types

- ◆ State Local Purchasing Contracts
  - Some Responsibilities Remain With the Subrecipient
  - FTA Post-Delivery Requirements
    - Actual Adherence to Purchaser's Specifications
    - Buy America Compliance
    - Compliance with FMVSS
  - Potential for Cost/Price Analysis
    - Subrecipient Purchased Options Not Included in the State Purchasing Schedule

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## Prohibited Actions

- ◆ Improper Contract Expansions
  - Expanding Scope, Ordering Greater Quantities, or Negotiating Options Outside Those Needed by the Recipient/Subrecipient
  - Establishing Additional Quantities Primarily to Permit Assignment of Those Contract Rights to Another Entity

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## Prohibited Actions

- ◆ Cardinal Changes
  - A Significant Change in Contract Work (Property or Services)
    - Major Deviation From the Original Purpose of the Work
    - Methods of Achievement of the Work Scope
    - Causes a Revision of Contract Work So Extensive, Significant, or Cumulative That, In Effect, The Contractor Is Required to Perform Very Different Work From That Described in the Original Contract

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## Prohibited Actions

- ◆ Cardinal Changes
  - Cardinal Changes
    - Sometimes Difficult to Determine
    - Not Measured by Specific Quantity, Percentage, or Number
    - Consultation with ODOT Highly Recommended

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## Open Market Procurements

- ◆ General Principles
  - Full and Open Competition
    - Actions Not Consistent with Full and Open Competition
      - Excessive Qualifications
      - Unnecessary Experience
      - Improper Pre-Qualifications
      - Retainer Contracts
      - Excessive Bonding
      - Brand Name Only Specifications
      - Geographic Preferences
      - Organizational Conflicts of Interest

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## Open Market Procurements

- ◆ Disclosure of Evaluation Factors
  - Regardless of Procurement Type, the Purchaser Has the Obligation to Disclose the Factors on Which the Purchase Decision Will be Made

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## Open Market Procurements

### ◆ Contract Types

- Two Common Types
  - Fixed Price
  - Cost Reimbursement
- Prohibited Types
  - Cost Plus a Percentage of Cost
- Restricted Types
  - Time and Materials

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## Open Market Procurements

### ◆ Procurement Methods

- Category Changes With Revisions to 2 CFR § 200
  - Informal
    - Micro-Purchase
    - Small Purchase)
  - Formal
    - Sealed Bids
    - Proposals
  - Non-Competitive

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## Open Market Procurements

### ◆ Methods

- Micro Purchases
- Small Purchases
- Sealed Bids
- Competitive Proposals
- Two-Step
- A/E Services (Brooks Act)
- Design-Build
- Design-Bid-Build

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## Micro-Purchases

- ◆ Those Purchases Which Do Not Exceed \$10,000 (Federal Threshold)
- ◆ Purchases Below that Threshold May be Made Without Obtaining Competitive Quotations if the Subrecipient Determines that the Price is Fair and Reasonable and This Practice is Permitted by State and Local Laws

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## Micro-Purchases

- ◆ Important
  - Oregon Law Permits Micro-Purchase Like Acquisitions Up to \$25,000 (Referred to as “Direct Procurements”)
    - If State Funds Only are Used in the Procurement, This Action is Permissible
    - However, If Any Amount of Federal Funds are Used, the \$10,000 Threshold Must Prevail

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## Micro-Purchases

- ◆ Exempt from Buy America
- ◆ Davis-Bacon Prevailing Wage Requirements, However, Apply To Construction Contracts Exceeding \$2,000, Even Though the Recipient Uses Micro-Purchase Procurement Procedures

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## Micro-Purchases

- ◆ Other Factors
  - Distribute Micro Purchases Among Qualified Suppliers
  - Division or Break-Down of Purchases to Meet Micro Purchase Thresholds Not Permitted
  - Maintain Documentation that Price is Fair Reasonable and How that Determination Was Reached

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## Simplified Acquisitions

- ◆ Designed to Provide Relatively Simple Procedures for Small Purchases
  - \$10,000 and Over But Under \$250,000 – Federal Threshold
  - \$250,00 Oregon Threshold (Intermediate Procurements)
- ◆ May Be Exempt from Buy America
  - Buy America Has Its Own Threshold - \$150,000

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## Small Purchase

- ◆ Most Entities Have Much Lower Thresholds
- ◆ Must Follow Local or State Thresholds
- ◆ Must Follow What is in Your Procurement Policy

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## Small Purchase

- ◆ Procedures
  - The Subrecipient Must Obtain Price or Rate Quotations From an Adequate Number of Qualified Sources
- ◆ Division or Break-Down of Purchases to Meet Informal Thresholds Not Permitted

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## Sealed Bids

- ◆ Bids Are Publicly Solicited, and a Firm Fixed Price Contract (Lump Sum Or Unit Price) is Awarded to the Responsible Bidder Whose Bid, Conforming to All the Material Terms and Conditions, is Lowest In Price

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## Sealed Bids

- ◆ Appropriate Uses of Sealed Bid Method
  - A Complete, Adequate, and Realistic Specification or Purchase Description is Available
  - Two or More Responsible Bidders are Willing and Able to Compete Effectively for the Business

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## Sealed Bids

- ♦ Appropriate Uses of Sealed Bid Method
  - The Procurement Lends Itself to a Firm, Fixed Price Contract and the Selection of the Successful Bidder Can be Made Principally on the Basis of Price
  - No Discussion with Bidders is Needed (Does Not Preclude Pre-Bid Meeting)

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## Sealed Bids

- ♦ Methods (Invitation for Bid)
  - The IFB Must be Publicly Advertised and Bids
  - Must be Solicited from an Adequate Number of Known Suppliers
  - Adequate Specification (Detailed)
    - The IFB Must Define the Items or Services Sought in Order for the Bidder to Properly Respond
  - Sufficient Time Allowed to Prepare Bids Prior to the Date Set for Opening the Bids
  - Public Opening

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## Sealed Bids

- ♦ Contract Type
  - A Firm Fixed Price Contract Is Usually Awarded In Writing to the Lowest Responsive and Responsible Bidder
  - Does Not Preclude a Price Incentive Contract or Inclusion of an Economic Price Adjustment Provisions
    - Must Be Specified In the Bidding Documents
    - Factors Such as Transportation Costs and Life Cycle Costs Affect the Determination of the Lowest Bid

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## Competitive Proposals

- ◆ Appropriate Uses of Competitive Proposals
  - The Nature of the Procurement Does Not Lend Itself to Sealed Bidding
  - Subrecipient Expects That More Than One Source Will Be Willing and Able to Submit an Offer or Proposal
  - The Need for Discussions With Prospective Offerors Is Anticipated
  - The Basis for Contract Award Is on Factors Other Than Price
  - Uncertain Number of Sources

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## Competitive Proposals

- ◆ Methods
  - The Request for Proposals is Publicly Advertised
    - Depending Upon Available Suppliers, Be Prepared to Broaden Your Notification/Advertisement Procedures
    - Including Urbanized Area Newspapers
    - Passenger Transport
  - All Evaluation Factors Are Specified in the Solicitation
    - Numerical or Percentage Ratings or Weights Need Not Be Disclosed

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## Competitive Proposals

- ◆ Methods
  - Proposals Are Solicited From an Adequate Number of Qualified Sources
  - A Specific Method Is Established and Used to Conduct Technical Evaluations of the Proposals to Determine the Most Qualified Offeror
  - An Award Is Made to the Responsible Offeror Whose Proposal Is Most Advantageous to the Subrecipient
    - Price and Other Factors Considered

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## Competitive Proposals

### ♦ Methods

- Award to the Offeror Whose Proposal Provides the Greatest Value to the Subrecipient
- The Subrecipient's Solicitation Must Inform Potential Offerors That The Award Will Be Made On A "Best Value" Basis And Identify What Factors Will Form The Basis For Award

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## Competitive Proposals

### ♦ Methods

- The Evaluation Factors for a Specific Procurement Should Reflect the Subject Matter and the Elements That Are Most Important to the Subrecipient
- Examples:
  - Technical Design
  - Technical Approach
  - Length of Delivery Schedules
  - Quality of Proposed Personnel
  - Past Performance
  - Management Plan

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## Two-Step Procurements

### ♦ Applicable to Both Sealed Bids and Competitive Negotiations

- Step 1 – Review of the Technical Qualifications
- Step 2 – Review of Bids or Proposals of Offerors Deemed Most Qualified

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## A/E Services

- ◆ Special Qualifications-Based Process (Brooks Act)
- ◆ Can Be Used Only for Procurements of
  - A&E Services
  - Program Management
  - Construction Management
  - Feasibility Studies
  - Preliminary Engineering
  - Surveying, Mapping, and Related Services

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## A/E Services

- ◆ FTA Regulations Prohibit the Use of a Qualifications-Based Approach for Other Types of Services
- ◆ Only the Construction Related Items Can be Procured in this Manner

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## A/E Services

- ◆ Methods
  - Qualifications Only are Used to Determine the Top Ranked Offeror
  - Price Is NOT a Factor In this Evaluation
  - Negotiations are First Conducted With Only the Most Qualified Offeror
  - Only After Failing to Agree on a Fair and Reasonable Price May Negotiations Be Conducted With the Next Most Qualified Offeror, Etc.

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A/E Services

◆ Possible Exceptions

○ If a State Has Adopted Qualifications-Based Selection Procedures Prior to August 10, 2005, then Brooks Act Procedures Do Not Apply

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A/E Services

◆ Confidentiality of Cost Data

○ Subrecipient Must Keep Cost Data Confidential Even in the Face of a State Law Prohibits Such Action

○ The Confidentiality Requirements of 49 U.S.C. 5325(b)(3)(D) Cannot be Waived, Even if They Conflict with State Law or Regulations

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Module 3

AVOIDING PROCUREMENT DEFICIENCIES

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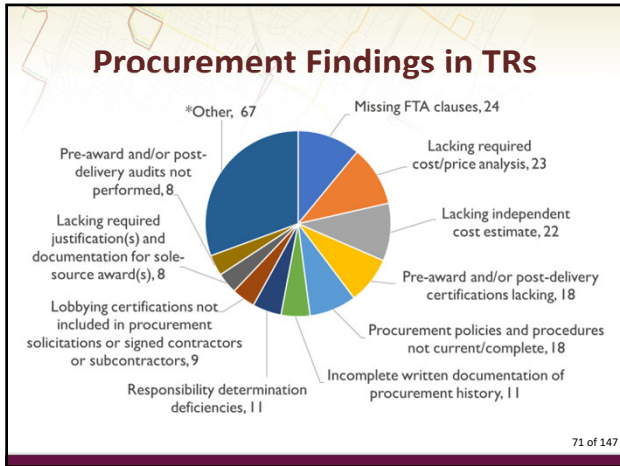
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### Top Procurement Findings

Category	TR	SMR
♦ Total 2021 Findings – 291		
○ Missing FTA Clauses	24	3
○ Lacking Cost/Price Analysis	23	3
○ Lacking ICE	22	3
○ Pre-Award/Posts Deliver Certs	18	
○ Incomplete Policies	18	
○ Lack of Written History	11	

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## Federal Clauses

- ◆ Common Oregon Deficiency
  - Use of Section 5310 Funds to “Acquire” Services
  - Special Legislation Permits the “Acquisition of Services” Under Section 5310 to be Treated as a Capital Expense (e.g., 80% or Higher Reimbursement of What is Otherwise an Operating Expense)

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## Federal Clauses

- ◆ Common Oregon Deficiency
  - However, to Obtain Reimbursement at the Capital Level, the Subrecipient Must Use a Competitive Procurement Process
    - Pass-Through Arrangements Permissible, But Would Have to be Treated as an Operating Expense

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## Federal Clauses

- ◆ Number #1 Deficiency – Missing FTA Clauses
- ◆ Issues
  - Procurement Lacks Any FTA Clauses
  - Procurement Lacks Specific FTA-Required Clauses
  - Failure to Recognize that Some Clauses Apply to All Procurements

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## Federal Clauses

### ◆ Requirement

- Recipients Are Required to Include Specific Required Clauses in FTA-Funded Procurements, Intergovernmental Agreements (e.g., Those Involving States and Other Public Entities), and Subrecipient Agreements
- Particularly Important in Third-Party Contracting

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## Federal Clauses

### ◆ Resources

- FTA Master Agreement
- FTA Best Practices Procurement & Lessons Learned Manual
- FTA Circular 4220.1F, Appendix D-4
- 2 CFR § 200.324
- Appendix II to 2 CFR Part 200
- National RTAP's Procurement Pro
  - QuickPro is for Clauses Only

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## Federal Clauses

### ◆ Applicability

- Clauses Must be Used in Purchases Over the Micro-Purchase Level
  - Some Construction Clauses (Davis-Bacon) Required for Lesser Amounts (\$2,000)

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## Federal Clauses

- ◆ Best Practice Methods
  - Develop Independent Cost Estimate
  - Classify the Procurement in Accordance with FTA Defined Categories
    - Professional Services/A&E
    - Operations/Management
    - Rolling Stock
    - Construction
    - Materials & Supplies

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## Federal Clauses

- ◆ Best Practice Methods
  - Use the Matrix in Appendix D-4 to Determine Applicability of Clauses by Procurement Type
  - Filter, as Appropriate, by Financial Threshold
  - Adopt Clause Language from BPPM and/or Master Agreement

*Or*

- Use ProcurementPro Tool

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## Federal Clauses

- ◆ Best Practice Methods
  - Use Caution – Avoid “Shotgun” Approach (e.g., Copying and Pasting All FTA Third-Party Clauses, Even When They Do Not Apply)
  - Catch-22
    - Regardless of Any FTA Resource Used, the Transit Agency is Ultimately Responsible for Inclusion of the Applicable Clauses
    - FTA Does Not Warrant Compliance

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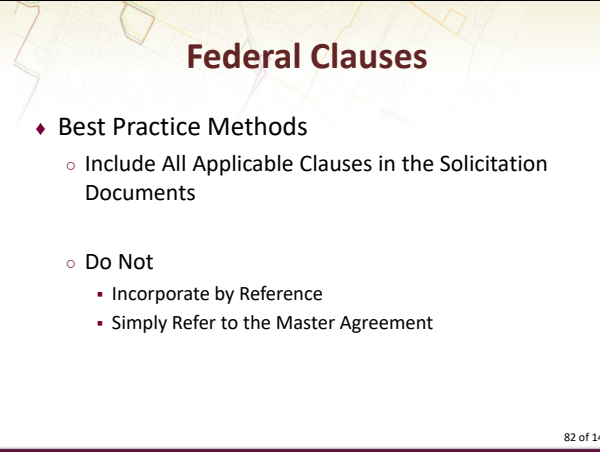
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## Federal Clauses

- ◆ Best Practice Methods
  - Include All Applicable Clauses in the Solicitation Documents
  - Do Not
    - Incorporate by Reference
    - Simply Refer to the Master Agreement

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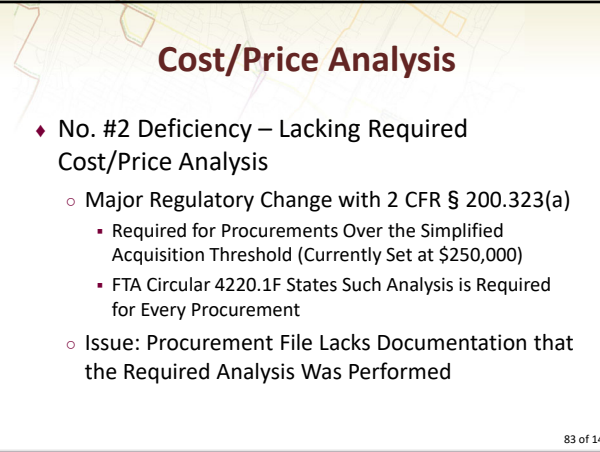
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## Cost/Price Analysis

- ◆ No. #2 Deficiency – Lacking Required Cost/Price Analysis
  - Major Regulatory Change with 2 CFR § 200.323(a)
    - Required for Procurements Over the Simplified Acquisition Threshold (Currently Set at \$250,000)
    - FTA Circular 4220.1F States Such Analysis is Required for Every Procurement
  - Issue: Procurement File Lacks Documentation that the Required Analysis Was Performed

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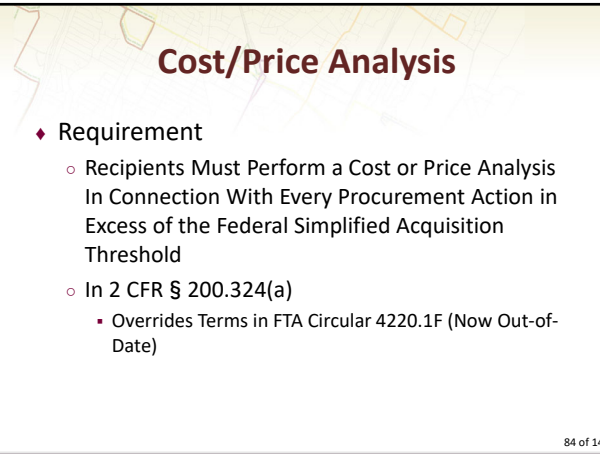
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## Cost/Price Analysis

- ◆ Requirement
  - Recipients Must Perform a Cost or Price Analysis In Connection With Every Procurement Action in Excess of the Federal Simplified Acquisition Threshold
  - In 2 CFR § 200.324(a)
    - Overrides Terms in FTA Circular 4220.1F (Now Out-of-Date)

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## Cost/Price Analysis

- ♦ Issue: Transit Agency Fails to Conduct Analysis in Other Situations Where the Cost/Price Analysis is Required
  - Contract Modifications
  - Competition is Inadequate/Single Bid
  - Sole Source (Unless “Reasonableness” Can be Established)
  - Change Orders

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## Cost/Price Analysis

- ♦ Issue: Transit Agency Conducts Price Analysis Where Cost Analysis is Required
  - Lack of Understanding of Differences Between the Two Techniques
  - Conditions Must Exist to Justify Use of Price Analysis

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## Cost/Price Analysis

- ♦ Price Analysis
  - Methods Used to Determine that the Price to be Paid Under a Contract is Fair and Reasonable
  - Different Methods
    - Adequate Price Competition
    - Established Catalog or Market Prices
    - Comparisons to Previous Purchases
    - Comparisons to ICE

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# Cost/Price Analysis

- ◆ Price Analysis
  - Adequate Price Competition
    - Conditions
      - Two or More Offerors that Meet the Requirements of the Solicitation
      - Determination of Responsibility
      - Pricing is Responsive to Terms of the Solicitation

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- Two or More Offerors that Meet the Requirements of the Solicitation
- Determination of Responsibility
- Pricing is Responsive to Terms of the Solicitation

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# Cost/Price Analysis

- ◆ Price Analysis
  - Adequate Price Competition
    - Conditions
      - Two or More Offerors that Meet the Requirements of the Solicitation
      - Determination of Responsibility
      - Pricing is Responsive to Terms of the Solicitation

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- Two or More Offerors that Meet the Requirements of the Solicitation
- Determination of Responsibility
- Pricing is Responsive to Terms of the Solicitation

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# Cost/Price Analysis

- ◆ Price Analysis
  - Established Catalog Prices
    - Conditions
      - Catalog Pricing Exists
      - Items Being Procured are Commercial in Nature
      - Sold in Substantial Quantities to the Public
  - Market Prices
    - Comparable to Catalog Pricing, But Based on Current Pricing in Similar Procurements

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- Comparable to Catalog Pricing, But Based on Current Pricing in Similar Procurements

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## Cost/Price Analysis

- ◆ Cost Analysis
  - Admittedly, More Complex and Time-Consuming than Price Analysis
  - Generally Required When
    - Price Analysis Will Not Provide Sufficient Information to Make a Reasonableness Determination
    - When the Offeror Submits Detailed Cost Proposal
  - Cost Analysis
    - Review and Evaluation of the Separate Cost Elements and Profit in an Offeror's Proposal

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## Cost/Price Analysis

- ◆ Best Practices
  - Always Adopt Procurement Practices that Foster Competition
    - When Competition is Adequate, Price Analysis is Generally Acceptable
  - Train Staff on Cost Analysis Techniques
    - Send Local Government Procurement Staff to FTA Training Opportunities

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## Independent Cost Estimate

- ◆ No. #3 Deficiency – Lacking Independent Cost Estimate (ICE)
  - Issue
    - ICE Not Prepared
    - ICE Not Prepared Prior to the Solicitation
    - ICE Lacks Independence
      - ICE Predicated on Cost Quote from a Single Vendor

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## Independent Cost Estimate

- ◆ Requirement
  - Embedded in the Cost and Price Analysis Clause of the Uniform Guidance (2 CFR § 200.324(a))
  - Both OMB and FTA State, That as a Starting Point in the Cost and Price Analysis Process, the Subrecipient Must Make Independent Estimates Before Receiving Bids or Proposals

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## Independent Cost Estimate

- ◆ Best Practices
  - Adopt Procurement Policies that Incorporate the Development of the ICE as Integral Element of the Procurement Process
  - Conduct Requisite Market Research
  - Ensure the ICE is Documented

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## Independent Cost Estimate

- ◆ Recommended Corrective Action on 2 CFR § 200.319, Lacking Independent Cost Estimate
  - Conduct Training on
    - Competition Requirements
    - Methods for Developing an ICE
      - Recent Procurement History of Comparable Items
      - Similar Procurements by Peer Transit Agencies
      - Catalog or Web-Based Research

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## Independent Cost Estimate

- ◆ What to Avoid in ICE Development
  - Requesting a Quote from Only a Single Vendor
  - Failure to Adjust Research Results to Current Market Conditions
    - Inflation Adjustments
    - Supply Chain Cost Increases
  - Develop the ICE AFTER Bids/Proposals/Quotes Are Received

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## Independent Cost Estimate

- ◆ Use External Resources If the Subrecipient Lacks the Ability to Generate an ICE
- ◆ Document the File
- ◆ Understand the Role of the ICE in the Determination of Reasonableness in Price Analysis

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## Pre-Award/Post-Delivery

- ◆ No. #4 Deficiency – Pre-Award and/or Post-Delivery Certifications Lacking
  - Issue
    - Process Steps Not Undertaken
    - Certifications Not Obtained
      - No Evidence that All Required Pre-Award Certifications Made
      - No Evidence of Subsequent Certification Made When Options are Exercised in Subsequent Vehicle Acquisition
      - Award Less than \$150,000 and Failure to Get FMVSS and Purchaser Requirements Certifications

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## Pre-Award/Post-Delivery

- ◆ Requirement
  - The Subrecipient Purchasing Revenue Service Rolling Stock With Federal Funds Must Conduct Pre-Award and Post-Delivery Audits Verifying Compliance
    - Buy America
    - Purchaser's Requirements
    - Resident Inspector Requirements (Some Limitations)
    - Federal Motor Vehicle Safety Standards (FMVSS)

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## Pre-Award/Post-Delivery

- ◆ Issue
  - No Evidence of Certification Review When Piggybacking
  - Purchasing From State Purchase Contracts
    - Transit Agency May Rely on the Certification of the Purchasing Agency But It is a Best Practice to Obtain Copies of the Required Certifications on File

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## Pre-Award/Post-Delivery

- ◆ Issue
  - Signed Buy America Certifications Not in File
  - Buy America Content Using Outdated Thresholds
  - Failure to Analyze Manufacturer's Component/Subcomponent Listings to Verify Vendor's Assertion of Compliance

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## Pre-Award/Post-Delivery

- ◆ Best Practices
  - Only File Executed/Signed Copies of Required Certifications
  - Use Written History Checklists to Ensure Certifications are Included in File
  - Ensure Subrecipient Procurement Policies Detail Local Policy for Conducting Requisite Pre- and Post Delivery Actions

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## Pre-Award/Post-Delivery

- ◆ Best Practices
  - Use FTA Evaluation Tables to Ensure Content Meets Current Threshold (70%)
  - Use Third-Party Expertise to
    - Conduct Buy America Assessments if Agency Lacks In-House Technical Capacity
    - Conduct In-Plant Inspections

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## Procurement Policies Incomplete

- ◆ No. #5 Deficiency – Procurement Policy Not Current/Incomplete
  - Issue
    - Procurement Policies Build on Local/State Compliance and Lack FTA Requirements
    - Policies Updated After Last Release of FTA Circular 4220.1F and Now Out-of-Date
      - 2 CFR § 200
      - Updated Buy America Thresholds
      - Other Congressional Actions

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## Procurement Policies Incomplete

- ◆ Requirement
  - All Subrecipients Must Have Documented Procurement Policies and Procedures (2 CFR200.318(a))

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## Procurement Policies Incomplete

- ◆ Issue
  - Policies Do Not Address Key FTA Elements
  - Policies Contain Prohibited Geographic Preferences

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## Procurement Policies Incomplete

- ◆ Best Practices
  - Use the Most Recent Version of the “Contractors Manual” (Current Version – FY 202), Section 9, Q1 to Compare Your Policy With FTA Required Provisions

Procurement Policies and Procedures Information		
Requirements	Recipients Policy and Procedures (Page or Section Number)	Description of Process
Maintenance of contract management (Contract Administration System)	-	-
Maintenance of written standards of conduct	-	-
Avoidance of unnecessary or excessive travel	-	-
Contracting with responsible contractors	-	-
Maintenance of written procurement history	-	-
Use of time and material contracts	-	-
Procedures for contract dispute resolution	-	-
Provision of full and open competition	-	-
Prohibition on geographic preference	-	-
Use and maintenance of procurement data to determine allowed methods of procurement	-	-
(1) non-competitive, of this method is used, include in this table for threshold award	-	-
(2) non-competitive, of this method is used, include in this table for threshold award	-	-
(3) sealed bid	-	-
(4) competitive proposals, or	-	-
(5) non-competitive proposals	-	-

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## Procurement Policies Incomplete

- ◆ Best Practices for State DOTs
  - Develop Procurement Policy Template for Subrecipient Use That Contains All Federal Provisions
    - See Q1, Section 9, of the Current Version of FTA's Contractor Manual for All Required Elements of the Policy
  - Allow Subrecipients to Add Local Provisions
  - Require State Review and Approval of Procurement Policies

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## Written History

- ◆ No. #6 Deficiency – Incomplete Written Documentation of Procurement History
  - Issue
    - Files Do Not Address Required Elements
    - Incomplete Files
    - Missing Documents

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## Written History

- ◆ Requirement
  - The Written History Must Contain Specified Elements
    - Rationale for the Method of Procurement
    - Selection of Contract Type
    - Contractor Selection or Rejection
    - Basis for the Contract Price
  - Other Information Necessary to Establish the History of the Procurement

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# Written History

- ◆ Best Practice
  - Use a Checklist Form to Document the Required Narrative to Explain the Four Required Elements that Must be Documented in the Written History

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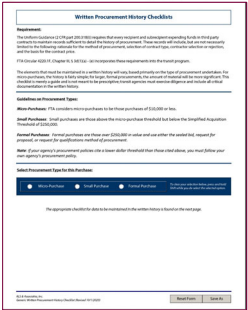
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# Written History

- ◆ Best Practices
  - Use Checklists to Document the Elements of a Written History to Ensure Completeness



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# Written History

- ◆ Best Practice
  - Use a Form to Document the Required Narrative to Explain the Four Required Elements that Must be Documented in the Written History

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# Written History

- ◆ Best Practices
  - Use Checklists to Document the Elements of a Written History to Ensure Completeness (Micro Purchase)

Micro-Purchase Written History Checklist

**Item(s):** (use the Extension ID or Warehouse Price)

**Extension ID:**  **Warehouse Price:**

**Invoice #:**  **Invoice Date:**

**Receipts for the Written History File**

Yes	No	Remarks to be Included in the Subsequent File to Establish a Written History
<input type="checkbox"/>	<input type="checkbox"/>	A printed copy of this invoice
<input type="checkbox"/>	<input type="checkbox"/>	Copy of the purchase order/invoice/contract, if any, incorporated
<input type="checkbox"/>	<input type="checkbox"/>	Copy of the vendor's receipt, bill of sale, contract (or similar documentation)

Sign and date, attach this form to the history file.

Signature:  Date:

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# Written History

- Best Practices
  - Use Checklists to Document the Elements of a Written History to Ensure Completeness (Small Purchase)

**Small Purchase Written History Checklist**

Written History

Step	Do	Not Do	Item Number	Notes
1	Prepare the Written History			
1	1. Personal note of the incident			
1	1.1 Incident documents (e.g., Request for Quotes, Invoices, purchase order)			
1	1.2 Verify location for contract (e.g., Road, lot or post mile marker)			
1	1.3 Copy of the Independent Cost Estimate (ICE)			
1	1.4 Documentation that the repairs that you provided were applied to this vehicle			
1	1.5 Obtain a police report and registration for this vehicle			
1	1.6 Documentation that the price paid was fair and reasonable			
1	1.7 Reference to the vehicle's VIN and engine number, reported to the police if other law enforcement is called			
1	1.8 A signature for the record that explains factors used to select the vehicle and the incident (e.g. 10000)			
1	2. Documentation of other vendor responsibility factors			
1	2.1 Signatures of all parties involved			
1	2.2 Signature for the vehicle's condition, if applicable (over \$150,000 and requires use of other resources to conduct an investigation)			
1	2.3 Proof of the contract price and completion of the price paid (if significantly different from the value of the Independent Cost Estimate (ICE))			
1	2.4 Reference to contract reference or expiration			
1	2.5 Copy of the contract reference, if applicable			
1	2.6 Documentation of delivery acceptance			
1	2.7 Vehicle number			
1	2.8 Documentation of vendor payment			

Sign and date, retain this form in the history file.

Signature:  Date:

Print the Name:

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## Responsibility Determinations

- ◆ Requirements
  - Debarment
    - 2 CFR § 180 and 2 CFR § 1200
      - Debarment – Three Options
        - » Checking SAM.gov
        - » Collecting a Certification
        - » Adding a Clause or Condition to the Solicitation and Contract

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## Responsibility Determinations

- ◆ Two Sets of Requirements – Responsibility and Debarment
  - Responsibility
    - 2 CFR § 200.218(h)
      - Responsibility determined by
        - » Ability to Perform Successfully Under the Terms and Conditions of the Proposed Contract
        - » Contractor Integrity
        - » Compliance with Public Policy
        - » Record of Past Performance
        - » Financial and Technical Resources

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## Responsibility Determinations

- ◆ Best Practice Methods
  - Responsibility Determination
    - Incorporate Responsibility Determination in the Proposal/Bid Evaluation Process
    - Create Specific Responsibility Checklist
    - Document Written Procurement History File with Evidence that Responsibility Factors Were Evaluated

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## Responsibility Determinations

- ◆ Best Practice Methods
  - While There are Three Acceptable Methods, Generally Acknowledged that a SAM.gov Check is Most Advantageous/Least Risk to the Buyer
  - Document the SAM.gov Check
    - Print Out the Search Results and Maintain in the Written History of the Procurement
  - Some Agencies Will Combine SAM.gov Checks with Vendor Certification

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## Lobbying Certifications

- ◆ No. #8 Deficiency – Lobbying Certifications Not Included in Procurement Solicitations or Signed by Bidders
  - Issue
  - Failure to Obtain Lobbying Certifications
    - Required for All Contracts and/or Subrecipients if Value is \$100,000 or Greater

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## Lobbying Certifications

- ◆ Requirement
  - Subrecipients are Required to Include a Lobbying Certification in Agreements, Contracts, and Subcontracts Exceeding \$100,000
    - Signed Certifications Regarding Lobbying Must be Obtained by the Subrecipient
      - Prime Contractors with Bids
      - Subcontractors in Excess of \$100,000
      - Other Lower Tiers

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## Lobbying Certifications

- ◆ Best Practice
  - Based on ICE, Ensure Lobbying Certifications are Obtained in All Solicitations Over \$100,000
  - Include Language in Solicitations that Stipulate This Requirement Flows Down to Lower Tiers
    - Contractors Required to Obtain Certification from Subcontractors if Value of Subcontract is Over \$100,000

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## Sole Source Procurements

- ◆ No. #9 Deficiency – Lack of Justification for Sole Source Procurements
  - Issue
    - Sole Source Procurements Lack Written Justification Consistent with the Requirements of 2 CFR § 200.320(f)(1)-(4)
    - Sole Source Justification Based on Local, Less Restrictive Provisions

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## Sole Source Procurements

- ◆ Requirement
  - Only Permissible in Limited Circumstances
    - Item Only Available from a Single Source
    - Public Emergency Will Not Permit a Delay for Required Advertising
    - Federal Awarding Agency or Pass-Through Agency (ODOT) Has Authorized This Method
    - Previous Solicitation Did Not Produce Adequate Competition

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## Sole Source Procurements

- ◆ Best Practices
  - Develop Written Sole Source Justification Memo Prior to Undertaking the Procurement
  - Ensure the Rationale is Consistent with Federal Requirements (2 CFR § 200.320(f)(1)-(4))
    - Sole Source Justification Based on Local, Less Restrictive Provisions Not Acceptable

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## Sole Source Procurements

- ◆ Expanding this Topic to Include a Separate, But Related Bid
- ◆ A Single Bid Situation Arises When Despite Multiple Identified Vendors, Only a Single Bid or Proposal is Received
- ◆ Both (Sole Source and Single Bid) Represent Procurements that Lack Competition

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## Sole Source Procurements

- ◆ Recommended Corrective Action on 2 CFR § 200.319, Lacking Full and Open Competition for One or More Methods of Procurement
  - Requires Multiple Strategies as This Deficiency Stems from Different Procurement Situation

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## Sole Source Procurements

- ◆ Single Bid
  - Develop Strategies
    - Methods for Identifying Suppliers
    - Ensuring Specifications are Not Restrictive
    - Ensuring that Procurement Policies Are Contrary to Federal Guidance
    - Determine Step in Single Bids
      - Automatic Re-Bid?
      - Investigation, Cost Analysis, and Potential Award?
    - Techniques for Conducting Single Bid Due Diligence

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## Buy America Certifications

- ◆ No. #10 Issue – Procurement Files Lack Buy America Certifications
  - Issue
    - Files Lack Vendor Buy America Certification
      - Pre-Award and Post-Delivery Requirements

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## Buy America Certifications

- ◆ Requirements
  - All Iron and Steel Used in a Project Must be Domestically Produced
  - All Manufactured Products Must Have Final Assembly in the U.S.
  - Components of Rolling Stock Must be 70% Domestic Origin

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Buy America Certifications

◆ Best Practices

○ Use Procurement Written History Checklists with Vehicle Acquisition Section

▪ Document that Buy America Certifications

• Pre-Award and Post-Delivery Requirements

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Module 4

NEW REQUIREMENTS IN PROCUREMENT

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Procurement Thresholds

◆ Revisions to 2 CFR § 200 Effective 2014

○ Set Government-Wide Standards

▪ \$3,500 Micro-Purchase Threshold

▪ \$150,000 Small Acquisition Threshold

◆ Congress Revised These Standards

○ Effective with OMB-18-18, June 20, 2018

▪ \$10,000 Micro-Purchase Threshold

▪ \$250,000 Small Acquisition Threshold

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BIA/IIJA

- ◆ Build America Added to Buy America Requirement
  - DOT Temporary Waiver
    - Pre-November 10, 2022
- ◆ Requirement
  - Construction Materials
    - Post-November 10, 2022 Contracts Must Use Construction Materials Produced in the U.S.

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BIA/IIJA

- ◆ Materials
  - Non-Ferrous Metals
  - Plastic and Polymer-Based Products
  - Glass
  - Lumber
  - Drywall
- ◆ April 18, 2023 “Initial Implementation Guidance” Issued by OMB

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BIA/IIJA

- ◆ August 16, 2023
  - FTA Issues a Public Interest Waiver if BABA Domestic Preferences for Iron and Steel, Manufactured Products, and Construction Materials When:
    - Total Value of Non-Compliant Products is No More than \$1,000,000 OR Five (5%) Percent of the Total Cost of the Project
    - OR
    - Total Amount of Federal Financial Assistance in the Project is <\$500,000

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BIA/IIJA

♦ August 16, 2023

Public Interest Waiver ONLY Applies to Awards/Subawards Obligated After the Effective Date of the Waiver (8/16/2023)

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Permissive Authority on Micro-Purchase Threshold

♦ Establishment of Higher Micro-Purchase Threshold

2 CFR § 200.320(a)(iv) Provides an Option to Any Non-Federal Entity That Enables the Organization to Establish a Threshold Higher Than the Micro-Purchase Threshold Identified in the Federal Acquisition Regulation (FAR)

The Entity May Adopt A Threshold Of Up To \$50,000, But There Are Conditions

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Permissive Authority on Micro-Purchase Threshold

♦ Conditions

Annual Self-Certification

Justification for the Higher Threshold Must be Made

Entity Must be a “Low Risk” Auditee in Most Recent Single Audit

Must Conduct Annual Risk Assessment Process

If a Public Entity, Higher Threshold Must be Consistent with Prevailing State Laws

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Prohibitions

- ◆ Never Contract with the Enemy Act
  - 2 CFR § 183
    - Applies Only to Grants Performed Outside the U.S.
  - Some Burden to Check SAM.gov to Ensure Your Agency Does Not Do Business with an Entity That Has Been Debarred Due to Violations of this Act

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Prohibitions

- ◆ Certain Telecommunications and Video Surveillance Services or Equipment
  - 2 CFR § 200.216
    - The NFE Cannot Procure, Obtain, Extend or Renew a Contract to Procure or Obtain
      - Equipment
      - Services
      - Systems
    - From
      - Huawei Technologies
      - ZTE Corporation

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New Classifications

- ◆ Revisions to 2 CFR § 200.320 Defining Procurement Methods
  - Informal Procurement Methods
    - Micro-Purchases
    - Small Purchases
  - Formal Procurement Methods
    - Sealed Bids
    - Proposals
  - Noncompetitive Procurement

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## Small Quantity Conditions

- ♦ New Provisions Under 49 U.S.C. § 5339
  - Applicants Must Use “Innovative Procurement Tools”
    - If Under Five (5) Buses in a Stand-Alone Procurement, FTA Will Now Require Written Justification for Not Using an Authorized Procurement Tool
      - Examples
        - » Cooperative Procurements
        - » State Cooperative Purchasing Contracts
        - » Innovative Leasing Arrangements

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## Questions & Answers

- ♦ Any Final Questions on Any Matter Related to Procurement?



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## Presenter

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